Hearing Date: May 25, 2006
J:\MANDATES\1999\tc\99-tc-05\toc.doc

ITEM 6

TEST CLAIM
FINAL STAFF ANALYSIS

Education Code Sections 47605, subdivision (b)(5)(O) and 47611.5
Government Code section 3540, et seq., Statutes 1999, Chapter 828

Charter School Collective Bargaining (99-TC-05)

Western Placer Unified School District, Claimant

Table of Contents

Executive Summary/Staff Analysis 1

Exhibit A

Charter Schools Collective Bargaining test claim and attachments submitted November 1999 101

Exhibit B

Department of Finance comments submitted June 2000 178

Exhibit C

Claimant rebuttal comments to Department of Finance submitted July 2000 182

Exhibit D

Draft Staff Analysis issued April 6, 2006 189

Exhibit E

Charter Schools, CSM-4437, Statement of Decision adopted on July 21, 1994 403
Charter Schools, CSM-4437, parameters and guidelines adopted Oct. 18, 1994 421
Charter Schools II, 99-TC-03, Statement of Decision adopted Nov. 21, 2002 427
Charter Schools I & II combined parameters and guidelines adopted Dec. 2, 2003 447
Collective Bargaining, parameters and guidelines adopted October 22, 1980 457
Collective Bargaining Agreement Disclosure, 97-TC-08, Statement of Decision 468
Collective Bargaining and Collective Bargaining Agreement Disclosure, consolidated parameters and guidelines adopted August 20, 1998 472
Agency Fee Arrangements, 00-TC-17 & 01-TC-14, Statement of Decision adopted December 9, 2005 485

Exhibit F

Office of the Legislative Analyst, "Assessing California's Charter Schools" (January 2004); See <http://www.lao.ca.gov/2004/charter_schools/012004_charter_schools.htm> [as of January 13, 2006]. Selected pages 511
In Re. Jennings (2004) 34 Cal. 4th 254. 523
Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379. 543
Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506 571
Desmond v. County of Contra Costa (1993) 21 Cal. App. 4th 330 582

Hearing Date: May 25, 2006
J:\MANDATES\1999\tc\99-tc-05\fsa.doc

ITEM 6

TEST CLAIM
FINAL STAFF ANALYSIS

Education Code Sections 47605, subdivision (b)(5)(O) and 47611.5
Government Code section 3540, et seq., Statutes 1999, Chapter 828;

Charter School Collective Bargaining (99-TC-05)

Western Placer Unified School District, Claimant

EXECUTIVE SUMMARY

The test claim was filed in November 1999 by the Western Placer Unified School District on test claim statutes that subject charter schools to the Educational Employment Relations Act (EERA). Specifically, the statutes require a charter school to insert in the charter a declaration as to whether the charter school will be deemed the public school employer for purposes of the EERA. If the charter school does not opt to be the public school employer, the school district where the charter is located is deemed the public school employer by default.

For the reasons indicated in the analysis, staff finds that, as to the test claim statutes:

- A school district claimant does not have standing to claim reimbursement for the activities alleged to be mandated on a charter school.
- Charter schools are not eligible claimants subject to article XIII B, section 6 of the California Constitution. Thus, the requirement for the charter school to be subject to the EERA, as well as the declaration in the charter whether or not the charter school shall be deemed to be the exclusive public school employer, and requiring this declaration by March 31, 2000 (Ed. Code, § 47611.5, subds. (b) & (f)) are not activities subject to article XIII B, section 6.
- The test claim statutes do not mandate an activity on county boards of education.
- Subjecting charter schools to the EERA is not a new program or higher level of service for school districts that are deemed the public school employer.
- There is no evidence in the record that a school district incurs increased costs mandated by the state (within the meaning of Government Code sections 17514 and 17556) to make written findings of fact when denying a charter petition because the petition does not contain a reasonably comprehensive description of "A declaring whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for purposes of the [EERA]." (Ed Code, § 47605, subd. (b)(5)(O).)

Recommendation

Therefore, staff recommends that the Commission adopt this analysis and deny the *Charter Schools Collective Bargaining* test claim (99-TC-05).

STAFF ANALYSIS

Claimant

Western Placer Unified School District

Chronology

11/29/99	Test Claim filed by Western Placer Unified School District, Claimant
06/13/00	Department of Finance submits comments on the test claim
07/13/00	Claimant submits rebuttal comments on the test claim
07/24/02	Claimant requests postponement of the hearing on the test claim
07/29/02	Commission staff grants postponement request
04/06/06	Commission staff issues draft staff analysis on the test claim
05/11/06	Commission staff issues final staff analysis on the test claim

Background

Charter schools are publicly funded K-12 schools that enroll pupils based on parental choice rather than residential assignment. In order to encourage innovation and provide expanded educational choices,[1] charter schools are exempt from most laws governing public education.[2] California was the second state in the nation to authorize charter schools in 1992, and they have steadily increased in number and enrollment since then.[3]

The test claim statutes subject charter schools to the Educational Employment Relations Act (EERA) or "Rodda Act."[4] Enacted in 1975, the EERA governs labor relations in California public schools with the stated purpose as follows:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems … by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public

---

[1] Education Code section 47601 includes these reasons, among others, in the Legislature's intent behind establishing charter schools.

[2] Education Code section 47610. Exceptions to the exemption in section 47610 include teachers' retirement, the Charter School Revolving Loan Fund, and laws establishing minimum age for public school attendance. Other areas in which charter schools are subject to the Education Code include pupil assessments (§ 47605, subd. (c)(1)), and teacher credentials ((§ 47605, subd. (l)).

[3] Office of the Legislative Analyst, "Assessing California's Charter Schools" (January 2004); See <http://www.lao.ca.gov/2004/charter_schools/012004_charter_schools.htm> [as of January 13, 2006].

[4] The EERA is in Education Code section 3540 et seq. (Stats. 1975, ch. 961, eff. July 1, 1976).

> school employers ...and to afford certificated employees a voice in the formulation of educational policy.[5]

The EERA creates a process for groups of school district employees that share a 'community of interest' to organize and become represented by an employee organization (or union).[6] The EERA also defines the issues that may be negotiated between the school district and the employee organization,[7] and defines the rules for negotiations,[8] mediation,[9] and dispute of grievances.[10] It also establishes the Public Employment Relations Board (PERB)[11] to administer the EERA and referee labor disputes.

The Test Claim Statutes

Education Code section 47605, subdivision (b)(5)(O)[12] requires each charter school charter to contain, "[a] declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of a charter school...."

Education Code section 47611.5 was also added by the test claim legislation. Subdivision (b) states, "If the charter school is not so deemed a public school employer, the school district where the charter is located shall be deemed the public school employer for the purposes of [the EERA]." Subdivision (f) of section 47611.5 requires, "By March 31, 2000, all existing charter schools ...[to] declare whether or not they shall be deemed a public school employer in accordance with subdivision (b), and such declaration shall not be materially inconsistent with the charter." Subdivision (c) defines the scope of representation to include discipline and dismissal of charter school employees "if the charter ... does not specify that it shall comply with those statutes and regulations ... that establish and regulate tenure or a merit or civil service system."

The EERA, in Government Code section 3540.1, subdivision (k), as amended by the test claim legislation, defines "public school employer" as "the governing board of a school district, a school district, a county board of education, or a county superintendent of schools, *or a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code.*" (Italicized text added by Stats. 1999, ch. 828.)

Related Commission Decisions on Charter Schools

On May 26, 1994, the Commission heard and decided a related test claim: *Charter Schools*, (CSM-4437).[13] The Commission found that Statutes 1992, chapter 781 (Ed. Code, §§ 47605 &

---

[5] Education Code section 3540

[6] Education Code section 3543.

[7] Education Code section 3543.2.

[8] Education Code section 3543.3.

[9] Education Code section 3548. Impasse procedures are also in this section.

[10] Education Code section 3543.

[11] Education Code section 3541.

[12] References herein are to the Education Code unless otherwise indicated.

47607) is a reimbursable state-mandated program on school districts for new activities related to initial charter school petitions, and for monitoring and evaluating the performance of charter schools pertaining to the revision or renewal of approved charters.

On November 21, 2002, the Commission adopted its Statement of Decision for the *Charter Schools II* test claim (99-TC-03) finding that Statutes 1998, chapters 34 and 673 (Ed. Code, §§ 47605, subds. (j)(1) & (k)(3), 47605.5, 47607, & 47614) impose reimbursable state-mandated activities on school districts and/or county offices of education activities related to reviewing renewal petitions and permitting charter schools to use school district facilities.

On December 2, 2003, the Commission adopted consolidated parameters and guidelines for the *Charter Schools* and *Charter Schools II* decisions. School districts may charge a fee from one to three percent of the charter school's revenue for "supervisorial oversight" of the charter school.[14] This fee is a recognized offset in the *Charter Schools* parameters and guidelines.

The Commission was scheduled to hear the *Charter Schools III* test claim[15] at the April 26, 2006 Commission hearing, but it was continued to the May 25, 2006 hearing. The *Charter Schools III* claim alleges various activities related to charter school funding and accountability, and was filed on behalf of both school districts and charter schools.

Related Commission Decisions on Collective Bargaining/EERA

In the *Collective Bargaining* statement of decision, the Board of Control determined that Statutes 1975, chapter 961 (the EERA) is a reimbursable mandate. Parameters and guidelines were adopted on October 22, 1980, and amended seven times before the decision on the next related claim: *Collective Bargaining Agreement Disclosure* (97-TC-08).

On March 26, 1998, the Commission adopted the decision for the *Collective Bargaining Agreement Disclosure* (97-TC-08) test claim. The Commission found that Government Code section 3547.5 (Stats. 1991, ch. 1213) and CDE Management Advisory 92-01 is a reimbursable mandate for requiring K-14 school districts to publicly disclosing the major provisions of all collective bargaining agreements after negotiations, but before the agreement becomes binding.

The parameters and guidelines for *Collective Bargaining Agreement Disclosure* (97-TC-08) were adopted in August 19, 1998, and consolidated with the *Collective Bargaining* parameters and guidelines. The reimbursable activities in the consolidated parameters and guidelines can be summarized as follows:

---

[13] *Charter Schools* (CSM-4437) Statement of Decision adopted on July 21, 1994; parameters and guidelines adopted on October 18, 1994.

[14] Education Code section 47613 (former section 47613.7, added by Stats. 1998, ch. 34).

[15] Filed on Education Code Sections 41365, 47605, subdivisions (b),(c),(d), (j) and (l), 47604.3, 47607, subdivision (c), 47612.5, 47613 (former § 47613.7), and 47630-47664; Statutes 1996, Chapter 786, Statutes 1998, Chapter 34, Statutes 1998, Chapter 673, Statutes 1999, Chapter 162, Statutes 1999, Chapter 736, Statutes 1999, Chapter 78, California Department of Education Memo (May 22, 2000).

1. Determination of appropriate bargaining units for representation and determination of the exclusive representatives:
   a. Unit determination;
   b. Determination of the exclusive representative.
2. Elections and decertification elections of unit representatives are reimbursable in the event the Public Employment Relations Board determines that a question of representation exists and orders an election held by secret ballot.
3. Negotiations: reimbursable functions include -- receipt of exclusive representative's initial contract proposal, holding of public hearings, providing a reasonable number of copies of the employer's proposed contract to the public, development and presentation of the initial district contract proposal, negotiation of the contract, reproduction and distribution of the final contract agreement.
4. Impasse proceedings:
   a. Mediation;
   b. Fact-finding publication of the findings of the fact-finding panel.
5. Collective bargaining agreement disclosure.
6. Contract administration and adjudication of contract disputes either by arbitration or litigation. Reimbursable functions include grievances and administration and enforcement of the contract.
7. Unfair labor practice adjudication process and public notice complaints.

In another related decision adopted in December 2005, the *Agency Fee Arrangements* Statement of Decision (CSM 00-TC-17, 01-TC-14), found that a portion of the EERA (Gov. Code, §§ 3543, 3546 & 3546.3, Cal. Code Regs, tit. 8 §§ 34030 & 34055) and its regulations constitute a reimbursable state-mandated program on K-14 school districts for deducting fair share fees and paying the amount to the employee organization, providing the exclusive representative of a public employee with the home address of each member of a bargaining unit, and for filing with PERB a list of names and job titles of persons employed in the unit described in the petition within a specified time.

Claimant Position

Claimant alleges that the test claim statutes impose a reimbursable mandate under section 6 of article XIII B of the California Constitution. After summarizing the test claim statutes, claimant states their consequence will be "school districts (including county superintendents of schools that sponsor charter schools), or the charter school will incur the cost of collective bargaining, depending upon the election of the charter school."[16] Claimant alleges the following activities:

[16] Test Claim, page 3.

- On county superintendents of schools, a higher level of service as the public school employer is required to assume the collective bargaining obligations of Government Code section 3540 through 3549 for charter schools granted under the authority of a county board of education when the charter school elects not to be the public school employer. The county board will incur additional costs of having to conduct a hearing for the material change in an existing charter school's charter in order to comply with the new mandate that all charter schools' charters include a declaration regarding its status as the public school employer. Although this is a new reimbursable activity, this cost will be covered under the existing Charter School mandated reimbursement program.[17]

- On school districts, a higher level of service as the public school employer is required to assume the collective bargaining obligations of Government Code sections 3540 through 3549 for charter schools within their districts when the charter school elects not to be the "public school employer" under Section 47611.5. The school district that granted the charter will incur additional costs of having to conduct a hearing for the material change in an existing charter school's charter in order to comply with the new mandate that all charter schools' charters include a declaration regarding [their] status as the public school employer. Although this is a new reimbursable activity, this cost will be covered under the existing Charter School mandated reimbursement program.[18]

- In those cases where the charter school declares itself to be the "public school employer" ... new reimbursable activities as the "public school employer" required to assume the collective bargaining obligations of Government Code sections 3540 through 3549. In addition to the costs of collective bargaining, an existing charter school is now mandated to amend its charter to include its declaration regarding its status as a "public school employer."[19]

As to the collective bargaining activities, claimant alleges activities "that mirror those already allowed under the Collective Bargaining reimbursement program."[20] Thus, claimant summarizes the activities listed in the *Collective Bargaining* parameter and guidelines listed above.

In comments submitted in July 2000 in response to the Department of Finance, claimant asserts:

> [W]here the charter school elects to be the 'public school employer' it is the <u>charter school</u> that assumes the new program or higher level of service in that the charter school will now be forced to comply with the collective bargaining obligations of the Educational Employment Relations Act.

Claimant agues that charter schools that make this election should be entitled to reimbursement under the current collective bargaining mandate reimbursement program. If, however, the

---

[17] Test Claim, page 3-4.

[18] Test Claim, page 4.

[19] Test Claim, page 4.

[20] Test Claim, page 4, footnote 10.

charter school elects not to be the "public school employer' and the school district or the county office of education assume that role, claimant states that reimbursement should occur under the current collective bargaining program by amending the parameters and guidelines "to reflect the additional authority under which this obligation occurs."

Claimant refutes the assumption that charter school employees, for charter schools that elect not to become the "public school employer," would automatically become part of the existing bargaining units, so no additional costs would be incurred. Claimant states that this would occur in some cases by agreement of the parties; "however, in most cases the charter schools' employees will not have community of interest with school district employees and will not become part of the school districts' bargaining units. Claimant includes with its comments a copy of Assembly Bill No. 842 (Migden), a bill that was introduced in 1999 but not enacted, that would have required charter school employees to be included in existing bargaining units. Claimant attaches Assembly Bill No. 842 (hereafter AB 842) to show that the legislative intent was not for charter employees to join existing bargaining units. Thus, claimant argues that "in most cases local educational agencies would incur costs as outlined in the collective bargaining mandated reimbursement program for all additional activities assumed with these new bargaining units (if formed)."

State Agency Position

In comments submitted in June 2000, the Department of Finance (Finance) states,

> If a charter school elects [not[21]] to be the public school employer of its employees for EERA purpose, and the charter school employees are subsequently placed in the same bargaining units with which the county office of education or school district currently negotiates, the Department of Finance believes no additional State-mandated costs would be incurred.

Finance goes on to comment, "[i]f, however, a charter school declares itself the exclusive public school employer of its employees and, as a consequence, new bargaining units are established with which the county office of education or school district must conduct negotiations, we do believe additional state-mandated costs may be incurred."

No other state agencies submitted comments on the claim.

---

[21] As noted by claimant, Department of Finance comments include a number of typos that lead to contradictory statements. This analysis is based on a reasonable interpretation of those comments as read by the claimant to insert the word "not" into the first sentence of the fourth full paragraph of the Department of Finance comments. The sentence should read, "If a charter school elects not to be the public school employer..."

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[22] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[23] "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."[24] 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.[25]

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.[26]

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.[27] 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

---

[22] Article XIII B, section 6, subdivision (a), (as amended in November 2004) provides:

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

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

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

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

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

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

legislation.[28] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[29]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[30]

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.[31] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[32]

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

A. Are charter schools eligible claimants?

The test claim statutes include, in addition to the Education Code statutes pled by claimant, Government Code section 3540 et seq., the Educational Employment Relations Act (EERA). Because the Board of Control (the Commission's predecessor) already adjudicated the EERA in the *Collective Bargaining* test claim, as discussed above, this analysis of the EERA only applies to charter schools because the Commission does not have jurisdiction to reconsider the original EERA test claim.

Education Code section 47611.5, subdivision (a), states that the EERA applies to charter schools. Under subdivisions (b) and (f) of this section, as added by the test claim legislation, "all existing charter schools must declare whether or not they shall be deemed a public school employer ..." and must do so by March 31, 2000. Therefore, the first part of the analysis under issue 1 addresses whether these activities are subject to article XIII B, section 6 where the charter school has declared itself to be the public school employer. The second part of the analysis addresses whether these activities are subject to article XIII B, section 6 where the school district is the public school employer.

---

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

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

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

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

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

Charter School as "Public School Employer"

By way of background, charter schools are formed through a petition signed by either (1) at least one-half of the parents of the pupils that the charter school estimates will enroll in the school in its first year of operation; or (2) at least one-half of the number of teachers that the charter school estimates will be employed at the school during its first year.[33] Charters are submitted to a school district for approval or denial. The district must approve the charter unless it makes specified written findings regarding defects in the petition, the proposed program, or charter.[34] If the district denies the petition, petitioners can appeal to the county office of education or State Board of Education.[35] In certain situations, petitioners can apply for a charter directly to the county office of education[36] or State Board of Education.[37]

Finance comments, "[i]f, however, a charter school declares itself the exclusive public school employer of its employees and, as a consequence, new bargaining units are established with which the county office of education or school district must conduct negotiations, we do believe additional state-mandates costs may be incurred."

Claimant does not address the issue directly, but states in rebuttal to Finance's comments that if "the charter school elects to be the "public school employer" it is the charter school that assumes the new program or higher level of service in that the charter school will now be forced to comply with the collective bargaining obligations of the Educational Employment Relations Act." [Emphasis in original.]

The claimant in this case is a school district. Staff finds that a school district does not have standing to claim reimbursement for activities alleged to be mandated on a charter school, since school districts are not defined to include charter schools.[38] The Legislature treats charter schools differently from school districts. In addition, as discussed below, staff finds that there is not a state mandate subject to article XIII B, section 6 when charter schools are deemed public school employers.

In the *Kern High School Dist.* case,[39] the California Supreme Court considered whether school districts have a right to reimbursement for costs in complying with statutory notice and agenda requirements for various education-related programs that are funded by the state and federal government. The court held that in eight of the nine programs at issue, the claimants were not

---

[33] Education Code section 47605, subdivision (a)(1). In the case of an existing public school conversion to a charter school, the petition must be signed by not less than 50 percent of the permanent status teachers currently employed at the school (Ed. Code, § 47605, subd. (a)(2)).

[34] Education Code section 47605, subdivision (b).

[35] Education Code section 47605, subdivision (j).

[36] Education Code sections 47605.5 and 47605.6.

[37] Education Code section 47605.8.

[38] Government Code section 17519 defines 'school districts' for purposes of article XIII B, section 6. As to standing, Cf. *Kinlaw v. State of California* (1991) 54 Cal. 3d 326, 334-335.

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

entitled to reimbursement for notice and agenda costs because district participation in the underlying program was voluntary. As the court stated, "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirement related to that program does not constitute a reimbursable mandate."[40]

In this case, the charter school is *voluntarily* participating in the charter program at issue. Because charter schools are initiated by petition of either parents or teachers, they are created voluntarily. No state mandate requires them to exist. Rather, the charter is more in the nature of a contract than a state-imposed mandate. Consequently, based on the reasoning in the *Kern* case regarding voluntary participation, charters schools are not entitled to reimbursement under article XIII B, section 6.

Moreover, a charter school that elects to be the "public school employer" would be voluntarily subjecting itself to the provisions of the EERA. Section 47611.5 of the test claim statutes states:

> (b) A charter school charter shall contain a declaration regarding whether or not the charter school shall be deemed the exclusive public school employer of the employees at the charter school for the purposes of Section 3540.1 of the Government Code. [¶]...[¶]
> (f) By March 31, 2000, all existing charter schools must declare whether or not they shall be deemed a public school employer in accordance with subdivision (b), and such declaration shall not be materially inconsistent with the charter.

Based on the Supreme Court's reasoning discussed above regarding voluntary participation, charter schools are not entitled to reimbursement under article XIII B, section 6.

Government Code section 17519 defines "school district" for purposes of mandate reimbursement, as "any school district, community college district, or county superintendent of schools." Thus, in addition to the reasons discussed above, charter schools are not eligible for reimbursement because they are not included in this definition.

The Education Code treats charter schools as school districts for some purposes, such as special education,[41] collective bargaining,[42] and apportionment of funds.[43] And charter schools are deemed school districts for purposes of "Sections 8 and 8.5 of Article XVI of the California Constitution [Proposition 98 school funding.]"[44]

These examples, however, underscore that charter schools are not treated as school districts for purposes of mandate reimbursement under article XIII B, section 6. Charter schools are not mentioned in the mandates statutes (Gov. Code, § 17500 et seq.), nor are they considered "school districts" for purposes of mandate reimbursement in the charter school statutes (Ed. Code,

---

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

[41] Education Code section 47604 et seq.

[42] Education Code section 47611.5.

[43] Education Code sections 47612, subdivision (c), 47650 and 47651.

[44] Education Code sections 47612, subdivision (c).

§ 47600 et seq.). And as mentioned above, except as otherwise specified, charter schools are "exempt from the laws governing school districts."[45] This exemption includes the mandate reimbursement statutes (Gov. Code, § 17500 et seq.).

Charter schools were established in 1992 (Stats. 1992, ch. 781), long after the Commission's statutory scheme was enacted in 1984. Yet in spite of recent amendments to article XIII B, section 6,[46] as well as both the mandates and charter school statutory schemes,[47] the Legislature has not amended either scheme to make charter schools eligible claimants. Because the definition of "school district" in Government Code section 17519 does not include charter schools, they cannot be read into that definition. The Commission, like a court, may not add to or alter the statutory language to accomplish a purpose that does not appear on the face of the statute or from its legislative history, where the language is clear.[48]

As the California Supreme Court has stated, "Where a statute, with reference to one subject [whether school districts includes charter schools] contains a given provision, the omission of such provision from a similar statute concerning a related subject ... is significant to show that a different intention existed."[49] Thus, that the Legislature deemed a "charter school" to be a school district for some purposes (such as special education for example) cannot be interpreted to mean that a "charter school" should be deemed a school district for other purposes, such as mandate reimbursement. The omission of "charter school" from the definition of school districts in Government Code section 17519 is significant to show a different intention: that charter schools are not eligible for mandate reimbursement.

Therefore, staff finds that charter schools are not eligible claimants for purposes of article XIII B, section 6 of the California Constitution, nor are they eligible claimants for purposes of this test claim.

Based on this analysis, staff finds that the requirement for the charter school to be subject to the EERA, as well as the charter school's charter to declare whether or not the charter school shall be deemed to be the exclusive public school employer, and requiring this declaration by March 31, 2000 (Ed. Code, § 47611.5, subds. (b) & (f)) are not activities subject to article XIII B, section 6.

---

[45] Education Code section 47610.

[46] In November 2004, Proposition 1A was enacted to amend article XIII B, section 6, so that school district mandates are treated differently for purposes of mandate suspension, as well as mandates that "provide or recognize any procedural or substantive protection, right, benefit, or employment status of any local government employee ... or ... local government employee organization." (Cal. Const., art. XIII B, § 6, subds. (b)(4) & (b)(5).)

[47] For charter schools, in addition to the test claim statutes, see e.g., Statutes 2003, chapter 892. For the Commission, see e.g., Statutes 2004, chapter 890, Statutes 2002, chapter 1124, and Statutes 1999, chapter 643.

[48] *In Re. Jennings* (2004) 34 Cal. 4th 254, 265.

[49] *Id.* at page 273.

B. School district activities

School District or County Superintendent of Schools as "Public School Employer"

Education Code section 47611.5, subdivision (b), states, "If the charter school is not so deemed a public school employer, the school district where the charter is located shall be deemed the public school employer for the purposes of Chapter 10.7 ... [the EERA]." Since the Legislature has made the school district the default public school employer if the charter school elects not to be the employer, the issue is whether doing so triggers mandated school district activities under article XIII B, section 6.

Claimant alleges the activities that mirror those listed in the *Collective Bargaining* parameters and guidelines are reimbursable for charter school employees: determination of appropriate bargaining units, elections and decertification of elections, negotiations, impasse proceedings, collective bargaining agreement disclosure, contract administration and adjudication of contract disputes, and unfair labor practice adjudication process and public notice complaints.

Staff finds that the test claim statutes impose EERA (collective bargaining) activities on school districts (or county superintendents that act as school districts[50]) for charter school employees. Therefore, staff finds that the test claim legislation is subject to article XIII B, section 6 when the school district acts as the public school employer, (for purposes of the EERA) for charter school employees.[51]

Claimant alleges, as to county superintendents of schools, a higher level of service as the public school employer that is required to assume the collective bargaining obligations of Government Code sections 3540 through 3549 for charter schools granted under the authority of a county board of education when the charter school elects not to be the public school employer.

Although a county board of education may grant a charter petition,[52] and may be a 'public school employer,'[53] the test claim statute does not expressly apply to county boards of education. There is no provision under section 47611.5 for a county board to be assigned the public school employer role. According to section 47611.5, subdivision (b), either the charter school elects to

---

[50] Education Code section 35160.2 states, "For the purposes of Section 35160, [regarding the authority of school districts] "school district" shall include county superintendents of schools and county boards of education."

[51] On page 4 of the test claim, in footnote 9, claimant states the "school district that granted a charter will incur additional costs ... to conduct a hearing for the material change in an existing ... charter ... to comply with the new mandate that all ... charters include a declaration regarding [their] status as the 'public school employer.' Although this is a new reimbursable activity this cost will be covered under the existing Charter School mandated reimbursement program." Staff notes that the public hearing requirement (in Ed. Code, § 47607) was decided by the Commission in the *Charter Schools* test claim (CSM 4437). Claimant's footnoted comment appears to be an observation. Because claimant alleges neither section 47607, nor activities based on it, staff makes no findings on the hearing activity.

[52] Education Code sections 47605, subdivision (j)(1), 47605.5 and 47605.6.

[53] Government Code section 3540.1, subdivision (k).

be the public school employer, or the school district becomes so by default. Therefore, staff finds that claimant's alleged activity for county boards of education is not a mandate subject to article XIII B, section 6.[54]

Findings on denial

Claimant pleads section 47605, subdivision (b)(5) which requires written findings when denying a charter petition. In subparagraph (O), the findings must state, when applicable, that the petition does not contain a reasonably comprehensive description of "A declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for purposes of the [EERA]."

Although this statute merely describes a provision that the charter must contain, it also requires school districts to make a written finding when denying a charter for lack of this public school employer declaration. Although preexisting law required written findings on denial, the plain language of section 47605, subdivision (b)(5)(O) adds the lack of a public school employer designation as another potential reason for denying a charter petition. Therefore, as a requirement imposed on school districts when making applicable findings, staff finds that section 47605, subdivision (b)(5)(O) is subject to article XIII B, section 6.

Although in the *Charter Schools III* test claim (99-TC-14), the claimant pled that the activity of making written findings on denial of a charter is reimbursable, the statutes pled in that claim did not contain the public school employer declaration requirement of subdivision (b)(5)(O). Thus, staff finds that it has jurisdiction over this test claim statute, because subdivision (b)(5)(O) was not pled in the *Charter Schools III* test claim.

C. Does the test claim legislation constitute a "program" within the meaning of article XIII B, section 6?

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program," defined as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all

---

[54] On page 4 of the test claim, in footnote 8, claimant states that the "county board of education ... will incur additional costs of having to conduct a hearing for the material change in an existing ... charter in order to comply with the new mandate that all ... charters include a declaration regarding [their] status as the 'public school employer.' Although this is a new reimbursable activity this cost will be covered under the existing Charter School mandated reimbursement program." Staff notes that the public hearing requirement for school districts (in Ed. Code, § 47607) was decided by the Commission in the *Charter Schools* test claim (4437). Claimant's footnoted comment appears to be an observation. Because claimant alleges neither section 47607, nor activities based on it, staff makes no findings on the hearing activity.

residents and entities in the state.[55] Only one of these findings is necessary to trigger article XIII B, section 6.[56]

Of the activities discussed above, only the following that are subject to article XIII B, section 6 are now under consideration:

- Subjecting school districts to the EERA (collective bargaining, Gov. Code, § 3540 et seq.) for charter school employees (Ed. Code, § 47611.5) when the district assumes the role of public school employer.
- Including in written findings when denying a charter petition that the petition does not contain a reasonably comprehensive description of "A declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for purposes of the [EERA]." (Ed Code, § 47605, subd. (b)(5)(O).)

Staff finds that the test claim statutes constitute a program within the meaning of article XIII B, section 6. Although courts have generally held that mandates that affect employee benefits do not constitute a program within the meaning of article XIII B, section 6,[57] the EERA transcends ordinary employee rights or benefits.

For example, Government Code section 3540 specifically declares the EERA's legislative intent: "It is the purpose of this chapter to ... afford certificated employees *a voice in the formation of educational policy*." [Emphasis added.] Moreover, Government Code section 3543.2 of the EERA includes the following: "[T]he exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law."[58]

---

[55] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[56] *Carmel Valley Fire Protection District v. State of California, et al.* (1987) 190 Cal.App.3d 521, 537.

[57] In *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, the court held that legislation affording local agency employees the same increased level of workers' compensation benefits to employees in private organizations was not a program. Likewise, in *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, the court held that legislation requiring local governments to provide death benefits to local safety officers under both the Public Employees Retirement System and the workers' compensation system was not a program. Also, the court in *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484, determined that a temporary increase in PERS benefits to retired employees, resulting in higher contribution rates for local government, did not constitute a program. And in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, the California Supreme Court determined that providing unemployment compensation protection to a city's employees was not a service to the public.

[58] In addition to certificated employees, the EERA also applies to classified employees. (Gov. Code, § 3540.1 subd. (e)).

The courts have held that although numerous private schools exist, education is a peculiarly governmental function and public education is administered by local agencies to provide a service to the public.[59] Thus, because the test claim statutes affect the educational policy of school districts that are public school employers as to their charter school(s), staff finds that the test claim statutes constitute a program within the meaning of article XIII B, section 6.

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

To determine whether the "program" is new or imposes a higher level of service, the test claim legislation is compared to the legal requirements in effect immediately before enacting the test claim legislation.[60] And the test claim legislation must increase the level of governmental service provided to the public.[61] Each activity is discussed separately.

EERA

The issue is whether subjecting charter schools to the EERA for charter school employees creates any new school district activities, thereby imposing a new program or higher level of service on school districts. Staff finds that it does not.

Finance, in its June 2000 comments on the test claim, states,

> If a charter school elects [not[62]] to be the public school employer of its employees for EERA purpose, and the charter school employees are subsequently placed in the same bargaining units with which the county office of education or school district currently negotiates, the Department of Finance believes no additional State-mandated costs would be incurred.

Claimant, in response to Finance's comments, states that Finance seems to argue that "if the charter school elects not to be the "public school employer" that the school district and/or county office of education will not assume any additional state mandated costs." Clamant assumes that Finance takes the position that these costs would be covered by the current collective bargaining reimbursement program. According to claimant:

> [I]n those instances where a charter school elects not to be the 'public school employer' and the school district or the county office of education assumes this responsibility that the costs for collective bargaining can be covered under the current collective bargaining mandated reimbursement program. However, the

---

[59] *Long Beach Unified School Dist.* (1990) 225 Cal.App.3d 155, 172.

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

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

[62] As noted by claimant, Department of Finance comments include a number of typos that lead to contradictory statements. This analysis is based on a reasonable interpretation of those comments as read by the claimant to insert the word "not" into the first sentence of the fourth full paragraph of the Department of Finance comments. The sentence should read, "If a charter school elects not to be the public school employer..."

parameters and guidelines for the collective bargaining reimbursement program would have to be amended to reflect the additional authority under which this obligation occurs."

Claimant goes on to refute the assumption that employees of charter schools that elect not to become the "public school employer," would automatically become part of the existing bargaining units, so no additional costs would be incurred. Claimant states that this would occur in some cases by agreement of the parties; "however, in most cases the charter schools' employees will not have community of interest with school district employees and will not become part of the school districts' bargaining units. Claimant includes with its comments a copy of AB 842 (Migden), a bill introduced in 1999 but not enacted, that would have required charter school employees to be included in existing bargaining units. Claimant includes AB 842, apparently attempting to show that the legislative intent was not for charter employees to join existing bargaining units. Claimant argues that "in most cases local educational agencies would incur costs as outlined in the collective bargaining mandated reimbursement program for all additional activities assumed with these new bargaining units (if formed)."

Staff disagrees. Other than claimant's assertions[63] and AB 842 (which was not enacted), claimant provides no evidence or legal authority that charter school employees, in a school district where the charter school is not the public school employer, would not join established collective bargaining units. Rather, the statutory scheme authorizes the new employees to join the established units[64] so that the school district is not required to engage in new activities with regards to the new charter school employees.

As to claimant's assertions regarding AB 842, where the Legislature simultaneously enacts a bill and rejects another, there is inference of legislative intent.[65] The legislative intent of AB 842, however, does not reveal whether charter school employees join existing bargaining units. It merely demonstrates that the Legislature did not enact AB 842 to force them to do so. Thus, legislative rejection of AB 842 sheds little light on the issue of whether charter school employees join existing bargaining units.

Therefore, staff finds that subjecting charter schools to the EERA for charter school employees does not create any new activities – and therefore is not a new program or higher level of service - for school districts.

Findings on Denial

The next issue is whether the following is a new program or higher level of service on school districts: including in written findings when denying a charter petition because the petition does

---

[63] As to claimant's assertions, statements of fact are to be accompanied by a declaration under penalty of perjury (Cal. Code Regs, tit. 2, § 1183.03, subd. (d)). The record contains no such claimant declaration in its comments in response to Finance, or in any comments on the issue of charter school employees joining existing bargaining units when the school district is the public school employer.

[64] Education Code section 47611.5.

[65] *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3rd 1379, 1396.

not contain a reasonably comprehensive description of "A declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for purposes of the [EERA]." (Ed Code, § 47605, subd. (b)(5)(O).)

Preexisting law (Stats. 1998, ch. 34) requires the school district to make written findings of fact, as specified, to support denying a charter petition. Preexisting law did not, however, specify the lack of a public school employer declaration as one of the possible findings. Therefore, staff finds that it is a new program or higher level of service for a school district to make written findings of fact when denying a charter petition because the petition does not contain a reasonably comprehensive description of "A declaring whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for purposes of the [EERA]." (Ed Code, § 47605, subd. (b)(5)(O).) Because this is now the sole activity that constitutes a new program or higher level of service under this test claim, it alone is considered below.

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

In order for the test claim statute to impose a reimbursable state-mandated program under the California Constitution, the test claim legislation must impose costs mandated by the state.[66] In addition, no statutory exceptions listed in Government Code section 17556 can apply. Government Code section 17514 defines "cost mandated by the state" as follows:

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

With its test claim, claimant files a declaration from the Western Placer Unified School District that it "will/has incurred significantly more than $200[67] to implement these new duties mandated by the state for which Western Placer Unified School District has not be [sic] reimbursed..." The new duties for which it claims to have incurred costs, however, do not include making findings to deny a charter petition for lack of declaration as to the public school employer for purposes of the EERA (Ed. Code, § 47605, subd. (b)(5)(O)). Thus, there is no evidence in the record that the claimant has or will incur the cost of making this written finding.

The Commission must base its findings on substantial evidence in the record.[68]

> ...[S]ubstantial evidence has been defined in two ways: first, as evidence of ponderable legal significance ... reasonable in nature, credible, and of solid value

---

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

[67] The current requirement is $1000 in costs (Gov. Code, § 17564, as amended by Stats. 2004, ch. 890).

[68] *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515. Government Code section 17559, subdivision (b).

> [citation]; and second, as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[69]

The Commission's finding must be supported by:

> ...all relevant evidence in the entire record, considering both the evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by "substantial evidence."[70]

The administrative record, including claimant's declaration, does not indicate that there are costs for making written findings on denial for lack of a declaration in the charter as to the public school employer. Therefore, because of this lack of evidence in the record, staff finds that test claim statute (Ed. Code, § 47605, subd. (b)(5)(O)) does not impose increased "costs mandated by the state" on school districts within the meaning of article XIII B, section 6, and Government Code sections 17514 and 17556.

CONCLUSION

For the reasons indicated above staff finds that, as to the test claim statutes:

- A school district claimant does not have standing to claim reimbursement for the activities alleged to be mandated on a charter school.
- Charter schools are not eligible claimants subject to article XIII B, section 6 of the California Constitution. Thus, the requirement for the charter school to be subject to the EERA, as well as the declaration in the charter whether or not the charter school shall be deemed to be the exclusive public school employer, and requiring this declaration by March 31, 2000 (Ed. Code, § 47611.5, subds. (b) & (f)) are not activities subject to article XIII B, section 6.
- The test claim statutes do not mandate an activity on county boards of education.
- Subjecting charter schools to the EERA is not a new program or higher level of service for school districts that are deemed the public school employer.
- There is no evidence in the record that a school district incurs increased costs mandated by the state (within the meaning of Government Code sections 17514 and 17556) to make written findings of fact when denying a charter petition because the petition does not contain a reasonably comprehensive description of "A declaring whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for purposes of the [EERA]." (Ed Code, § 47605, subd. (b)(5)(O).)

Recommendation

Staff recommends that the Commission adopt this analysis and deny the *Charter Schools Collective Bargaining* test claim (99-TC-05).

---

[69] *Desmond v. County of Contra Costa* (1993) 21 Cal. App. 4th 330, 335.

[70] *Ibid.*

PAGES 20-100 LEFT BLANK INTENTIONALLY

State of California
COMMISSION ON STATE MANDATES
1300 "I" Street, Suite 950
Sacramento, CA 95814
(916) 323-3562
CSM 1 (2 91)

EXHIBIT A

RECEIVED
NOV 29 1999
COMMISSION ON STATE MANDATES

For Official Use Only

Claim No. 99-TC-05

RECEIVED
NOV 29 1999
COMMISSION ON STATE MANDATES

TEST CLAIM FORM

Local Agency or School District Submitting Claim

Western Placer Unified School District
1400 First Street
Lincoln, CA 95648

Contact Person — Telephone No.

Paul C. Minney, Esq. — Ph.: (925) 746-7660
Attorney for Mandated Cost Systems, Inc. — Fax: (925) 935-7995

Address

GIRARD & VINSON
Growers Square
1676 N. California Blvd., Suite 450
Walnut Creek, CA 94596

Representative Organization to be Notified

Mandated Cost Systems, Inc.
Attn.: Steve Smith, President
2275 Watt Avenue, Suite C
Sacramento, CA 95825

This test claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable.

Chapter 828, Statutes of 1999 (AB 631)
Education Code section 47605(b)(5)(o)
Education Code section 47611.5
Government Code section 3540, et seq.

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative — Telephone:

Paul C. Minney, Attorney — (925) 746-7660

Signature of Authorized Representative — Date: 11/23/99

Paul C. Minney

Roger Yohe, Superintendent
Western Placer Unified School District
1400 First Street
Lincoln, CA 95648
Telephone: (916) 645-6350
Fax: (916) 645-6356

Paul C. Minney, Esq.
GIRARD & VINSON
1676 N. California Blvd., Suite 450
Walnut Creek, CA 94596
Telephone: (925) 746-7660
Fax: (925) 935-7995

BEFORE THE COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of: WESTERN PLACER UNIFIED SCHOOL DISTRICT,	)	CSM No._____ TEST CLAIM OF Chapter 828, Statutes of 1999 (AB 631) Education Code § 47605(b)(5)(o) Education Code § 47611.5 Government Code § 3540, et seq. ***Charter School Collective Bargaining***

GIRARD &
ATTORNEYS AT LAW
VINSON

RECEIVED
DEC 0 1 1999
COMMISSION ON
STATE MANDATES

Growers Square
1676 N. California Blvd., Ste. 450
Walnut Creek, CA 94596
Telephone: 925.746.7660
Fax: 925.935.7995
e-mail: g-and-v@verio.com
www.gandv.com

6767 Green Valley Road
Placerville, CA 95667
530.622.7130 ext. 235
Fax: 530.642.1832

The California Fruit Building
1006 Fourth Street
Suite 701
Sacramento, CA 95814
916.446.9292
916.446.5711
Second to Walnut Creek

DAVID W. GIRARD
ALLEN R. VINSON
PAUL C. MINNEY
CHRISTIAN M. KEINER*
PHILLIP A. TRUJILLO
ANNA J. MOUSER

Lois Schwartz
Michelle L. Mueller
Laura Lee Briggs
J. Bray
Heather A. Hoyle

OF COUNSEL
Sally Jensen Dutcher

*Professional Law Corporation

November 30, 1999

Paula Higashi, Executive Director
Commission on State Mandates
1300 "I" Street, Suite 950
Sacramento, CA 95814

Re: Test Claim of Western Placer Unified School District
Chapter 828, Statutes of 1999 (AB 631)
Education Code § 47605(b)(5)(o)
Education Code § 47611.5
Government Code § 3540, et seq.

Charter School Collective Bargaining

Dear Ms. Higashi:

Enclosed please find the original and seven (7) copies of the Authorization to Act and Declaration in support of the above-referenced test claim, forwarded to the Commission on November 23, 1999.

Thank you for your time and assistance in this matter and if you have any questions, please do not hesitate to contact this office.

Very truly yours,

GIRARD & VINSON

Holly S. DeBellis

Holly S. DeBellis
Secretary to
Paul C. Minney
Attorney at Law

PCM/hsd

AUTHORIZATION TO ACT AS REPRESENTATIVE
FOR WESTERN PLACER UNIFIED SCHOOL DISTRICT'S
TEST CLAIM

COLLECTIVE BARGAINING

CHAPTER 828, STATUTES OF 1999 (AB 631)

I, Jay Stewart, Assistant Superintendent/CFO, Western Placer Unified School District, hereby authorize Paul C. Minney (or designee) of the Law Office of GIRARD & VINSON to act as the representative and sole contact of Western Placer Unified School District in the above-referenced Test Claim. All correspondence and communications regarding this test claim should be forwarded to:

Paul C. Minney, Esq.
GIRARD & VINSON
1676 North California Blvd., Suite 450
Walnut Creek, CA 94596
Telephone: (925) 746-7660
Fax: (925) 935-7995

Dated: 11/29/95

Jay Stewart, Assistant Superintendent/CFO
Western Placer Unified School District

TABLE OF CONTENTS

I. AUTHORITY FOR CLAIM 1

II. STATEMENT OF THE CLAIM 1

III. ACTIVITIES REQUIRED UNDER CHAPTER 828/99 2

A. Activities Required of Local Education Agencies Including Charter Schools, Prior to the Effective Date of the Test Claim Legislation (January 1, 2000) 2

B. Activities Added to the Charter Schools Act By the Test Claim Legislation Effective January 1, 2000 3

IV. REIMBURSABLE ACTIVITIES ALLEGED IN THIS TEST CLAIM 3

V. CONSTITUTIONAL PROVISIONS, FEDERAL REQUIREMENTS, AND COURT DECISIONS AFFECTING THE MANDATED ACTIVITIES 5

VI. ESTIMATED COSTS RESULTING FROM THE MANDATE 6

VII. APPROPRIATIONS 6

VIII. CLAIM REQUIREMENTS 6

IX. CERTIFICATION 7

I. AUTHORITY FOR THE CLAIM

The Commission on State Mandates has the authority pursuant to Government Code section 17551(a) to hear and to decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the State for costs mandated by the State as required by Section 6 of Article XIIIB of the California Constitution. The Western Placer Unified School District ("Claimant") is a school district as defined in Government Code section 17519. This test claim is filed pursuant to Title 2, California Code of Regulations, section 1183.

II. STATEMENT OF THE CLAIM

This test claim alleges reimbursable costs mandated by the State by Chapter 828, Statutes of 1999[1] (AB 631) (effective January, 2000) ("Chapter 828/99"), Education Code section 47605(b)(5)(o),[2] Education Code section 47611.5,[3] and Government Code §§ 3540, et seq.[4] which together: (1) require a county superintendent of schools to incur the costs of collective bargaining[5] with certificated and classified personnel for a county sponsored charter school when the charter school does not declare itself to be the "public school employer" under the Educational Employment Relations Act (EERA)[6]; (2) require a school district to incur the costs of collective bargaining with certificated and classified personnel for a charter school situated within its district when the charter school does not declare itself to be the "public school employer" under the EERA; and (3) require

---

1 Chapter 828, Statutes of 1999 is attached as Exhibit "A".

2 Education Code § 47605(b)(5)(o) as amended by Chapter 828/99 is attached as Exhibit "B".

3 Education Code § 47611.5 as added by Chapter 828/99 is attached as Exhibit "C".

4 Government Code §§ 3540, et seq. is attached as Exhibit "D".

5 The costs of collective bargaining under the EERA are fully delineated in the *Collective Bargaining mandate reimbursement program*.

6 Government Code §§ 3540, et seq.

a charter school that declares itself to be the "public school employer" under the EERA to incur the costs of collective bargaining with certificated and classified personnel.

III. ACTIVITIES REQUIRED UNDER CHAPTER 828/99

A. Activities Required of Local Educational Agencies, Including Charter Schools, Prior to the Effective Date of the Test Claim Legislation (January 1, 2000).

The Charter Schools Act of 1992 was added to the Education Code by Chapter 781, Statutes of 1992 (SB 1448)[7]. The Charter Schools Act permits teachers, parents, pupils, and community members to petition a school district governing board to approve a charter school to operate independently from the existing school district structure so as to, among other things, improve pupil learning, provide the charter schools with a method to change from rule-based to performance-based accountability systems, and to provide vigorous competition within the public school system.

A charter school is a public school and may provide instruction in any of grades K-12. Specific goals and operating procedures for the charter school are detailed in an agreement (or "charter") between the sponsoring board and charter organizers in accordance with the Charter Schools Act.

A charter school is exempt from laws which are unique to school districts, except where specifically noted in the law. (See Education Code Section 47610). Consequently, charter schools are exempt from the statutory body of law that provides for collective bargaining in California's public schools (i.e., the Educational Employment Relations Act; Government Code §§ 3540 et seq.).

The Charter Schools Act has been amended a number of times since 1992, however, none of those amendments added the requirement that charter schools be subject to the EERA until the test claim legislation.

---

7 Chapter 781, Statutes of 1992 is attached as Exhibit "E"

B. Activities Added to the Charter Schools Act By the Test Claim Legislation Effective January 1, 2000

Under intense pressure from the unions in the State of California the Legislature passed and the Governor signed AB 631 (Chapter 828, Statutes of 1999 hereinafter referred to as "Chapter 828/99"). Chapter 828/99 added Section 47611.5 to the Education Code. Section 47611.5 mandates that the EERA (Government Code Section 3540 et. seq) "shall apply to charter schools." In order to bring charter schools under the EERA, Chapter 828/99 expands the scope of the EERA to include charter schools by amending the definition of a "public school employer" to include a charter school.

Education Code section 47611.5, as added by Chapter 828/99, requires the charter school's charter to contain a declaration regarding whether or not the charter school shall be deemed to be the "public school employer" for purposes of EERA obligations. If the charter school fails to declare or chooses not to be the "public school employer" the school district in which the charter school is "located" shall become the "public school employer" for purposes of EERA obligations. Chapter 828/99 further amended Education Code Section 47605(b)(5) to require all charter school charters, by March 31, 2000, to state whether "the charter school shall be deemed the exclusive public school employer of the employees of the charter school for purposes of the Educational Employment Relations Act." (See, Education Code section 47605(b)(5)(o)).

As a consequence of the test claim legislation (Chapter 828/99), school districts (including county superintendents of schools that sponsor charter schools), or the charter school will incur the cost of collective bargaining, depending upon the election of the charter school.

IV. REIMBURSABLE ACTIVITIES ALLEGED IN THIS TEST CLAIM

Chapter 828/99 imposes upon county superintendents of schools a higher level of service as the public school employer required to assume the collective bargaining obligations of Government Code sections 3540 through 3549 for charter schools granted under the authority of a

county board of education when the charter school elects not to be the "public school employer" under Education Code section 47611.5.[8]

Chapter 828/99 imposes upon school districts a higher level of service as the public school employer required to assume the collective bargaining obligations of Government Code sections 3540 through 3549 for charter schools within their districts when the charter school elects not to be the "public school employer" under Section 47611.5.[9]

In those cases where the charter school declares itself to be the "public school employer" Chapter 828/99 imposes upon charter schools new reimbursable activities as the "public school employer" required to assume the collective bargaining obligations of Government Code sections 3540 through 3549. In addition to the costs of collective bargaining, an existing charter school is now mandated to amend its charter to include its declaration regarding its status as a "public school employer."

As a result of Chapter 828/99, county superintendents of schools, school districts, and charter schools are required to incur the costs of collective bargaining. Such costs include, but are not limited to[10]:

1. Determinations of Appropriate Unit and Representative

   Determination of the appropriate bargaining units for representation and determination of the exclusive representatives.

---

8 A county board of education that granted a charter will incur additional costs of having to conduct a hearing for the material change in an existing charter school's charter in order to comply with the new mandate that all charter schools' charters include a declaration regarding its status as the "public school employer." Although this is a new reimbursable activity this cost will be covered under the existing Charter School mandated reimbursement program.

9 A school district that granted a charter will incur additional costs of having to conduct a hearing for the material change in an existing charter school's charter in order to comply with the new mandate that all charter schools' charters include a declaration regarding its status as the "public school employer." Although this is a new reimbursable activity this cost will be covered under the existing Charter School mandated reimbursement program.

10 Claimant is alleging reimbursable activities that mirror those already allowed under the Collective Bargaining reimbursement program.

2. Representative Elections and Decertification Procedures

Activities include, but are not limited to, elections and decertification elections of unit representatives.

3. Negotiations

Activities include, but are not limited to, receipt of exclusive representative's initial contract proposal, conducting of public hearings, providing copies of representative's proposed contract to the public, development and presentation of the initial contract proposal, negotiation of the contract, reproduction, and distribution of the final contract.

4. Impasse Proceedings

Activities include, but are not limited to, costs of mediation and fact finding.

5. Collective Bargaining Disclosure

Activities include, but are not limited to, disclosure of collective bargaining agreement after negotiation and before public school employer adoption as mandated by Government Code section 3547.5. Prepare disclosure forms and documents. Distribution of forms and documents within public school employer governing body.

6. Administration of Contract and Resolution of Disputes

Activities include, but are not limited to, administration of the contract and adjudication and arbitration of contract disputes.

7. Dispute, Grievance, and Unfair Labor Practice Charge Adjudication

Activities include, but are not limited to, costs of adjudicating grievances and responding to unfair labor practice charges along with litigation expenses.

V. CONSTITUTIONAL PROVISIONS, FEDERAL REQUIREMENTS, AND COURT DECISIONS AFFECTING THE MANDATED ACTIVITIES

There are neither state nor federal constitutional provisions which impact the mandates which are the subject of this test claim. There are no state or federal statutes or executive orders which materially impact the mandated activities which are subject to this test claim. There are no court decisions which impact the mandated activities which are the subject of this test claim. In addition, none of the Government Code section 17556 statutory exceptions to a finding of costs mandated by the State to apply to these statutes.

VI. ESTIMATED COSTS RESULTING FROM THE MANDATE

It is estimated that the Claimant, Western Placer Unified School District, will incur more than $200 in personal services, supplies, legal fees, and other direct and indirect costs in meeting the requirements mandated by Chapter 828, Statutes of 1999 (AB 631), Education Code section 47605(o), Education Code section 47611.5, and Government Code section 3540.1 as further set forth in the Declaration of Jay Stewart attached hereto and incorporated by reference herein.

VII. APPROPRIATIONS

No funds are appropriated by the statutes for reimbursement of these new costs mandated by the State, and there is no other provision of law for recovery of costs for any other services.

VIII. CLAIM REQUIREMENTS

The following elements of this claim are provided pursuant to Section 1183, Title 2, California Code of Regulations:

Exhibit "A"	Chapter 828, Statutes of 1999
Exhibit "B"	Education Code § 47605(b)(5)(o) as amended by Chapter 828, Statutes of 1999
Exhibit "C"	Education Code § 47611.5 as added by Chapter 828, Statutes of 1999
Exhibit "D"	Government Code § 3540, et seq.
Exhibit "E"	Chapter 781, Statutes of 1992
Exhibit "F"	Education Code 47610 as enacted by Chapter 781, Statutes of 1992
Exhibit "G"	Chapter 34, Statutes of 1998
Exhibit "H"	Declaration of Jay Stewart

IX. CERTIFICATION

I certify by my signature below that the statements made in this document are true and correct of my own knowledge, and as to all other matters, I believe them to be true and correct based upon the information and belief.

Executed on November 23, 1999, at Walnut Creek, California, by:

GIRARD & VINSON

By: Paul C. Minney

PAUL C. MINNEY, ESQ.
Attorney for Mandated Costs Systems, Inc.
Authorized Representative of Test Claimant

C:\gandv8\mcs\pam\ab 631\test claim #3.wpd

Exhibit A

CHAPTER 828, STATUTES OF 1999
AB 631

Assembly Bill No. 631

CHAPTER 828

An act to amend Section 47605 of, and to add Section 47611.5 to, to add an article heading (commencing with Section 47620) to Chapter 5 of, and to add Article 2 (commencing with Section 47626) to Chapter 5 of, Part 26.8 of, the Education Code, and to amend Section 3540.1 of the Government Code, relating to charter schools.

[Approved by Governor October 8, 1999. Filed with Secretary of State October 10, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

AB 631, Migden. Charter schools: collective bargaining.

Existing law, the Charter Schools Act of 1992, permits teachers, parents, pupils, and community members to petition a school district governing board to approve a charter school to operate independently from the existing school district structure as a method of accomplishing, among other things, improved pupil learning. Existing law, with certain exceptions, generally exempts charter schools from the provisions of the Education Code applicable to school districts.

This bill would require that provisions of existing law related to collective bargaining in public education employment apply to charter schools, thereby imposing a state-mandated local program. The bill would require the charter school charter to declare whether the charter school is the exclusive public school employer of the employees at the charter school for this purpose. The bill would require a charter school, operated by the University of California in university facilities, to declare in its charter that it is the employer of the employees at the charter school for the purposes of provisions of law relating to collective bargaining for employees of public institutions of higher education. This bill would require that, if the charter of a charter school does not specify that it would comply with statutory and regulatory provisions that govern public school employers relating to tenure and merit or civil service, then discipline and dismissal of employees would be included within the scope of representation.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

This bill would incorporate additional changes in Section 3540.1 of the Government Code proposed by AB 91, to be operative only if that bill and this bill are enacted and become effective on or before January 1, 2000, and this bill is enacted last.

The people of the State of California do enact as follows:

SECTION 1. Section 47605 of the Education Code is amended to read:

47605. (a) (1) Except as set forth in paragraph (2), a petition for the establishment of a charter school within any school district may be circulated by any one or more persons seeking to establish the charter school. The petition may be submitted to the governing board of the school district for review after either of the following conditions are met:

(A) The petition has been signed by a number of parents or guardians of pupils that is equivalent to at least one-half of the number of pupils that the charter school estimates will enroll in the school for its first year of operation.

(B) The petition has been signed by a number of teachers that is equivalent to at least one-half of the number of teachers that the charter school estimates will be employed at the school during its first year of operation.

(2) In the case of a petition for the establishment of a charter school through the conversion of an existing public school, that would not be eligible for a loan pursuant to subdivision (b) of Section 41365, the petition may be circulated by any one or more persons seeking to establish the converted charter school. The petition may be submitted to the governing board of the school district for review after the petition has been signed by not less than 50 percent of the permanent status teachers currently employed at the public school to be converted.

(3) A petition shall include a prominent statement that a signature on the petition means that the parent or guardian is meaningfully interested in having his or her child, or ward, attend the charter school, or in the case of a teacher's signature, means that the teacher is meaningfully interested in teaching at the charter school. The proposed charter shall be attached to the petition.

(b) No later than 30 days after receiving a petition, in accordance with subdivision (a), the governing board of the school district shall hold a public hearing on the provisions of the charter, at which time the governing board of the school district shall consider the level of support for the petition by teachers employed by the district, other

employees of the district, and parents. Following review of the petition and the public hearing, the governing board of the school district shall either grant or deny the charter within 60 days of receipt of the petition, provided, however, that the date may be extended by an additional 30 days if both parties agree to the extension. In reviewing petitions for the establishment of charter schools pursuant to this section, the chartering authority shall be guided by the intent of the Legislature that charter schools are and should become an integral part of the California educational system and that establishment of charter schools should be encouraged. A school district governing board shall grant a charter for the operation of a school under this part if it is satisfied that granting the charter is consistent with sound educational practice. The governing board of the school district shall not deny a petition for the establishment of a charter school unless it makes written factual findings, specific to the particular petition, setting forth specific facts to support one, or more, of the following findings:

(1) The charter school presents an unsound educational program for the pupils to be enrolled in the charter school.

(2) The petitioners are demonstrably unlikely to successfully implement the program set forth in the petition.

(3) The petition does not contain the number of signatures required by subdivision (a).

(4) The petition does not contain an affirmation of each of the conditions described in subdivision (d).

(5) The petition does not contain reasonably comprehensive descriptions of all of the following:

(A) A description of the educational program of the school, designed, among other things, to identify those whom the school is attempting to educate, what it means to be an "educated person" in the 21st century, and how learning best occurs. The goals identified in that program shall include the objective of enabling pupils to become self-motivated, competent, and lifelong learners.

(B) The measurable pupil outcomes identified for use by the charter school. "Pupil outcomes," for purposes of this part, means the extent to which all pupils of the school demonstrate that they have attained the skills, knowledge, and attitudes specified as goals in the school's educational program.

(C) The method by which pupil progress in meeting those pupil outcomes is to be measured.

(D) The governance structure of the school, including, but not limited to, the process to be followed by the school to ensure parental involvement.

(E) The qualifications to be met by individuals to be employed by the school.

(F) The procedures that the school will follow to ensure the health and safety of pupils and staff. These procedures shall include the

requirement that each employee of the school furnish the school with a criminal record summary as described in Section 44237.

(G) The means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted.

(H) Admission requirements, if applicable.

(I) The manner in which annual, independent, financial audits shall be conducted, which shall employ generally accepted accounting principles, and the manner in which audit exceptions and deficiencies shall be resolved to the satisfaction of the chartering authority.

(J) The procedures by which pupils can be suspended or expelled.

(K) The manner by which staff members of the charter schools will be covered by the State Teachers' Retirement System, the Public Employees' Retirement System, or federal social security.

(L) The public school attendance alternatives for pupils residing within the school district who choose not to attend charter schools.

(M) A description of the rights of any employee of the school district upon leaving the employment of the school district to work in a charter school, and of any rights of return to the school district after employment at a charter school.

(N) The procedures to be followed by the charter school and the entity granting the charter to resolve disputes relating to provisions of the charter.

(O) A declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for the purposes of the Educational Employment Relations Act (Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 4 of Title 1 of the Government Code.

(c) (1) Charter schools shall meet all statewide standards and conduct the pupil assessments required pursuant to Section 60605 and any other statewide standards authorized in statute or pupil assessments applicable to pupils in noncharter public schools.

(2) Charter schools shall on a regular basis consult with their parents and teachers regarding the school's educational programs.

(d) (1) In addition to any other requirement imposed under this part, a charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations, shall not charge tuition, and shall not discriminate against any pupil on the basis of ethnicity, national origin, gender, or disability. Except as provided in paragraph (2), admission to a charter school shall not be determined according to the place of residence of the pupil, or of his or her parent or guardian, within this state, except that any existing public school converting partially or entirely to a charter school under this part shall adopt and maintain a policy giving admission

preference to pupils who reside within the former attendance area of that public school.

(2) (A) A charter school shall admit all pupils who wish to attend the school.

(B) However, if the number of pupils who wish to attend the charter school exceeds the school's capacity, attendance, except for existing pupils of the charter school, shall be determined by a public random drawing. Preference shall be extended to pupils currently attending the charter school and pupils who reside in the district. Other preferences may be permitted by the chartering authority on an individual school basis and only if consistent with the law.

(C) In the event of a drawing, the chartering authority shall make reasonable efforts to accommodate the growth of the charter school and, in no event, shall take any action to impede the charter school from expanding enrollment to meet pupil demand.

(e) No governing board of a school district shall require any employee of the school district to be employed in a charter school.

(f) No governing board of a school district shall require any pupil enrolled in the school district to attend a charter school.

(g) The governing board of a school district shall require that the petitioner or petitioners provide information regarding the proposed operation and potential effects of the school, including, but not limited to, the facilities to be utilized by the school, the manner in which administrative services of the school are to be provided, and potential civil liability effects, if any, upon the school and upon the school district. The petitioner or petitioners shall also be required to provide financial statements that include a proposed first-year operational budget, including startup costs, and cash-flow and financial projections for the first three years of operation.

(h) In reviewing petitions for the establishment of charter schools within the school district, the school district governing board shall give preference to petitions that demonstrate the capability to provide comprehensive learning experiences to pupils identified by the petitioner or petitioners as academically low achieving pursuant to the standards established by the State Department of Education under Section 54032.

(i) Upon the approval of the petition by the governing board of the school district, the petitioner or petitioners shall provide written notice of that approval, including a copy of the petition, to the State Board of Education.

(j) (1) If the governing board of a school district denies a petition, the petitioner may elect to submit the petition for the establishment of a charter school to either the county board of education or directly to the State Board of Education. The county board of education or the State Board of Education, as the case may be, shall review the petition pursuant to subdivision (b). If the petitioner elects to submit a petition for establishment of a charter school to the county board of

education and the county board of education denies the petition, the petitioner may file a petition for establishment of a charter school with the State Board of Education.

(2) A charter school for which a charter is granted by either the county board of education or the State Board of Education pursuant to this subdivision shall qualify fully as a charter school for all funding and other purposes of this part.

(3) If either the county board of education or the State Board of Education fails to act on a petition within 120 days of receipt, the decision of the governing board of the school district to deny a petition shall, thereafter, be subject to judicial review.

(4) The State Board of Education shall adopt regulations implementing this subdivision.

(5) Upon the approval of the petition by the county board of education, the petitioner or petitioners shall provide written notice of that approval, including a copy of the petition to the State Board of Education.

(k) (1) The State Board of Education may, by mutual agreement, designate its supervisorial and oversight responsibilities for a charter school approved by the State Board of Education to any local education agency in the county in which the charter school is located or to the governing board of the school district that first denied the petition.

(2) The designated local education agency shall have all monitoring and supervising authority of a chartering agency, including, but not limited to, powers and duties set forth in Section 47607, except the power of revocation, which shall remain with the State Board of Education.

(3) A charter school that has been granted its charter by the State Board of Education and elects to seek renewal of its charter shall, prior to expiration of the charter, submit its petition for renewal to the governing board of the school district that initially denied the charter. If the governing board of the school district denies the school's petition for renewal, the school may petition the State Board of Education for renewal of its charter.

(*l*) Teachers in charter schools shall be required to hold a Commission on Teacher Credentialing certificate, permit, or other document equivalent to that which a teacher in other public schools would be required to hold. These documents shall be maintained on file at the charter school and shall be subject to periodic inspection by the chartering authority. It is the intent of the Legislature that charter schools be given flexibility with regard to noncore, noncollege preparatory courses.

SEC. 2. Section 47611.5 is added to the Education Code, to read:

47611.5. (a) Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code shall apply to charter schools.

(b) A charter school charter shall contain a declaration regarding whether or not the charter school shall be deemed the exclusive public school employer of the employees at the charter school for the purposes of Section 3540.1 of the Government Code. If the charter school is not so deemed a public school employer, the school district where the charter is located shall be deemed the public school employer for the purposes of Chapter 10.7 (commencing with Section 3540) of Division 4 of the Government Code.

(c) If the charter of a charter school does not specify that it shall comply with those statutes and regulations governing public school employers that establish and regulate tenure or a merit or civil service system, the scope of representation for that charter school shall also include discipline and dismissal of charter school employees.

(d) The Public Employment Relations Board shall take into account the Charter Schools Act of 1992 (Part 26.8 (commencing with Section 47600)) when deciding cases brought before it related to charter schools.

(e) The approval or a denial of a charter petition by a granting agency pursuant subdivision (b) of Section 47605 shall not be controlled by collective bargaining agreements nor subject to review or regulation by the Public Employment Relations Board.

(f) By March 31, 2000, all existing charter schools must declare whether or not they shall be deemed a public school employer in accordance with subdivision (b), and such declaration shall not be materially inconsistent with the charter.

SEC. 3. An article heading is added to Chapter 5 (commencing with Section 47620) of Part 26.8, to read:

Article 1. University of California at Los Angeles Elementary Charter School

SEC. 4. Article 2 (commencing with Section 47626) is added to Chapter 5 of Part 26.8 of the Education Code, to read:

Article 2. Employer

47626. (a) Notwithstanding Section 47611.5, a charter school operated by the University of California in facilities owned by the Regents of the University of California shall declare in its charter that it is the employer of the employees at the charter school for the purposes of Chapter 12 (commencing with Section 3560) of Division 4 of Title 1 of the Government Code. The provisions of Chapter 12 (commencing with Section 3560) of Division 4 of Title 1 of the Government Code shall apply to the charter school. A charter school operated by the University of California in facilities owned by the

Regents of the University of California may not be deemed a public school employer for the purposes of this chapter.

(b) By March 31, 2000, an existing charter school operated by the University of California shall amend its charter to comply with this section.

SEC. 5. Section 3540.1 of the Government Code is amended to read:

3540.1. As used in this chapter:

(a) "Board" means the Public Employment Relations Board created pursuant to Section 3541.

(b) "Certified organization" or "certified employee organization" means an organization which has been certified by the board as the exclusive representative of the public school employees in an appropriate unit after a proceeding under Article 5 (commencing with Section 3544).

(c) "Confidential employee" means any employee who, in the regular course of his or her duties, has access to, or possesses information relating to, his or her employer's employer-employee relations.

(d) "Employee organization" means any organization which includes employees of a public school employer and which has as one of its primary purposes representing those employees in their relations with that public school employer. "Employee organization" shall also include any person such an organization authorizes to act on its behalf.

(e) "Exclusive representative" means the employee organization recognized or certified as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer.

(f) "Impasse" means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile.

(g) "Management employee" means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Public Employment Relations Board.

(h) "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall

not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

(i) "Organizational security" means either of the following:

(1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him or her, as a condition of continued employment, if he or she does join, to maintain his or her membership in good standing for the duration of the written agreement. However, no such arrangement shall deprive the employee of the right to terminate his or her obligation to the employee organization within a period of 30 days following the expiration of a written agreement.

(2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first.

(j) "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

(k) "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, a county superintendent of schools, or a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code.

(*l*) "Recognized organization" or "recognized employee organization" means an employee organization which has been recognized by an employer as the exclusive representative pursuant to Article 5 (commencing with Section 3544).

(m) "Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

SEC. 5.5. Section 3540.1 of the Government Code is amended to read:

3540.1. As used in this chapter:

(a) "Board" means the Public Employment Relations Board created pursuant to Section 3541.

(b) "Certified organization" or "certified employee organization" means an organization that has been certified by the board as the exclusive representative of the public school employees

in an appropriate unit after a proceeding under Article 5 (commencing with Section 3544).

(c) "Confidential employee" means any employee who, in the regular course of his or her duties, has access to, or possesses information relating to, his or her employer's employer-employee relations.

(d) "Employee organization" means any organization that includes employees of a public school employer and that has as one of its primary purposes representing those employees in their relations with that public school employer. "Employee organization" shall also include any person that organization authorizes to act on its behalf.

(e) "Exclusive representative" means the employee organization recognized or certified as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer.

(f) "Impasse" means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile.

(g) "Management employee" means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Public Employment Relations Board.

(h) "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

(i) "Organizational security" means either of the following:

(1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him or her, as a condition of continued employment, if he or she does join, to maintain his or her membership in good standing for the duration of the written agreement. However, that arrangement shall not deprive the employee of the right to terminate his or her obligation to the employee organization within a period of 30 days following the expiration of a written agreement.

(2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an

amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first.

(j) "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

(k) "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools, a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code, or a joint powers agency, except a joint powers agency established to provide services pursuant to Sections 990.4 and 990.8, provided that all of the following apply to the joint powers agency:

(1) It is created as an agency or entity that is separate from the parties to the joint powers agreement pursuant to Section 6503.5.

(2) It has its own employees separate from employees of the parties to the joint powers agreement.

(3) Any of the following are true:

(A) It provides services primarily performed by a school district, county board of education, or county superintendent of schools.

(B) A school district, county board of education, or county superintendent of schools is designated in the joint powers agreement pursuant to Section 6509.

(C) It is comprised solely of school agencies.

(*l*) "Recognized organization" or "recognized employee organization" means an employee organization that has been recognized by an employer as the exclusive representative pursuant to Article 5 (commencing with Section 3544).

(m) "Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend that action, if, in connection with the foregoing functions, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

SEC. 6. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

SEC. 7. Section 5.5 of this bill incorporates amendments to Section 3540.1 of the Government Code proposed by both this bill and AB 91. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2000, (2) each bill amends Section 3540.1 of the Government Code, and (3) this bill is enacted after AB 91, in which case Section 5 of this bill shall not become operative.

O

90

Exhibit B

EDUCATION CODE § 47605(b)(5)(o) AS AMENDED BY CHAPTER 828, STATUTES OF 1999

requirement that each employee of the school furnish the school with a criminal record summary as described in Section 44237.

(G) The means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted.

(H) Admission requirements, if applicable.

(I) The manner in which annual, independent, financial audits shall be conducted, which shall employ generally accepted accounting principles, and the manner in which audit exceptions and deficiencies shall be resolved to the satisfaction of the chartering authority.

(J) The procedures by which pupils can be suspended or expelled.

(K) The manner by which staff members of the charter schools will be covered by the State Teachers' Retirement System, the Public Employees' Retirement System, or federal social security.

(L) The public school attendance alternatives for pupils residing within the school district who choose not to attend charter schools.

(M) A description of the rights of any employee of the school district upon leaving the employment of the school district to work in a charter school, and of any rights of return to the school district after employment at a charter school.

(N) The procedures to be followed by the charter school and the entity granting the charter to resolve disputes relating to provisions of the charter.

(O) A declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for the purposes of the Educational Employment Relations Act (Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 4 of Title 1 of the Government Code.

(c) (1) Charter schools shall meet all statewide standards and conduct the pupil assessments required pursuant to Section 60605 and any other statewide standards authorized in statute or pupil assessments applicable to pupils in noncharter public schools.

(2) Charter schools shall on a regular basis consult with their parents and teachers regarding the school's educational programs.

(d) (1) In addition to any other requirement imposed under this part, a charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations, shall not charge tuition, and shall not discriminate against any pupil on the basis of ethnicity, national origin, gender, or disability. Except as provided in paragraph (2), admission to a charter school shall not be determined according to the place of residence of the pupil, or of his or her parent or guardian, within this state, except that any existing public school converting partially or entirely to a charter school under this part shall adopt and maintain a policy giving admission

Exhibit C

EDUCATION CODE § 47611.5 AS ADDED BY CHAPTER 828, STATUTES OF 1999

(b) A charter school charter shall contain a declaration regarding whether or not the charter school shall be deemed the exclusive public school employer of the employees at the charter school for the purposes of Section 3540.1 of the Government Code. If the charter school is not so deemed a public school employer, the school district where the charter is located shall be deemed the public school employer for the purposes of Chapter 10.7 (commencing with Section 3540) of Division 4 of the Government Code.

(c) If the charter of a charter school does not specify that it shall comply with those statutes and regulations governing public school employers that establish and regulate tenure or a merit or civil service system, the scope of representation for that charter school shall also include discipline and dismissal of charter school employees.

(d) The Public Employment Relations Board shall take into account the Charter Schools Act of 1992 (Part 26.8 (commencing with Section 47600)) when deciding cases brought before it related to charter schools.

(e) The approval or a denial of a charter petition by a granting agency pursuant subdivision (b) of Section 47605 shall not be controlled by collective bargaining agreements nor subject to review or regulation by the Public Employment Relations Board.

(f) By March 31, 2000, all existing charter schools must declare whether or not they shall be deemed a public school employer in accordance with subdivision (b), and such declaration shall not be materially inconsistent with the charter.

SEC. 3. An article heading is added to Chapter 5 (commencing with Section 47620) of Part 26.8, to read:

Article 1. University of California at Los Angeles Elementary Charter School

SEC. 4. Article 2 (commencing with Section 47626) is added to Chapter 5 of Part 26.8 of the Education Code, to read:

Article 2. Employer

47626. (a) Notwithstanding Section 47611.5, a charter school operated by the University of California in facilities owned by the Regents of the University of California shall declare in its charter that it is the employer of the employees at the charter school for the purposes of Chapter 12 (commencing with Section 3560) of Division 4 of Title 1 of the Government Code. The provisions of Chapter 12 (commencing with Section 3560) of Division 4 of Title 1 of the Government Code shall apply to the charter school. A charter school operated by the University of California in facilities owned by the

education and the county board of education denies the petition, the petitioner may file a petition for establishment of a charter school with the State Board of Education.

(2) A charter school for which a charter is granted by either the county board of education or the State Board of Education pursuant to this subdivision shall qualify fully as a charter school for all funding and other purposes of this part.

(3) If either the county board of education or the State Board of Education fails to act on a petition within 120 days of receipt, the decision of the governing board of the school district to deny a petition shall, thereafter, be subject to judicial review.

(4) The State Board of Education shall adopt regulations implementing this subdivision.

(5) Upon the approval of the petition by the county board of education, the petitioner or petitioners shall provide written notice of that approval, including a copy of the petition to the State Board of Education.

(k) (1) The State Board of Education may, by mutual agreement, designate its supervisorial and oversight responsibilities for a charter school approved by the State Board of Education to any local education agency in the county in which the charter school is located or to the governing board of the school district that first denied the petition.

(2) The designated local education agency shall have all monitoring and supervising authority of a chartering agency, including, but not limited to, powers and duties set forth in Section 47607, except the power of revocation, which shall remain with the State Board of Education.

(3) A charter school that has been granted its charter by the State Board of Education and elects to seek renewal of its charter shall, prior to expiration of the charter, submit its petition for renewal to the governing board of the school district that initially denied the charter. If the governing board of the school district denies the school's petition for renewal, the school may petition the State Board of Education for renewal of its charter.

(*l*) Teachers in charter schools shall be required to hold a Commission on Teacher Credentialing certificate, permit, or other document equivalent to that which a teacher in other public schools would be required to hold. These documents shall be maintained on file at the charter school and shall be subject to periodic inspection by the chartering authority. It is the intent of the Legislature that charter schools be given flexibility with regard to noncore, noncollege preparatory courses.

SEC. 2. Section 47611.5 is added to the Education Code, to read:

47611.5. (a) Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code shall apply to charter schools.

Exhibit D

GOVERNMENT CODE § 3540, ET SEQ.

GOVERNMENT CODE
SECTION 3540-3540.2

3540. It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy. This chapter shall not supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

It is the further intention of the Legislature that this chapter shall not restrict, limit, or prohibit the full exercise of the functions of any academic senate or faculty council established by a school district in a community college to represent the faculty in making recommendations to the administration and governing board of the school district with respect to district policies on academic and professional matters, so long as the exercise of the functions does not conflict with lawful collective agreements.

It is the further intention of the Legislature that any legislation enacted by the Legislature governing employer-employee relations of other public employees shall be incorporated into this chapter to the extent possible. The Legislature also finds and declares that it is an advantageous and desirable state policy to expand the jurisdiction of the board created pursuant to this chapter to cover other public employers and their employees, in the event that this legislation is enacted, and if this policy is carried out, the name of the Educational Employment Relations Board shall be changed to the "Public Employment Relations Board."

3540.1. As used in this chapter:

(a) "Board" means the Public Employment Relations Board created pursuant to Section 3541.

(b) "Certified organization" or "certified employee organization" means an organization which has been certified by the board as the exclusive representative of the public school employees in an appropriate unit after a proceeding under Article 5 (commencing with Section 3544).

(c) "Confidential employee" means any employee who, in the regular course of his or her duties, has access to, or possesses information relating to, his or her employer's employer-employee relations.

(d) "Employee organization" means any organization which includes employees of a public school employer and which has as one of its primary purposes representing those employees in their relations with that public school employer. "Employee organization" shall also include any person such an organization authorizes to act on its behalf.

(e) "Exclusive representative" means the employee organization recognized or certified as the exclusive negotiating representative

of certificated or classified employees in an appropriate unit of a public school employer.

(f) "Impasse" means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile.

(g) "Management employee" means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Public Employment Relations Board.

(h) "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

(i) "Organizational security" means either of the following:

(1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him or her, as a condition of continued employment, if he or she does join, to maintain his or her membership in good standing for the duration of the written agreement. However, no such arrangement shall deprive the employee of the right to terminate his or her obligation to the employee organization within a period of 30 days following the expiration of a written agreement.

(2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first.

(j) "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

(k) "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

(l) "Recognized organization" or "recognized employee organization" means an employee organization which has been recognized by an employer as the exclusive representative pursuant to Article 5 (commencing with Section 3544).

(m) "Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

3540.2. (a) A school district that has a qualified or negative certification pursuant to Section 42131 of the Education Code shall allow the county office of education in which the school district is located at least six working days to review and comment on any

proposed agreement made between the exclusive representative and the public school employer, or designated representatives of the employer, pursuant to this chapter. The school district shall provide the county superintendent of schools with all information relevant to yield an understanding of the financial impact of that agreement.

(b) The Superintendent of Public Instruction shall develop a format for use by the appropriate parties in generating the financial information required pursuant to subdivision (a).

(c) The county superintendent of schools shall notify the school district publicly within those six days if, in his or her opinion, the agreement reviewed pursuant to subdivision (a) would endanger the fiscal well-being of the school district.

(d) A school district shall provide the county superintendent of schools, upon request, with all information relevant to provide an understanding of the financial impact of any final collective bargaining agreement reached pursuant to Section 3543.2.

GOVERNMENT CODE
SECTION 3541-3541.5

3541. (a) There is in state government the Public Employment Relations Board which shall be independent of any state agency and shall consist of five members. The members of the board shall be appointed by the Governor by and with the advice and consent of the Senate. One of the original members shall be chosen for a term of one year, one for a term of three years, and one for a term of five years. The first term for the two new members of the board resulting from the expansion of the board to five members shall be reduced by the Governor as necessary so that the term of only one member of the board shall expire in any given year. Thereafter, terms shall be for a period of five years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he or she succeeds. Members of the board shall be eligible for reappointment. The Governor shall select one member to serve as chairperson. A member of the board may be removed by the Governor upon notice and hearing for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the board shall not impair the right of the remaining members to exercise all the powers of the commission, and three members of the board shall at all times constitute a quorum.

(c) The board may delegate its powers to any group of three or more board members. Nothing shall preclude any board member from participating in any case pending before the board.

(d) Members of the board shall hold no other public office in the state, and shall not receive any other compensation for services rendered.

(e) Each member of the board shall receive the salary provided for by Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 2. In addition to his or her salary, each member of the board shall be reimbursed for all actual and necessary expenses incurred by him or her in the performance of his or her duties, subject to the rules of the Department of Personnel Administration relative to the payment of these expenses to state officers generally.

(f) The board shall appoint an executive director who shall be the chief administrative officer. The executive director shall appoint other persons that may, from time to time, be deemed necessary for the performance of the board's administrative functions, prescribe their duties, fix their compensation, and provide for reimbursement of their expenses in the amounts made available therefor by appropriation. The executive director shall be a person familiar with employer-employee relations. The executive director shall be subject to removal at the pleasure of the board. The Governor shall appoint a general counsel, upon the recommendation of the board, to assist the board in the performance of its functions under this chapter. The general counsel shall serve at the pleasure of the board.

(g) The executive director and general counsel serving the board on December 31, 1977, shall become employees of the Public Employment Relations Board and shall continue to serve at the discretion of the board. A person so employed may, independently of the Attorney General, represent the board in any litigation or other matter pending in a court of law to which the board is a party or in which it is otherwise interested.

(h) The Governor shall appoint one legal adviser for each member of the board upon the recommendation of that board member. Each

appointee shall serve at the pleasure of the recommending board member and shall receive a salary as shall be fixed by the board with the approval of the Department of Personnel Administration.

(i) Attorneys serving the board on May 19, 1978, shall not be appointed as legal advisers to board members pursuant to subdivision (h) until the time that they have attained permanent civil service status.

(j) Notwithstanding subdivision (a), the member of the board appointed by the Governor for the term beginning on January 1, 1991, shall not be subject to the advice and consent of the Senate.

3541.3. The board shall have all of the following powers and duties:

(a) To determine in disputed cases, or otherwise approve, appropriate units.

(b) To determine in disputed cases whether a particular item is within or without the scope of representation.

(c) To arrange for and supervise representation elections which shall be conducted by means of secret ballot elections, and certify the results of the elections.

(d) To establish lists of persons broadly representative of the public and qualified by experience to be available to serve as mediators, arbitrators, or factfinders. In no case shall these lists include persons who are on the staff of the board.

(e) To establish by regulation appropriate procedures for review of proposals to change unit determinations.

(f) Within its discretion, to conduct studies relating to employer-employee relations, including the collection, analysis, and making available of data relating to wages, benefits, and employment practices in public and private employment, and, when it appears necessary in its judgment to the accomplishment of the purposes of this chapter, recommend legislation. The board shall report to the Legislature by October 15 of each year on its activities during the immediately preceding fiscal year. The board may enter into contracts to develop and maintain research and training programs designed to assist public employers and employee organizations in the discharge of their mutual responsibilities under this chapter.

(g) To adopt, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter.

(h) To hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and, in connection therewith, to issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any matter within its jurisdiction. Notwithstanding Section 11425.10, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 does not apply to a hearing by the board under this chapter, except a hearing to determine an unfair practice charge.

(i) To investigate unfair practice charges or alleged violations of this chapter, and take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

(j) To bring an action in a court of competent jurisdiction to enforce any of its orders, decisions, or rulings, or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

(k) To delegate its powers to any member of the board or to any

person appointed by the board for the performance of its functions, except that no fewer than two board members may participate in the determination of any ruling or decision on the merits of any dispute coming before it, and except that a decision to refuse to issue a complaint shall require the approval of two board members.

(l) To decide contested matters involving recognition, certification, or decertification of employee organizations.

(m) To consider and decide issues relating to rights, privileges, and duties of an employee organization in the event of a merger, amalgamation, or transfer of jurisdiction between two or more employee organizations.

(n) To take any other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

3541.4. Any person who shall willfully resist, prevent, impede or interfere with any member of the board, or any of its agents, in the performance of duties pursuant to this chapter, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not more than one thousand dollars ($1,000).

3541.5. The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:

(1) Issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

(2) Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that the settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits. Otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

(b) The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter.

(c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

GOVERNMENT CODE SECTION 3542

3542. (a) No employer or employee organization shall have the right to judicial review of a unit determination except: (1) when the board in response to a petition from an employer or employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

Upon receipt of a board order joining in the request for judicial review, a party to the case may petition for a writ of extraordinary relief from the unit determination decision or order.

(b) Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, may petition for a writ of extraordinary relief from such decision or order.

(c) Such petition shall be filed in the district court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. The petition shall be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable. Upon the filing of such petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless such time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board such temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying, or setting aside the order of the board. The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive. The provisions of Title 1 (commencing with Section 1067) of Part 3 of the Code of Civil Procedure relating to writs shall, except where specifically superseded herein, apply to proceedings pursuant to this section.

(d) If the time to petition for extraordinary relief from a board decision has expired, the board may seek enforcement of any final decision or order in a district court of appeal or a superior court in the district where the unit determination or unfair practice case occurred. The board shall respond within 10 days to any inquiry from a party to the action as to why the board has not sought court enforcement of the final decision or order. If the response does not indicate that there has been compliance with the board's final decision or order, the board shall seek enforcement of the final decision or order upon the request of the party. The board shall file in the court the record of the proceeding, certified by the board, and appropriate evidence disclosing the failure to comply with the decision or order. If, after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person or entity refuses to comply with the order, the court shall enforce such order by writ of mandamus. The court shall not review the merits of the order.

GOVERNMENT CODE SECTION 3543-3543.8

3543. Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

3543.1. (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

(b) Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

(c) A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

(d) All employee organizations shall have the right to have membership dues deducted pursuant to Sections 13532 and 13604.2 of the Education Code, until such time as an employee organization is recognized as the exclusive representative for any of the employees in an appropriate unit, and then such deduction as to any employee in the negotiating unit shall not be permissible except to the exclusive representative.

3543.2. (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22316 of the Education Code, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

(b) Notwithstanding Section 44944 of the Education Code, the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding causes and procedures for disciplinary action, other than dismissal, including a suspension of pay for up to 15 days, affecting certificated employees. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Section 44944 of the Education Code shall apply.

(c) Notwithstanding Section 44955 of the Education Code, the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding procedures and criteria for the layoff of certificated employees for lack of funds. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Section 44955 of the Education Code shall apply.

(d) Notwithstanding Section 45028 of the Education Code, the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding the payment of additional compensation based upon criteria other than years of training and years of experience. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Section 45028 of the Education Code shall apply.

(e) Pursuant to Section 45028 of the Education Code, the public school employer and the exclusive representative shall, upon the request of either party, meet and negotiate a salary schedule based on criteria other than a uniform allowance for years of training and years of experience. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Section 45028 of the Education Code requiring a salary schedule based upon a uniform allowance for years of training and years of experience shall apply. A salary schedule established pursuant to this subdivision shall not result in the reduction of the salary of any teacher.

3543.3. A public school employer or such representatives as it may designate who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, shall meet and negotiate with and only with

representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

3543.4. No person serving in a management position, senior management position, or a confidential position shall be represented by an exclusive representative. Any person serving in such a position may represent himself or herself individually or by an employee organization whose membership is composed entirely of employees designated as holding such positions, in his or her employment relationship with the public school employer, but, in no case, shall such an organization meet and negotiate with the public school employer. No representative shall be permitted by a public school employer to meet and negotiate on any benefit or compensation paid to persons serving in a management position, senior managment position, or a confidential position.

3543.5. It shall be unlawful for a public school employer to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

(e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

3543.6. It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause a public school employer to violate Section 3543. 5.

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

3543.7. The duty to meet and negotiate in good faith requires the parties to begin negotiations prior to the adoption of the final budget for the ensuing year sufficiently in advance of such adoption date so that there is adequate time for agreement to be reached, or for the resolution of an impasse.

3543.8. Any employee organization shall have standing to sue in any action or proceeding heretofore or hereafter instituted by it as representative and on behalf of one or more of its members. The provisions of this section are expressly intended to apply to actions or proceedings commenced prior to, but concluded or pending as of, as well as on and after, the effective date of this section.

GOVERNMENT CODE SECTION 3544-3544.9

3544. (a) An employee organization may become the exclusive representative for the employees of an appropriate unit for purposes of meeting and negotiating by filing a request with a public school employer alleging that a majority of the employees in an appropriate unit wish to be represented by such organization and asking the public school employer to recognize it as the exclusive representative. The request shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and shall be based upon majority support on the basis of current dues deduction authorizations or other evidence such as notarized membership lists, or membership cards, or petitions designating the organization as the exclusive representative of the employees. Notice of any such request shall immediately be posted conspicuously on all employee bulletin boards in each facility of the public school employer in which members of the unit claimed to be appropriate are employed.

(b) The employee organization shall submit proof of majority support to the board. The information submitted to the board shall remain confidential and not be disclosed by the board. The board shall obtain from the employer the information necessary for it to carry out its responsibilities pursuant to this section and shall report to the employee organization and the public school employer as to whether the proof of majority support is adequate.

3544.1. The public school employer shall grant a request for recognition filed pursuant to Section 3544 unless any of the following apply:

(a) The public school employer desires that a representation election be conducted or doubts the appropriateness of a unit. If the public school employer desires a representation election, the question of representation exists and the public school employer shall notify the board, which shall conduct a representation election pursuant to Section 3544.7, unless subdivision (c) or (d) applies.

(b) Another employee organization either files with the public school employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request. The claim shall be evidenced by current dues deductions authorizations or other evidence such as notarized membership lists, or membership cards, or petitions signed by employees in the unit indicating their desire to be represented by the organization. The evidence shall be submitted to the board, and shall remain confidential and not be disclosed by the board. The board shall obtain from the employer the information necessary for it to carry out its responsibilities pursuant to this section and shall report to the employee organizations seeking recognition and to the public school employer as to the adequacy of the evidence. If the claim is evidenced by the support of at least 30 percent of the members of an appropriate unit, a question of representation exists and the board shall conduct a representation election pursuant to Section 3544.7, unless subdivision (c) or (d) of this section applies.

(c) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee

organization covering any employees included in the unit described in the request for recognition, unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement.

(d) The public school employer has, within the previous 12 months, lawfully recognized another employee organization as the exclusive representative of any employees included in the unit described in the request for recognition.

3544.3. If, by January 1 of any school year, no employee organization has made a claim of majority support in an appropriate unit pursuant to Section 3544, a majority of employees of an appropriate unit may submit to a public school employer a petition signed by at least a majority of the employees in the appropriate unit requesting a representation election. An employee may sign such a petition though not a member of any employee organization.

Upon the filing of such a petition, the public school employer shall immediately post a notice of such request upon all employee bulletin boards at each school or other facility in which members of the unit claimed to be appropriate are employed.

Any employee organization shall have the right to appear on the ballot if, within 15 workdays after the posting of such notice, it makes the showing of interest required by subdivision (b) of Section 3544.1.

Immediately upon expiration of the 15-workday period following the posting of the notice, the public school employer shall transmit to the board the petition and the names of all employee organizations that have the right to appear on the ballot.

3544.5. A petition may be filed with the board, in accordance with its rules and regulations, requesting it to investigate and decide the question of whether employees have selected or wish to select an exclusive representative or to determine the appropriateness of a unit, by:

(a) A public school employer alleging that it doubts the appropriateness of the claimed unit; or

(b) An employee organization alleging that it has filed a request for recognition as an exclusive representative with a public school employer and that the request has been denied or has not been acted upon within 30 days after the filing of the request; or

(c) An employee organization alleging that it has filed a competing claim of representation pursuant to subdivision (b) of Section 3544.1; or

(d) An employee organization alleging that the employees in an appropriate unit no longer desire a particular employee organization as their exclusive representative, provided that such petition is supported by evidence of support such as notarized membership lists, cards, or petitions from 30 percent of the employees in the negotiating unit indicating support for another organization or lack of support for the incumbent exclusive representative. Such evidence of support shall be submitted to the board, and shall remain confidential and not be disclosed by the board. The board shall obtain from the employer the information necessary for it to carry out its responsibilities pursuant to this section and shall report to the employee organizations seeking recognition and to the public school employer as to the adequacy of the evidence of support.

3544.7. (a) Upon receipt of a petition filed pursuant to Section

3544.3 or 3544.5, the board shall conduct inquiries and investigations or hold any hearings it deems necessary in order to decide the questions raised by the petition. The determination of the board may be based upon the evidence adduced in the inquiries, investigations, or hearing. However, if the board finds on the basis of the evidence that a question of representation exists, or a question of representation exists pursuant to subdivision (a) or (b) of Section 3544.1, it shall order that an election be conducted by secret ballot and it shall certify the results of the election on the basis of which ballot choice received a majority of the valid votes cast. There shall be printed on each ballot the statement: "no representation." No voter shall record more than one choice on his or her ballot. Any ballot upon which there is recorded more than one choice shall be void and shall not be counted for any purpose. If at any election no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted. The ballot for the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(b) No election shall be held and the petition shall be dismissed whenever either of the following exist:

(1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, or unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement.

(2) The public school employer has, within the previous 12 months, lawfully recognized an employee organization other than the petitioner as the exclusive representative of any employees included in the unit described in the petition.

3544.9. The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

GOVERNMENT CODE SECTION 3545

3545. (a) In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

(b) In all cases:

(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

(2) Except as provided in subdivision (c), a negotiating unit of supervisory employees shall not be appropriate unless it includes all supervisory employees employed by the district and shall not be represented by the same employee organization as employees whom the supervisory employees supervise.

(3) Classified employees and certificated employees shall not be included in the same negotiating unit.

(c) In the case of a district which employs 20 or more supervisory peace officer employees, a negotiating unit of supervisory employees shall be appropriate if it includes any of the following:

(1) All supervisory nonpeace officer employees employed by the district and all supervisory peace officer employees employed by the district.

(2) All supervisory nonpeace officer employees employed by the district, exclusively.

(3) All supervisory peace officer employees employed by the district, exclusively.

A negotiating unit of supervisory employees shall not be represented by the same employee organization as employees whom the supervisory employees supervise.

GOVERNMENT CODE SECTION 3546-3546.5

3546. Subject to the limitations set forth in this section, organizational security, as defined, shall be within the scope of representation.

(a) An organizational security arrangement, in order to be effective, must be agreed upon by both parties to the agreement. At the time the issue is being negotiated, the public school employer may require that the organizational security provision be severed from the remainder of the proposed agreement and cause the organizational security provision to be voted upon separately by all members in the appropriate negotiating unit, in accordance with rules and regulations promulgated by the board. Upon such a vote, the organizational security provision will become effective only if a majority of those members of the negotiating unit voting approve the agreement. Such vote shall not be deemed to either ratify or defeat the remaining provisions of the proposed agreement.

(b) An organizational security arrangement which is in effect may be rescinded by majority vote of the employees in the negotiating unit covered by such arrangement in accordance with rules and regulations promulgated by the board.

3546.3. Notwithstanding subdivision (i) of Section 3540.1, Section 3546, or any other provision of this chapter, any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to join, maintain membership in, or financially support any employee organization as a condition of employment; except that such employee may be required, in lieu of a service fee, to pay sums equal to such service fee either to a nonreligious, nonlabor organization, charitable fund exempt from taxation under Section 501(c)(3) of Title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in the organizational security arrangement, or if the arrangement fails to designate such funds, then to any such fund chosen by the employee. Either the employee organization or the public school employer may require that proof of such payments be made on an annual basis to the public school employer as a condition of continued exemption from the requirement of financial support to the recognized employee organization. If such employee who holds conscientious objections pursuant to this section requests the employee organization to use the grievance procedure or arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using such procedure.

3546.5. Every recognized or certified employee organization shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, signed and certified as to accuracy by its president and treasurer, or corresponding principal officers. In the event of failure of compliance with this

section, any employee within the organization may petition the board for an order compelling such compliance, or the board may issue such compliance order on its motion.

GOVERNMENT CODE SECTION 3547-3547.5

3547. (a) All initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records.

(b) Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal at a meeting of the public school employer.

(c) After the public has had the opportunity to express itself, the public school employer shall, at a meeting which is open to the public, adopt its initial proposal.

(d) New subjects of meeting and negotiating arising after the presentation of initial proposals shall be made public within 24 hours. If a vote is taken on such subject by the public school employer, the vote thereon by each member voting shall also be made public within 24 hours.

(e) The board may adopt regulations for the purpose of implementing this section, which are consistent with the intent of the section; namely that the public be informed of the issues that are being negotiated upon and have full opportunity to express their views on the issues to the public school employer, and to know of the positions of their elected representatives.

3547.5. Before a public school employer enters into a written agreement with an exclusive representative covering matters within the scope of representation, the major provisions of the agreement, including, but not limited to, the costs that would be incurred by the public school employer under the agreement for the current and subsequent fiscal years, shall be disclosed at a public meeting of the public school employer in a format established for this purpose by the Superintendent of Public Instruction.

GOVERNMENT CODE
SECTION 3548-3548.8

3548. Either a public school employer or the exclusive representative may declare that an impasse has been reached between the parties in negotiations over matters within the scope of representation and may request the board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable. If the board determines that an impasse exists, it shall, in no event later than five working days after the receipt of a request, appoint a mediator in accordance with such rules as it shall prescribe. The mediator shall meet forthwith with the parties or their representatives, either jointly or separately, and shall take such other steps as he may deem appropriate in order to persuade the parties to resolve their differences and effect a mutually acceptable agreement. The services of the mediator, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be provided by the board without cost to the parties. Nothing in this section shall be construed to prevent the parties from mutually agreeing upon their own mediation procedure and in the event of such agreement, the board shall not appoint its own mediator, unless failure to do so would be inconsistent with the policies of this chapter. If the parties agree upon their own mediation procedure, the cost of the services of any appointed mediator, unless appointed by the board, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be borne equally by the parties.

3548.1. (a) If the mediator is unable to effect settlement of the controversy within 15 days after his appointment and the mediator declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other, request that their differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The board shall, within five days after such selection, select a chairperson of the factfinding panel. The chairperson designated by the board shall not, without the consent of both parties, be the same person who served as mediator pursuant to Section 3548.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

3548.2. (a) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps as it may deem appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. The several departments, commissions, divisions, authorities, boards, bureaus, agencies, and officers of the state, or any political subdivision or agency thereof, including any board of education, shall furnish the panel, upon its request, with all records, papers and information in

their possession relating to any matter under investigation by or in issue before the panel.

(b) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Stipulations of the parties.

(3) The interests and welfare of the public and the financial ability of the public school employer.

(4) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally in public school employment in comparable communities.

(5) The consumer price index for goods and services, commonly known as the cost of living.

(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.

(7) Any other facts, not confined to those specified in paragraphs (1) to (6), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

3548.3. (a) If the dispute is not settled within 30 days after the appointment of the panel, or, upon agreement by both parties, within a longer period, the panel shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only. Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties privately before they are made public. The public school employer shall make such findings and recommendations public within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses shall be borne by the board.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's resume on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of such interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public school employer and the exclusive representative. Any separately incurred costs for the panel member selected by each party, shall be borne by such party.

3548.4. Nothing in this article shall be construed to prohibit the mediator appointed pursuant to Section 3548 from continuing mediation efforts on the basis of the findings of fact and recommended terms of settlement made pursuant to Section 3548.3.

3548.5. A public school employer and an exclusive representative who enter into a written agreement covering matters within the scope of representation may include in the agreement procedures for final and binding arbitration of such disputes as may arise involving the interpretation, application, or violation of the agreement.

3548.6. If the written agreement does not include procedures authorized by Section 3548.5, both parties to the agreement may agree to submit any disputes involving the interpretation, application, or violation of the agreement to final and binding arbitration pursuant to the rules of the board.

3548.7. Where a party to a written agreement is aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the procedures provided therefor in the agreement or pursuant to an agreement made pursuant to Section 3548.6, the aggrieved party may bring proceedings pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure for a court order directing that the arbitration proceed pursuant to the procedures provided therefor in such agreement or pursuant to Section 3548.6.

3548.8. An arbitration award made pursuant to Section 3548.5, 3548.6, or 3548. 7 shall be final and binding upon the parties and may be enforced by a court pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure.

Exhibit E

CHAPTER 781, STATUTES OF 1992

LEGISLATIVE INTENT SERVICE
800-666-1917

Senate Bill No. 1448

CHAPTER 781

An act to add Part 26.8 (commencing with Section 47600) to the Education Code, relating to charter schools.

[Approved by Governor September 20, 1992. Filed with Secretary of State September 21, 1992.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1448, Hart. Charter schools.

Under existing law, the public elementary and secondary schools are operated under the governance of school districts and county offices of education.

This bill would establish a procedure for the establishment of not more than 100 "charter schools," which would receive certain public funding but would not be subject to the laws generally governing school districts. The bill would prohibit the conversion of a private school to a charter school under this authority.

The bill would authorize a school district governing board or, as specified, a county board of education, in response to a petition signed by a specified percentage of credentialed teachers, to grant a revocable charter authorizing operation of a charter school for up to 5 years, subject to renewal for additional 5-year periods. The bill would allow a school district to convert all of its schools to charter schools only if certain conditions are met and the petition receives joint approval by the State Board of Education and the Superintendent of Public Instruction.

The bill would require a charter school to be nonsectarian, and to comply with the conditions of its charter petition, including the attainment of identified educational objectives, health and safety standards, and racial and ethnic balance. The bill would prohibit school districts having one or more charter schools from requiring any pupil to attend, or any employee to be employed at, a charter school. Charter schools would be prohibited from discriminating on the basis of ethnicity, national origin, gender, or disability, and from determining admission on the basis of the residence of the pupil or his or her parent or guardian.

The bill would authorize a charter school to participate in the State Teacher's Retirement System, as specified.

The bill would specify, for identified purposes of the California Constitution, that a charter school is under the authority of the public schools, and that it constitutes a "school district" for purposes of the state school funding guarantee for school districts and community college districts.

The bill would require the State Department of Education to review the charter school approach and, not later than January 1

1999, to report to the Legislature with recommendations regarding that approach.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates which do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would impose a state-mandated local program by requiring school district governing boards to review and respond to petitions for the granting of charters within a specified time period.

This bill would provide that no reimbursement shall be made from the State Mandates Claims Fund for costs mandated by the state pursuant to this act, but would recognize that local agencies and school districts may pursue any available remedies to seek reimbursement for these costs.

The people of the State of California do enact as follows:

SECTION 1. Part 26.8 (commencing with Section 47600) is added to the Education Code, to read:

PART 26.8. CHARTER SCHOOLS

CHAPTER 1. GENERAL PROVISIONS

47600. This part shall be known, and may be cited, as the "Charter Schools Act of 1992."

47601. It is the intent of the Legislature, in enacting this part, to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure, as a method to accomplish all of the following:

(a) Improve pupil learning.

(b) Increase learning opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who are identified as academically low achieving.

(c) Encourage the use of different and innovative teaching methods.

(d) Create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site.

(e) Provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system.

(f) Hold the schools established under this part accountable for meeting measurable pupil outcomes, and provide the schools with a method to change from rule-based to performance-based accountability systems.

47602. (a) The total number of charter schools operating in this state in any school year shall not exceed 100, with not more than 10 charter schools in any single school district. For the purposes of implementing this section, the State Board of Education shall assign a number to each charter notice it receives pursuant to subdivision (g) of Section 47605, based on the chronological order in which the notice is received.

(b) No charter shall be granted under this part that authorizes the conversion of any private school to a charter school.

47603. This part shall not be construed to prohibit any private person or organization from providing funding or other assistance to the establishment or operation of a charter school.

CHAPTER 2. ESTABLISHMENT OF CHARTER SCHOOLS

47605. (a) A petition for the establishment of a charter school within any school district may be circulated by any one or more persons seeking to establish the charter school. After the petition has been signed by not less than 10 percent of the teachers currently employed by the school district, or by not less than 50 percent of the teachers currently employed at one school of the district, it may be submitted to the governing board of the school district for review.

(b) No later than 30 days after receiving a petition, in accordance with subdivision (a), the governing board of the school district shall hold a public hearing on the provisions of the charter, at which time the board shall consider the level of employee and parental support for the petition. Following review of the petition and the public hearing, the governing board shall either grant or deny the charter within 60 days of receipt of the petition, provided, however, that the date may be extended by an additional 30 days if both parties agree to the extension. A school district governing board may grant a charter for the operation of a school under this part if it determines that the petition contains the number of signatures required by subdivision (a), a statement of each of the conditions described in subdivision (d), and descriptions of all of the following:

(1) A description of the educational program of the school, designed, among other things, to identify those whom the school is attempting to educate, what it means to be an 'educated person' in the 21st century, and how learning best occurs. The goals identified in that program shall include the objective of enabling pupils to become self-motivated, competent, and lifelong learners.

(2) The measurable pupil outcomes identified for use by the charter school. "Pupil outcomes," for purposes of this part, means the extent to which all pupils of the school demonstrate that they have attained the skills, knowledge, and attitudes specified as goals in the school's educational program.

(3) The method by which pupil progress in meeting those pupil outcomes is to be measured.

(4) The governance structure of the school, including, but not limited to, the process to be followed by the school to ensure parental involvement.

(5) The qualifications to be met by individuals to be employed by the school.

(6) The procedures that the school will follow to ensure the health and safety of pupils and staff. These procedures shall include the requirement that each employee of the school furnish the school with a criminal record summary as described in Section 44237.

(7) The means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted.

(8) Admission requirements, if applicable.

(9) The manner in which an annual audit of the financial and programmatic operations of the school is to be conducted.

(10) The procedures by which pupils can be suspended or expelled.

(11) The manner by which staff members of the charter schools will be covered by the State Teachers' Retirement System, the Public Employees' Retirement System, or federal social security.

(12) The public school attendance alternatives for pupils residing within the school district who choose not to attend charter schools.

(13) A description of the rights of any employee of the school district upon leaving the employment of the school district to work in a charter school, and of any rights of return to the school district after employment at a charter school.

(c) Charter schools shall meet the statewide performance standards and conduct the pupil assessments required pursuant to Section 60602.5.

(d) In addition to any other requirement imposed under this part, a charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations, shall not charge tuition, and shall not discriminate against any pupil on the basis of ethnicity, national origin, gender, or disability. Admission to a charter school shall not be determined according to the place of residence of the pupil, or of his or her parent or guardian, within this state, except that any existing public school converting partially or entirely to a charter school under this part shall adopt and maintain a policy giving admission preference to pupils who reside within the former attendance area of that public school.

(e) No governing board of a school district shall require any employee of the school district to be employed in a charter school.

(f) No governing board of a school district shall require any pupil enrolled in the school district to attend a charter school.

(g) The governing board may require that the petitioner or

petitioners provide information regarding the proposed operation and potential effects of the school, including, but not limited to, the facilities to be utilized by the school, the manner in which administrative services of the school are to be provided, and potential civil liability effects upon the school and upon the school district.

(h) In reviewing petitions for the establishment of charter schools within the school district, the school district governing board shall give preference to petitions that demonstrate the capability to provide comprehensive learning experiences to pupils identified by the petitioner or petitioners as academically low achieving pursuant to the standards established by the State Department of Education under Section 54032.

(i) Upon the approval of the petition by the governing board of the school district, the petitioner or petitioners shall provide written notice of that approval, including a copy of the petition, to the State Board of Education.

(j) (1) If the governing board of the school district denies a charter, the county superintendent of schools, at the request of the petitioner or petitioners, shall select and convene a review panel to review the action of the governing board. The review panel shall consist of three governing board members from other school districts in the county and three teachers from other school districts in the county unless only one school district is located in the county, in which case the panel members shall be selected from school districts in adjoining counties.

(2) If the review panel determines that the governing board failed to appropriately consider the charter request, or acted in an arbitrary manner in denying the request, the review panel shall request the governing board to reconsider the charter request. In the case of a tie vote of the panel, the county superintendent of schools shall vote to break the tie.

(3) If, upon reconsideration, the governing board denies a charter, the county board of education, at the request of the petitioner or petitioners, shall hold a public hearing in the manner described in subdivision (b) and, accordingly, may grant a charter. A charter school for which a charter is granted by a county board of education pursuant to this paragraph shall qualify fully as a charter school for all funding and other purposes of this part.

47606. (a) A school district may convert all of its schools to charter schools under this part only if it meets all of the following conditions:

(1) Fifty percent of the teachers within the school district sign the charter petition.

(2) The charter petition contains all of the requirements set forth in subdivisions (b), (c), (d), (e), and (f) of Section 47605 and a provision that specifies alternative public school attendance arrangements for pupils residing within the school district who

156

choose not to attend charter schools.

(b) Notwithstanding subdivision (b) of Section 47605, the districtwide charter petition shall be approved only by joint action of the Superintendent of Public Instruction and the State Board of Education.

47607. (a) A charter may be granted pursuant to Sections 47605 and 47606 for a period not to exceed five years. A charter granted by a school district governing board or county board of education may be granted one or more subsequent renewals by that entity. Each renewal shall be for a period not to exceed five years. A material revision of the provisions of a charter petition may be made only with the approval of the authority that granted the charter.

(b) A charter may be revoked by the authority that granted the charter under this chapter if the authority finds that the charter school did any of the following:

(1) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter petition.

(2) Failed to meet or pursue any of the pupil outcomes identified in the charter petition.

(3) Failed to meet generally accepted accounting standards of fiscal management.

(4) Violated any provision of law.

Chapter 3. Charter School Operation and Funding

47610. A charter school shall comply with all of the provisions set forth in its charter petition, but is otherwise exempt from the laws governing school districts except as specified in Section 47611.

47611. If a charter school chooses to participate in the State Teacher's Retirement System, all employees of the charter school who qualify for membership in the system shall be covered under the system, and all provisions of Part 13 (commencing with Section 22000) shall apply in the same manner as if the charter school were a public school in the school district that granted the charter.

47612. (a) The Superintendent of Public Instruction shall make all of the following apportionments to each charter school for each fiscal year:

(1) From funds appropriated to Section A of the State School Fund for apportionment for that fiscal year pursuant to Article 2 (commencing with Section 42238) of Chapter 7 of Part 24, an amount for each unit of regular average daily attendance in the charter school that is equal to the current fiscal year base revenue limit for the school district to which the charter petition was submitted.

(2) For each pupil enrolled in the charter school who is entitled to special education services, the state and federal funds for special education services for that pupil that would have been apportioned for that pupil to the school district to which the charter petition was submitted.

(3) Funds for the programs described in clause (i) of subparagraph (B) of paragraph (1) of subdivision (a) of Section 54761, and Sections 63000 and 64000, to the extent that any pupil enrolled in the charter school is eligible to participate.

(b) A charter school shall be deemed to be under the exclusive control of the officers of the public schools for purposes of Section 9 of Article IX of the California Constitution, with regard to the appropriation of public moneys to be apportioned to any charter school, including, but not limited to, appropriations made for the purposes of subdivisions (a) and (b).

(c) A charter school shall be deemed to be a "school district" for purposes of Section 41302.5 and Sections 8 and 8.5 of Article XVI of the California Constitution.

Chapter 4. Notice

47615. The State Board of Education shall distribute information announcing the availability of the charter school process described in this part to each school district, county office of education, and public postsecondary educational institution and, through press releases, to each major newspaper in the state.

47616. The State Department of Education shall review the educational effectiveness of the charter school approach authorized under this part and, not later than January 1, 1999, shall report to the Legislature accordingly with recommendations to modify, expand, or terminate that approach.

SEC. 2. No reimbursement shall be made from the State Mandates Claims Fund pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code for costs mandated by the state pursuant to this act. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Part 7 (commencing with Section 17500) and any other provisions of law. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

O

Exhibit F

EDUCATION CODE § 47610 AS ENACTED BY CHAPTER 781, STATUTES OF 1992

choose not to attend charter schools.

(b) Notwithstanding subdivision (b) of Section 47605, the districtwide charter petition shall be approved only by joint action of the Superintendent of Public Instruction and the State Board of Education.

47607. (a) A charter may be granted pursuant to Sections 47605 and 47606 for a period not to exceed five years. A charter granted by a school district governing board or county board of education may be granted one or more subsequent renewals by that entity. Each renewal shall be for a period not to exceed five years. A material revision of the provisions of a charter petition may be made only with the approval of the authority that granted the charter.

(b) A charter may be revoked by the authority that granted the charter under this chapter if the authority finds that the charter school did any of the following:

(1) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter petition.

(2) Failed to meet or pursue any of the pupil outcomes identified in the charter petition.

(3) Failed to meet generally accepted accounting standards of fiscal management.

(4) Violated any provision of law.

CHAPTER 3. CHARTER SCHOOL OPERATION AND FUNDING

47610. A charter school shall comply with all of the provisions set forth in its charter petition, but is otherwise exempt from the laws governing school districts except as specified in Section 47611.

47611. If a charter school chooses to participate in the State Teacher's Retirement System, all employees of the charter school who qualify for membership in the system shall be covered under the system, and all provisions of Part 13 (commencing with Section 22000) shall apply in the same manner as if the charter school were a public school in the school district that granted the charter.

47612. (a) The Superintendent of Public Instruction shall make all of the following apportionments to each charter school for each fiscal year:

(1) From funds appropriated to Section A of the State School Fund for apportionment for that fiscal year pursuant to Article 2 (commencing with Section 42238) of Chapter 7 of Part 24, an amount for each unit of regular average daily attendance in the charter school that is equal to the current fiscal year base revenue limit for the school district to which the charter petition was submitted.

(2) For each pupil enrolled in the charter school who is entitled to special education services, the state and federal funds for special education services for that pupil that would have been apportioned for that pupil to the school district to which the charter petition was submitted.

Exhibit G

CHAPTER 34, STATUTES OF 1998

Assembly Bill No. 544

CHAPTER 34

An act to amend Sections 47601, 47602, 47605, 47607, 47608, 47610, 47612, 47613, and 47616.5 of, and to add Sections 47604, 47604.3, 47604.5, 47605.5, 47613.5, 47613.7, 47614, and 47615 to, the Education Code, relating to charter schools.

[Approved by Governor May 7, 1998. Filed with Secretary of State May 8, 1998.]

LEGISLATIVE COUNSEL'S DIGEST

AB 544, Lempert. Charter schools.

Existing law, the Charter Schools Act of 1992, permits teachers, parents, pupils, and community members to petition a school district governing board to approve a charter school to operate independently from the existing school district structure as a method of accomplishing, among other things, improved pupil learning.

Existing law, with certain exceptions, establishes the maximum number of charter schools in California at 100 and the maximum number of 10 in any single school district.

This bill would delete this provision, and would instead, establish the statewide maximum at 250 charter schools for the 1998–99 school year with an additional 100 charter schools per school year thereafter.

The bill would require the Legislative Analyst to contract for an evaluation and to report to the Legislature and the Governor by July 1, 2003, regarding the effectiveness of the charter school approach.

This bill would preclude receipt of public funds by a charter school if the pupil also attends a private school that charges the family for tuition, and would authorize the State Board of Education to adopt implementing regulations.

This bill would provide that a charter school may elect to operate as a nonprofit public benefit corporation and would entitle the school district that grants the charter to have one representative on the board of directors of the nonprofit public benefit corporation.

Existing law permits a petitioner to submit for the approval of the governing board of a school district, a petition for the establishment of a charter school after the petition has been signed by at least 10% of the teachers currently employed in the district, or by at least 50% of the teachers currently employed at one school of the district and establishes a process for review of a denial of the petition, including, but not limited to, the convening of a review panel, and the granting of the charter by the county board of education.

This bill would delete these provisions and would, instead, authorize the submission of a petition after the petition has been

signed by a number of parents or guardians of pupils equal to at least 1/2 of the pupils that the charter school estimates it will enroll in its first year, or after the petition has been signed by a number of teachers equal to at least 1/2 of the number of teachers that the charter school estimates will be employed at the charter school during its first year. In the case of petitions for establishment of a charter school by converting an existing public school, the bill would permit filing of the petition after the petition has been signed by at least 50% of the permanent status teachers currently employed at the public school to be converted.

This bill would authorize the State Board of Education to grant a charter for the establishment of a charter school. This bill would permit the petitioner to elect to file the petition with either the county board of education or directly with the State Board of Education, and in the case of a denial by the county board of education, the bill would permit petitioners to file with the State Board of Education. The bill would permit the State Board of Education to, by mutual agreement, designate a local educational agency to perform the State Board of Education's supervisorial and oversight responsibilities as a chartering agency, and would grant the local educational agency all related powers, excluding the power of revocation of the charter.

This bill would authorize the State Board of Education to take action, including, but not limited to, revocation of the charter if, based upon the recommendation of the Superintendent of Public Instruction the State Board of Education makes certain findings relating to, financial mismanagement, illegal or improper use of funds, or substantial and sustained departure from measurably successful practice.

This bill would require that teachers in charter schools be required to hold a Commission on Teacher Credentialing certificate, permit, or other document equivalent to that which a public school teacher would be required to hold.

Existing law requires a charter school to comply with its charter but generally exempts it from all laws governing school districts, with certain exceptions relating to the State Teachers' Retirement System and the Charter School Revolving Loan Fund.

This bill would add all laws establishing a minimum age for public school attendance to the provisions from which a charter school is not exempt.

Existing law requires the Superintendent of Public Instruction to make certain apportionments to each charter school for each fiscal year.

This bill would require that, only upon adoption of implementing regulations, charter school operational funding, as defined, be equal to the total funding that would be available to a similar school district, as defined, serving a similar pupil population, and would require the

State Department of Education to propose, and the State Board of Education to adopt, implementing regulations. The bill would, with certain exceptions, permit a chartering agency to charge up to a 1% charge for actual costs of oversight, or up to 3% for these costs if the chartering agency provides substantially rent free facilities to the charter school, or if the agency is a designated local education agency in the case of charters granted by the State Board of Education.

This bill would require a charter school to admit all pupils, would provide for a selection by random drawing in cases where the demand exceeds the capacity and would require that certain preferences be given in the case of pupils currently in the charter school. The bill would preclude the generating of average daily attendance in a charter school by a pupil who is not a resident of California. The bill would require a pupil over 19 to be continuously enrolled in public school and make satisfactory progress towards a high school diploma in order to remain eligible for generating charter school apportionments, and would require the State Board of Education to adopt implementing regulations by January 1, 2000.

By requiring local agencies to perform these additional duties relating to the formation, monitoring, and administration of charter school, this bill would impose a state-mandated local program.

The bill would declare that certain of its provisions are severable if held invalid, and would make conforming changes and other changes of a technical, nonsubstantive nature.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 47601 of the Education Code is amended to read:

47601. It is the intent of the Legislature, in enacting this part, to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure, as a method to accomplish all of the following:

(a) Improve pupil learning.

(b) Increase learning opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who are identified as academically low achieving.

(c) Encourage the use of different and innovative teaching methods.

(d) Create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the schoolsite.

(e) Provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system.

(f) Hold the schools established under this part accountable for meeting measurable pupil outcomes, and provide the schools with a method to change from rule-based to performance-based accountability systems.

(g) Provide vigorous competition within the public school system to stimulate continual improvements in all public schools.

SEC. 2. Section 47602 of the Education Code is amended to read:

47602. (a) (1) In the 1998–99 school year, the maximum total number of charter schools authorized to operate in this state shall be 250. In the 1999–2000 school year, and in each successive school year thereafter, an additional 100 charter schools are authorized to operate in this state each successive school year. The limits contained in this paragraph may not be waived pursuant to Section 33050 or any other provision of law.

(2) By July 1, 2003, the Legislative Analyst shall, pursuant to the criteria in Section 47616.5, report to the Legislature on the effectiveness of the charter school approach authorized under this part and recommend whether to expand or reduce the annual rate of growth of charter schools authorized pursuant to this section.

(b) No charter shall be granted under this part that authorizes the conversion of any private school to a charter school. No charter school shall receive any public funds for a pupil if the pupil also attends a private school that charges the pupil's family for tuition. The State Board of Education shall adopt regulations to implement this section.

SEC. 3. Section 47604 is added to the Education Code, to read:

47604. (a) Charter schools may elect to operate as, or be operated by, a nonprofit public benefit corporation, formed and organized pursuant to the Nonprofit Public Benefit Corporation Law (Part 2 (commencing with Section 5110) of Division 2 of Title 1) of the Corporations Code).

(b) The governing board of a school district that grants a charter for the establishment of a charter school formed and organized pursuant to this section shall be entitled to a single representative on the board of directors of the nonprofit public benefit corporation.

(c) It is the intent of the Legislature that an authority that grants a charter to a charter school to be operated by, or as, a nonprofit

public benefit corporation shall not be liable for the debts or obligations of the charter school.

SEC. 4. Section 47604.3 is added to the Education Code, to read:

47604.3. A charter school shall promptly respond to all reasonable inquiries, including, but not limited to, inquiries regarding its financial records, from its chartering authority or from the Superintendent of Public Instruction and shall consult with the chartering authority or the Superintendent of Public Instruction regarding any inquiries.

SEC. 5. Section 47604.5 is added to the Education Code, to read:

47604.5. The State Board of Education, whether or not it is the authority that granted the charter, may, based upon the recommendation of the Superintendent of Public Instruction, take appropriate action, including, but not limited to, revocation of the school's charter, when the State Board of Education finds any of the following:

(a) Gross financial mismanagement that jeopardizes the financial stability of the charter school.

(b) Illegal or substantially improper use of charter school funds for the personal benefit of any officer, director, or fiduciary of the charter school.

(c) Substantial and sustained departure from measurably successful practices such that continued departure would jeopardize the educational development of the school's pupils.

SEC. 6. Section 47605 of the Education Code is amended to read:

47605. (a) (1) Except as set forth in paragraph (2), a petition for the establishment of a charter school within any school district may be circulated by any one or more persons seeking to establish the charter school. The petition may be submitted to the governing board of the school district for review after either of the following conditions are met:

(A) The petition has been signed by a number of parents or guardians of pupils that is equivalent to at least one-half of the number of pupils that the charter school estimates will enroll in the school for its first year of operation.

(B) The petition has been signed by a number of teachers that is equivalent to at least one-half of the number of teachers that the charter school estimates will be employed at the school during its first year of operation.

(2) In the case of a petition for the establishment of a charter school through the conversion of an existing public school, that would not be eligible for a loan pursuant to subdivision (b) of Section 41365, the petition may be circulated by any one or more persons seeking to establish the converted charter school. The petition may be submitted to the governing board of the school district for review after the petition has been signed by not less than 50 percent of the

permanent status teachers currently employed at the public school to be converted.

(3) A petition shall include a prominent statement that a signature on the petition means that the parent or guardian is meaningfully interested in having his or her child, or ward, attend the charter school, or in the case of a teacher's signature, means that the teacher is meaningfully interested in teaching at the charter school. The proposed charter shall be attached to the petition.

(b) No later than 30 days after receiving a petition, in accordance with subdivision (a), the governing board of the school district shall hold a public hearing on the provisions of the charter, at which time the governing board of the school district shall consider the level of support for the petition by teachers employed by the district, other employees of the district, and parents. Following review of the petition and the public hearing, the governing board of the school district shall either grant or deny the charter within 60 days of receipt of the petition, provided, however, that the date may be extended by an additional 30 days if both parties agree to the extension. In reviewing petitions for the establishment of charter schools pursuant to this section, the chartering authority shall be guided by the intent of the Legislature that charter schools are and should become an integral part of the California educational system and that establishment of charter schools should be encouraged. A school district governing board shall grant a charter for the operation of a school under this part if it is satisfied that granting the charter is consistent with sound educational practice. The governing board of the school district shall not deny a petition for the establishment of a charter school unless it makes written factual findings, specific to the particular petition, setting forth specific facts to support one, or more, of the following findings:

(1) The charter school presents an unsound educational program for the pupils to be enrolled in the charter school.

(2) The petitioners are demonstrably unlikely to successfully implement the program set forth in the petition.

(3) The petition does not contain the number of signatures required by subdivision (a).

(4) The petition does not contain an affirmation of each of the conditions described in subdivision (d).

(5) The petition does not contain reasonably comprehensive descriptions of all of the following:

(A) A description of the educational program of the school, designed, among other things, to identify those whom the school is attempting to educate, what it means to be an "educated person" in the 21st century, and how learning best occurs. The goals identified in that program shall include the objective of enabling pupils to become self-motivated, competent, and lifelong learners.

(B) The measurable pupil outcomes identified for use by the charter school. "Pupil outcomes," for purposes of this part, means the extent to which all pupils of the school demonstrate that they have attained the skills, knowledge, and attitudes specified as goals in the school's educational program.

(C) The method by which pupil progress in meeting those pupil outcomes is to be measured.

(D) The governance structure of the school, including, but not limited to, the process to be followed by the school to ensure parental involvement.

(E) The qualifications to be met by individuals to be employed by the school.

(F) The procedures that the school will follow to ensure the health and safety of pupils and staff. These procedures shall include the requirement that each employee of the school furnish the school with a criminal record summary as described in Section 44237.

(G) The means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted.

(H) Admission requirements, if applicable.

(I) The manner in which annual, independent, financial audits shall be conducted, which shall employ generally accepted accounting principles, and the manner in which audit exceptions and deficiencies shall be resolved to the satisfaction of the chartering authority.

(J) The procedures by which pupils can be suspended or expelled.

(K) The manner by which staff members of the charter schools will be covered by the State Teachers' Retirement System, the Public Employees' Retirement System, or federal social security.

(L) The public school attendance alternatives for pupils residing within the school district who choose not to attend charter schools.

(M) A description of the rights of any employee of the school district upon leaving the employment of the school district to work in a charter school, and of any rights of return to the school district after employment at a charter school.

(N) The procedures to be followed by the charter school and the entity granting the charter to resolve disputes relating to provisions of the charter.

(c) (1) Charter schools shall meet all statewide standards and conduct the pupil assessments required pursuant to Section 60605 and any other statewide standards authorized in statute or pupil assessments applicable to pupils in noncharter public schools.

(2) Charter schools shall on a regular basis consult with their parents and teachers regarding the school's educational programs.

(d) (1) In addition to any other requirement imposed under this part, a charter school shall be nonsectarian in its programs, admission

policies, employment practices, and all other operations, shall not charge tuition, and shall not discriminate against any pupil on the basis of ethnicity, national origin, gender, or disability. Except as provided in paragraph (2), admission to a charter school shall not be determined according to the place of residence of the pupil, or of his or her parent or guardian, within this state, except that any existing public school converting partially or entirely to a charter school under this part shall adopt and maintain a policy giving admission preference to pupils who reside within the former attendance area of that public school.

(2) (A) A charter school shall admit all pupils who wish to attend the school.

(B) However, if the number of pupils who wish to attend the charter school exceeds the school's capacity, attendance, except for existing pupils of the charter school, shall be determined by a public random drawing. Preference shall be extended to pupils currently attending the charter school and pupils who reside in the district. Other preferences may be permitted by the chartering authority on an individual school basis and only if consistent with the law.

(C) In the event of a drawing, the chartering authority shall make reasonable efforts to accommodate the growth of the charter school and, in no event, shall take any action to impede the charter school from expanding enrollment to meet student demand.

(e) No governing board of a school district shall require any employee of the school district to be employed in a charter school.

(f) No governing board of a school district shall require any pupil enrolled in the school district to attend a charter school.

(g) The governing board of a school district shall require that the petitioner or petitioners provide information regarding the proposed operation and potential effects of the school, including, but not limited to, the facilities to be utilized by the school, the manner in which administrative services of the school are to be provided, and potential civil liability effects, if any, upon the school and upon the school district. The petitioner or petitioners shall also be required to provide financial statements that include a proposed first-year operational budget, including startup costs, and cash-flow and financial projections for the first three years of operation.

(h) In reviewing petitions for the establishment of charter schools within the school district, the school district governing board shall give preference to petitions that demonstrate the capability to provide comprehensive learning experiences to pupils identified by the petitioner or petitioners as academically low achieving pursuant to the standards established by the State Department of Education under Section 54032.

(i) Upon the approval of the petition by the governing board of the school district, the petitioner or petitioners shall provide written

notice of that approval, including a copy of the petition, to the State Board of Education.

(j) (1) If the governing board of a school district denies a petition, the petitioner may elect to submit the petition for the establishment of a charter school to either the county board of education or directly to the State Board of Education. The county board of education or the State Board of Education, as the case may be, shall review the petition pursuant to subdivision (b). If the petitioner elects to submit a petition for establishment of a charter school to the county board of education and the county board of education denies the petition, the petitioner may file a petition for establishment of a charter school with the State Board of Education.

(2) A charter school for which a charter is granted by either the county board of education or the State Board of Education pursuant to this subdivision shall qualify fully as a charter school for all funding and other purposes of this part.

(3) If either the county board of education or the State Board of Education fails to act on a petition within 120 days of receipt, the decision of the governing board of the school district to deny a petition shall, thereafter, be subject to judicial review.

(4) The State Board of Education shall adopt regulations implementing this subdivision.

(k) (1) The State Board of Education may, by mutual agreement, designate its supervisorial and oversight responsibilities for a charter school approved by the State Board of Education to any local education agency in the county in which the charter school is located or to the governing board of the school district that first denied the petition.

(2) The designated local education agency shall have all monitoring and supervising authority of a chartering agency, including, but not limited to, powers and duties set forth in Section 47607, except the power of revocation, which shall remain with the State Board of Education.

(3) A charter school that has been granted its charter by the State Board of Education and elects to seek renewal of its charter shall, prior to expiration of the charter, submit its petition for renewal to the governing board of the school district that initially denied the charter. If the governing board of the school district denies the school's petition for renewal, the school may petition the State Board of Education for renewal of its charter.

(*l*) Teachers in charter schools shall be required to hold a Commission on Teacher Credentialing certificate, permit, or other document equivalent to that which a teacher in other public schools would be required to hold. These documents shall be maintained on file at the charter school and shall be subject to periodic inspection by the chartering authority. It is the intent of the Legislature that

charter schools be given flexibility with regard to noncore, noncollege preparatory courses.

SEC. 7. Section 47605.5 is added to the Education Code, to read:

47605.5. A petition may be submitted directly to a county board of education in the same manner as set forth in Section 47605 for charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services. Any denial of a petition shall be subject to the same process for any other county board of education denial of a charter school petition pursuant to this part.

SEC. 8. Section 47607 of the Education Code is amended to read:

47607. (a) (1) A charter may be granted pursuant to Sections 47605, 47605.5, and 47606 for a period not to exceed five years. A charter granted by a school district governing board , a county board of education or the State Board of Education, may be granted one or more subsequent renewals by that entity. Each renewal shall be for a period of five years. A material revision of the provisions of a charter petition may be made only with the approval of the authority that granted the charter. The authority that granted the charter may inspect or observe any part of the charter school at any time.

(2) Renewals and material revisions of charters shall be governed by the standards and criteria in Section 47605.

(b) A charter may be revoked by the authority that granted the charter under this chapter if the authority finds that the charter school did any of the following:

(1) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter .

(2) Failed to meet or pursue any of the pupil outcomes identified in the charter .

(3) Failed to meet generally accepted accounting principles, or engaged in fiscal mismanagement.

(4) Violated any provision of law.

(c) Prior to revocation, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils.

SEC. 9. Section 47608 of the Education Code is amended to read:

47608. All meetings of the governing board of the school district and the county board of education at which the granting, revocation, appeal, or renewal of a charter petition is discussed shall comply with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Division 2 of Title 5 of the Government Code).

SEC. 10. Section 47610 of the Education Code is amended to read:

47610. A charter school shall comply with this part and all of the provisions set forth in its charter , but is otherwise exempt from the laws governing school districts except all of the following:

(a) As specified in Section 47611.

(b) As specified in Section 41365.

(c) All laws establishing minimum age for public school attendance.

SEC. 11. Section 47612 of the Education Code is amended to read:

47612. (a) The Superintendent of Public Instruction shall make all of the following apportionments to each charter school for each fiscal year:

(1) From funds appropriated to Section A of the State School Fund for apportionment for that fiscal year pursuant to Article 2 (commencing with Section 42238) of Chapter 7 of Part 24, an amount for each unit of regular average daily attendance in the charter school that is equal to the current fiscal year base revenue limit for the school district to which the charter petition was submitted. In no event shall average daily attendance in a charter school be generated by a pupil who is not a California resident. To remain eligible for generating charter school apportionments, a pupil over 19 years of age shall be continuously enrolled in public school and make satisfactory progress towards award of a high school diploma. The State Board of Education shall, on or before January 1, 2000, adopt regulations defining "satisfactory progress."

(2) For each pupil enrolled in the charter school who is entitled to special education services, the state and federal funds for special education services for that pupil that would have been apportioned for that pupil to the school district to which the charter petition was submitted.

(3) Funds for the programs described in clause (i) of subparagraph (B) of paragraph (1) of subdivision (a) of Section 54761, and Sections 63000 and 64000, to the extent that any pupil enrolled in the charter school is eligible to participate.

(b) A charter school shall be deemed to be under the exclusive control of the officers of the public schools for purposes of Section 8 of Article IX of the California Constitution, with regard to the appropriation of public moneys to be apportioned to any charter school, including, but not limited to, appropriations made for the purposes of subdivisions (a) and (b).

(c) A charter school shall be deemed to be a "school district" for purposes of Section 41302.5 and Sections 8 and 8.5 of Article XVI of the California Constitution.

SEC. 12. Section 47613 of the Education Code is amended to read:

47613. Notwithstanding subdivision (c) of Section 48209.11, the full apportionment received by the basic aid district pursuant to this section shall be provided to the charter school, and with respect to any pupil of a charter school located within a basic aid school district who attended a public school in a district other than a basic aid district immediately before transferring to the charter school, the Superintendent of Public Instruction, commencing with the 1998–99

fiscal year, shall calculate for that school an apportionment of state funds that provides 70 percent of the district revenue limit calculated pursuant to Section 42238 that would have been apportioned to the school district of residence for any average daily attendance credited pursuant to Section 48209.11. For purposes of this section, "basic aid district" means a school district that does not receive from the state, for any fiscal year in which the subdivision is applied, an apportionment of state funds pursuant to subdivision (h) of Section 42238.

SEC. 13. Section 47613.5 is added to the Education Code, to read:

47613.5. (a) Notwithstanding Sections 47612 and 47613, commencing with the 1999–2000 school year and only upon adoption of regulations pursuant to subdivision (b), charter school operational funding shall be equal to the total funding that would be available to a similar school district serving a similar pupil population, provided that a charter school shall not be funded as a necessary small school or a necessary small high school, nor receive revenue limit funding that exceeds the statewide average for a school district of a similar type.

(b) The State Department of Education shall propose, and the State Board of Education may adopt, regulations to implement subdivision (a) and, to the extent possible and consistent with federal law, provide for simple and, at the option of the charter school, local or direct allocation of funding to charter schools.

(c) For the purposes of this section, the following terms have the following meanings:

(1) "Operational funding" means all funding other than capital funding.

(2) "School district of a similar type" means a school district that is serving similar grade levels; elementary, high, or unified.

SEC. 14. Section 47613.7 is added to the Education Code, to read:

47613.7. (a) Except as set forth in subdivision (b), a chartering agency may charge for the actual costs of supervisorial oversight of a charter school not to exceed 1 percent of the revenue of the charter school.

(b) A chartering agency may charge for the actual costs of supervisorial oversight of a charter school not to exceed 3 percent of the revenue of the charter school if the charter school is able to obtain substantially rent free facilities from the chartering agency.

(c) A local agency that is given the responsibility for supervisorial oversight of a charter school, pursuant to paragraph (1) of subdivision (k) of Section 47605, may charge for the costs of supervisorial oversight, and administrative costs necessary to secure charter school funding, not to exceed 3 percent of the revenue of the charter school. A charter school that is charged for costs under this subdivision shall not be charged pursuant to subdivision (a) or (b).

(d) This section shall not prevent the charter school from separately purchasing administrative or other services from the chartering agency or any other source.

(e) For the purposes of this section, a chartering agency means a school district, county department of education, or the State Board of Education, that granted the charter to the charter school.

SEC. 15. Section 47614 is added to the Education Code, to read:

47614. A school district in which a charter school operates shall permit a charter school to use, at no charge, facilities not currently being used by the school district for instructional or administrative purposes, or that have not been historically used for rental purposes provided the charter school shall be responsible for reasonable maintenance of those facilities.

SEC. 16. Section 47615 is added to the Education Code, to read:

47615. (a) The Legislature finds and declares all of the following:

(1) Charter schools are part of the Public School System, as defined in Article IX of the California Constitution.

(2) Charter schools are under the jurisdiction of the Public School System and the exclusive control of the officers of the public schools, as provided in this part.

(3) Charter schools shall be entitled to full and fair funding, as provided in this part.

(b) This part shall be liberally construed to effectuate the findings and declarations set forth in this section.

SEC. 17. Section 47616.5 of the Education Code is amended to read:

47616.5. The Legislative Analyst shall contract for a neutral evaluator to conduct an evaluation of the effectiveness of the charter school approach authorized under this part and, on or before July 1, 2003, shall report to the Legislature and the Governor accordingly with recommendations to modify, expand, or terminate that approach. The evaluation of the effectiveness of the charter school approach shall include, but shall not be limited to, the following factors:

(a) If available, the pre- and post-charter school test scores of pupils attending charter schools and other pupil assessment tools.

(b) The level of parental satisfaction with the charter school approach compared with schools within the district in which the charter school is located.

(c) The impact of required parental involvement.

(d) The fiscal structures and practices of charter schools as well as the relationship of these structures and practices to school districts, including the amount of revenue received from various public and private sources.

(e) An assessment of whether or not the charter school approach has resulted in increased innovation and creativity.

(f) Opportunities for teachers under the charter school approach.

(g) Whether or not there is an increased focus on low-achieving and gifted pupils.

(h) Any discrimination and segregation in charter schools.

(i) If available, the number of charter school petitions submitted to governing boards of school districts and the number of those proposals that are denied, per year, since the enactment of the charter school law, including the reasons why the governing boards denied these petitions, and the reasons governing boards have revoked charters.

(j) The governance, fiscal liability and accountability practices and related issues between charter schools and the governing boards of the school districts approving their charters.

(k) The manner in which governing boards of school districts monitor the compliance of the conditions, standards, and procedures entered into under a charter.

(*l*) The extent of the employment of noncredentialed personnel in charter schools.

(m) An assessment of how the exemption from laws governing school districts allows charter schools to operate differently than schools operating under those laws.

(n) A comparison in each school district that has a charter school of the pupil dropout rate in the charter schools and in the noncharter schools.

(o) The role and impact of collective bargaining on charter schools.

SEC. 18. The provisions of Sections 1 to 17 of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 19. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Notwithstanding Section 17580 of the Government Code, unless otherwise specified, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

O

Exhibit H

DECLARATION OF JAY STEWART

BEFORE THE COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim Of: **WESTERN PLACER UNIFIED SCHOOL DISTRICT**	CSM NO. **DECLARATION OF JAY STEWART OF WESTERN PLACER UNIFIED SCHOOL DISTRICT IN SUPPORT OF TEST CLAIM** **(CHARTER SCHOOL COLLECTIVE BARGAINING)**

I, Jay Stewart, Assistant Superintendent/CFO, Western Placer Unified School District, make the following declaration and statement:

1. In my capacity as Assistant Superintendent, I am responsible for the labor negotiations and I am the Chief Financial Officer. I am familiar with the provisions and requirements of Chapter 828, Statutes of 1999 (AB 631) (effective January, 2000) ("Chapter 828/99"), Education Code section 47605(b)(5)(o), Education Code section 47611.5, and Government Code §§ 3540, et seq. which together: (1) require a county superintendent of schools to incur the costs of collective bargaining with certificated and classified personnel for a county sponsored charter school when the charter school does not declare itself to be the "public school employer" under the Educational Employment Relations Act (EERA); (2) require a school district to incur the costs of collective bargaining with certificated and classified personnel for a charter school situated within its district when the charter school does not declare itself to be the "public school employer" under the EERA; and (3) require a charter school that declares itself to be the "public school employer" under the EERA to incur the costs of collective bargaining with certificated and classified

personnel.

3. I am informed and believe that prior to the test claim legislation, there was no responsibility for Western Placer Unified School District to engage in the activities set forth above.

4. It is estimated that Western Placer Unified School District will/has incurred significantly more than $200.00 to implement these new duties mandated by the State for which Western Placer Unified School District has not be reimbursed by any federal, state, or local agency, and for which it cannot otherwise obtain reimbursement.

The foregoing facts are known to me personally and if so requested, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed this 29th day of November, 1999, in Lincoln, California.

Jay Stewart, Assistant Superintendent/CFO

PAGE LEFT BLANK INTENTIONALLY

STATE OF CALIFORNIA
DEPARTMENT OF FINANCE
915 L STREET
SACRAMENTO, CA 95814-3706

EXHIBIT B

June 8, 2000

RECEIVED
JUN 13 2000
COMMISSION ON
STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of December 2, 1999 the Department of Finance has reviewed the test claim submitted by the Western Placer Unified School District (claimant) asking the Commission to determine whether specified costs incurred under Chapter 828, Statutes of 1999 (AB 631, Migden) are reimbursable state mandated costs (Claim No. CSM-99-TC-05, *Charter School Collective Bargaining*). Commencing with page 3 of the test claim, claimant has identified the following new duties, which it asserts are reimbursable state mandates:

1. County boards of education and school districts that have established charter schools shall be required to assume the collective bargaining obligations contained in the Educational Employment Relations Act (EERA) if the charter schools elect to be the "exclusive public school employer" of their employees, as defined in Education Code Section 47611.5.

Under AB 631, a charter school must declare whether it is the exclusive public school employer of its employees for collective bargaining purposes. In those instances where a charter school elects to be the exclusive public school employer of its employees, the claimant asserts county boards of education and school districts will incur additional mandated costs associated with performing the following tasks:

- Determining the appropriate unit and representative for the charter school employees
- Conducting representative elections and de-certification elections
- Conducting negotiations
- Conducting negotiation impasse proceedings
- Issuing collective bargaining disclosures
- Administrating labor contracts and resolving contract disputes
- Adjudicating employee grievances and responding to unfair labor practice charges

If a charter school elects to be the public school employer of its employees for EERA purposes, and the charter school employees are subsequently placed in the same bargaining units with which the county office of education or school district currently negotiates, the Department of Finance believes no additional State-mandated costs would be incurred.

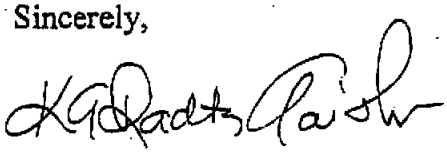
If, however, a charter school declares itself the exclusive public school employer of its employees and, as a consequence, new bargaining units are established with which the county office of education or school district must conduct negotiations, we do believe additional State-mandated costs may be incurred.

As the result of our review, we have concluded that this statute may result in a higher level of service. If the Commission reaches the same conclusion at its scheduled July 27, 2000 hearing on this matter, the nature and extent of the specific activities required of Western Placer Unified School District can be further addressed.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your December 2, 1999 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Patricia Pollard, Principal Program Budget Analyst at (916) 445-0328, or Jim Lombard, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,



Kathryn Radtkey-Gaither
Program Budget Manager

Attachments

Attachment A

DECLARATION OF PATRICIA POLLARD
DEPARTMENT OF FINANCE
CLAIM NO. CSM-99-TC-05

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter No. 828, Statutes of 1999, (AB 631, Migden) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

3. Attachment B is a true copy of Finance's analysis of AB 631 prior to its enactment as Chapter No. 828, Statutes of 1999, (AB 631, Migden).

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

915 2 Street
at Sacramento, CA

Patricia Pollard

PROOF OF SERVICE

Test Claim Name: Charter School Collective Bargaining
Test Claim Number: CSM-99-TC-05

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, Floor, Sacramento, CA 95814.

On June 8, 2000, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Paige Vorhies
3301 C Street, Room 500
Sacramento, CA 95816

E-8
Department of Education
School Business Services
Attention: Scott Hannan
560 J Street, Suite 170
Sacramento, CA 95814

Education Mandated Cost Network
C/O School Services of California
Attention: Dr. Carol Berg, PhD
1121 L Street, Suite 1060
Sacramento, CA 95814

Sixten & Associates
Attention: Keith Petersen
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Girard & Vinson
Attention: Paul Minney
1676 N. California Blvd., Suite 450
Walnut Creek, CA 95496

Western Placer Unified School District
Attention: Jay Stewart
1400 First Street
Lincoln, CA 95648

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 8, 2000, at Sacramento, California.

Paula Lorente for JN
Jennifer Nelson

EXHIBIT C

GIRARD & VINSON
ATTORNEYS AT LAW

RECEIVED
RECEIVED
2000
JUL 13 2000
COMMISSION ON
STATE MANDATES
STATE MANDATES

Growers Square
1676 N. California Blvd., Ste. 450
Walnut Creek, CA 94596
Telephone: 925.746.7660
Fax: 925.935.7995
e-mail: g-and-v@verio.com
www.gandv.com

6767 Green Valley Road
Placerville, CA 95667
530.622.7130 ext. 235
Fax: 530.642.1832

The California Fruit Building
1006 Fourth Street
Eighth Floor
Sacramento, CA 95814
916.446.9292
Fax: 916.446.5711
Respond to Walnut Creek

DAVID W. GIRARD
ALLEN R. VINSON
PAUL C. MINNEY
CHRISTIAN M. KEINER*
PHILLIP A. TRUJILLO
DEANNA J. MOUSER

Lois Schwartz
Michelle L. Cannon
Laura Lee Briggs
Keith J. Bray
Heather A. Hoyle
Marc P. Bouret
Sherianne Laba

OF COUNSEL
Sally Jensen Dutcher

*Professional Law Corporation

July 12, 2000

Via Facsimile and First Class Mail
(916) 445-0278

Paula Higashi, Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Response to Department of Finance Comments -Dated June 8, 2000
Charter School Collective Bargaining
CSM - 99-TC-05

Dear Ms. Higashi

The following is a response to the Department of Finance comments in the above-referenced test claim dated June 8, 2000.

Unfortunately, a number of typos in the Department of Finance comments make their responses difficult to follow. For example, the Department of Finance misstates the claimant position in bullet [1] where it indicates that we have alleged that county boards and school districts will assume mandated reimbursable activities when the charter schools elect to be the exclusive "public school employer" of its employees, as defined in Education Code Section 47611.5. Claimants, however, have alleged mandated reimbursable activities in those instances when the charter school elects not to be "the public school employer" under Education Code Section 47611.5. (See page 4 of 7 of the above-referenced test claim). Indeed, the claimant is asserting that in those instances where the charter school elects to be the "public school employer" it is the charter school that assumes the new program or higher level of service in that the charter school will now be forced to comply with the collective bargaining obligations of the Educational Employment Relations Act.

The Department of Finance seems to be arguing that if the charter school elects not to be the "public school employer" that the school district and/or county office of education will not assume any additional state mandated costs, but does not explain this conclusion. Claimant assumes that the Department of Finance is taking the position that these costs would be covered by the current collective bargaining reimbursement program. Claimant agrees that in those instances where a charter school elects not to be the "public school employer" and the school district or the county office of education assumes this responsibility that the costs

To: Paula Higashi, Director
Re: Response to Department of Finance Comments -Dated June 8, 2000
Page 2

for collective bargaining can be covered under the current collective bargaining mandated reimbursement program. However, the parameters and guidelines for the collective bargaining reimbursement program would have to be amended to reflect the additional authority under which this obligation occurs.

The Department of Finance may be arguing there are no reimbursable costs in those cases where the charter school elects not to be the "public school employer" and the charter school employees automatically become part of the bargaining units of the local educational agency. In some cases by agreement of the parties, a charter school's employees may become part of the bargaining unit of a district, however, in most cases the charter schools' employees will not have community of interest with school district employees and will not become part of the school districts' bargaining units. Indeed, a bill that would have required automatic inclusion in the school districts' bargaining units was rejected in favor of AB 631 (see, AB 842 attached hereto). As such, claimant would argue that in most cases local educational agencies would incur costs as outlined in the collective bargaining mandated reimbursement program for all additional activities assumed with these new bargaining units (if formed).

Lastly, the Department of Finance fails to address the alleged costs on behalf of charter schools. A substantial part of the test claim's allegations are that charter schools will now be subject to collective bargaining requirements of the EERA. As such, claimants are arguing that the charter schools shall be entitled to reimbursement under the current collective bargaining mandated reimbursement program.

If you have any questions or comments, please do not hesitate to call.

Very truly yours,

GIRARD AND VINSON

Paul C. Minney /DH

Paul C. Minney, Esq.

PCM/ro
cc: Proof of Service on All Parties Listed on COSM Mailing List

C:\gmdv12\MCS\letter to Paula Higashi re DOF comments on AB 631.wpd

GIRARD & VINSON
ATTORNEYS AT LAW

CALIFORNIA LEGISLATURE—1999-2000 REGULAR SESSION

ASSEMBLY BILL No. 842

Introduced by Assembly Member Migden

February 24, 1999

An act to amend Section 47610 of, and to add Section 47609 to, the Education Code, relating to charter schools.

LEGISLATIVE COUNSEL'S DIGEST

AB 842, as introduced, Migden. Charter schools: laws governing.

Existing law, the Charter Schools Act of 1992, permits teachers, parents, pupils, and community members to petition a school district governing board to approve a charter school to operate independently from the existing school district structure as a method of accomplishing, among other things, improved pupil learning. Existing law, with certain exceptions, generally exempts charter schools from the provisions of the Education Code applicable to school districts.

This bill would require that all certificated or classified employees of a charter school be deemed to be school district employees for the purposes of collective bargaining rights and obligations under the law pertaining to public school employees and public school employers. The bill would require all certificated or classified employees of the charter school to be members of the same bargaining unit of the certificated or classified employees of the school district where the charter school is located if the school district employees are represented by an exclusive collective

99

bargaining representative. The bill would apply to all collective bargaining agreements in effect as of, or entered into after, January 1, 2000, between the school district where a charter school is located and the exclusive representative of the certificated or classified employees of the school district to charter school certificated or classified employees. By increasing the class of employees for which collective bargaining and employee grievance procedures would apply, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 47609 is added to the Education
2 Code, to read:
3 47609. Notwithstanding any other provision of this
4 part, all certificated and classified employees employed
5 in a charter school shall be, for the purposes of Chapter
6 10.7 (commencing with Section 3540) of Division 4 of
7 Title 1 of the Government Code, deemed employees of
8 the school district where the charter school is located and
9 shall be subject to all of the following provisions:
10 (a) If the certificated or classified employees of the
11 school district where the charter school is located are
12 represented by an exclusive representative, as defined by
13 subdivision (e) of Section 3540.1 of the Government
14 Code, all certificated and classified employees employed
15 in the charter school shall also be members of the same

1 certificated or classified bargaining unit represented by
2 that exclusive representative.
3 (b) All collective bargaining agreements in effect as
4 of, or entered into after, January 1, 2000, between the
5 school district where a charter school is located and the
6 exclusive representative of the certificated or classified
7 employees of that school district shall apply to the
8 certificated or classified employees employed in the
9 charter school. Nothing in this subdivision shall prohibit
10 the exclusive representative of certificated or classified
11 employees employed in the charter school from mutually
12 agreeing with the district to amend the collective
13 bargaining agreement as it applies to employees in the
14 charter school to address the charter school's site-specific
15 issues, including but not limited to, discipline and
16 dismissal.
17 SEC. 2. Section 47610 of the Education Code is
18 amended to read:
19 47610. *(a)* A charter school shall comply with this
20 part and all of the provisions set forth in its charter, but
21 is otherwise exempt from the ~~laws governing school~~
22 ~~districts~~ *the Education Code* except all of the following:
23 ~~(a)~~
24 *(1)* As specified in Section 47611.
25 ~~(b)~~
26 *(2)* As specified in Section 41365.
27 ~~(c)~~
28 *(3)* All laws establishing minimum age for public
29 school attendance.
30 *(b) In the event that the requirements applicable to a*
31 *charter school set forth in this part conflict with any*
32 *requirements applicable to a charter school located in any*
33 *other part of the Education Code, this part shall control.*
34 SEC. 3. Notwithstanding Section 17610 of the
35 Government Code, if the Commission on State Mandates
36 determines that this act contains costs mandated by the
37 state, reimbursement to local agencies and school
38 districts for those costs shall be made pursuant to Part 7
39 (commencing with Section 17500) of Division 4 of Title
40 2 of the Government Code. If the statewide cost of the

1 claim for reimbursement does not exceed one million
2 dollars ($1,000,000), reimbursement shall be made from
3 the State Mandates Claims Fund.

O

99

PROOF OF SERVICE

Test Claim Name: Charter School Collective Bargaining
Test Claim Number: CSM-99-TC-05

I, the undersigned, declare as follows:
I am employed in the County of Contra Costa State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 1676 N. California Blvd., Suite 450, Walnut Creek, CA 94596.

On July 13, 2000, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 1676 N. California Blvd, Suite 450 for Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Paige Vorhies
3301 C Street, Room 500
Sacramento, CA 95816

E-8
Department of Education
School Business Services
Attention: Scott Hannan
560 J Street, Suite 170
Sacramento, CA 95814

Education Mandated Cost Network
C/O School Services of California
Attention: Dr. Carol Berg, PhD
1121 L Street, Suite 1060
Sacramento, CA 95814

Sixten & Associates
Attention: Keith Petersen
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Kathryn Radtkey-Gaither
Department of Finance
915 L Street
Sacramento, CA 95814

Western Placer Unified School District
Attention: Jay Stewart
1400 First Street
Lincoln, CA 95648

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 13, 2000, at Walnut Creek, California.

Diane K. Hancock

STATE OF CALIFORNIA

ARNOLD SC...

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
...RAMENTO, CA 95814
...NE: (916) 323-3562
...X: (916) 445-0278
E-mail: csminfo@csm.ca.gov

April 6, 2006

Mr. David Scribner
3840 Rosin Court, Suite 190
Sacramento, CA 95834

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Draft Staff Analysis and Hearing Date
Charter Schools Collective Bargaining (99-TC-05)
Western Placer Unified School District, Claimant
Education Code Sections 47605, subdivision (b)(5)(O) and 47611.5, Government Code section 3540, et seq., Statutes 1999, Chapter 828.

Dear Mr. Scribner:

The draft staff analysis of this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by Thursday, **April 20, 2006**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing on **Thursday, May 25, 2006** at 9:30 a.m. We will notify you of the location of the hearing when a hearing room has been confirmed. The final staff analysis will be issued on or about May 11, 2006. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Eric Feller at (916) 323-8221 with any questions regarding this matter.

Sincerely,

Paula Higashi

PAULA HIGASHI
Executive Director

Enc. Draft staff analysis and attachments

MAILED: _____ FAXED: _____
DATE: 4/5/010 INITIAL: LD
CHRON: _____ FILE: ✓
WORKING BINDER: _____

Hearing Date: May 25, 2006
J:\MANDATES\1999\tc\99-tc-05\dsa.doc

ITEM ___

TEST CLAIM
DRAFT STAFF ANALYSIS

Education Code Sections 47605, subdivision (b)(5)(O) and 47611.5
Government Code section 3540, et seq., Statutes 1999, Chapter 828;

Charter School Collective Bargaining (99-TC-05)

Western Placer Unified School District, Claimant

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN THE FINAL ANALYSIS.

STAFF ANALYSIS

Claimant

Western Placer Unified School District

Chronology

11/29/99	Test Claim filed by Western Placer Unified School District, Claimant
06/13/00	Department of Finance submits comments on the test claim
07/13/00	Claimant submits rebuttal comments on the test claim
07/24/02	Claimant requests postponement of the hearing on the test claim
07/29/02	Commission staff grants postponement request
04/06/06	Staff issues draft staff analysis on the test claim

Background

Charter schools are publicly funded K-12 schools that enroll pupils based on parental choice rather than residential assignment. In order to encourage innovation and provide expanded educational choices,[1] charter schools are exempt from most laws governing public education.[2] California was the second state in the nation to authorize charter schools in 1992, and they have steadily increased in number and enrollment since then.[3]

The test claim statutes subject charter schools to the Educational Employment Relations Act (EERA) or "Rodda Act."[4] Enacted in 1975, the EERA governs labor relations in California public schools with the stated purpose as follows:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems ... by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public

---

[1] Education Code section 47601 includes these reasons, among others, in the Legislature's intent behind establishing charter schools.

[2] Education Code section 47610. Exceptions to the exemption in section 47610 include teachers' retirement, the Charter School Revolving Loan Fund, and laws establishing minimum age for public school attendance. Other areas in which charter schools are subject to the Education Code include pupil assessments (§ 47605, subd. (c)(1)), and teacher credentials ((§ 47605, subd. (l)).

[3] Office of the Legislative Analyst, "Assessing California's Charter Schools" (January 2004); See <http://www.lao.ca.gov/2004/charter_schools/012004_charter_schools.htm> [as of January 13, 2006].

[4] The EERA is in Education Code section 3540 et seq. (Stats. 1975, ch. 961, eff. July 1, 1976).

school employers ...and to afford certificated employees a voice in the formulation of educational policy.[5]

The EERA creates a process for groups of school district employees that share a 'community of interest' to organize and become represented by an employee organization (or union).[6] The EERA also defines the issues that may be negotiated between the school district and the employee organization,[7] and defines the rules for negotiations,[8] mediation,[9] and dispute of grievances.[10] It also establishes the Public Employment Relations Board (PERB)[11] to administer the EERA and referee labor disputes.

The Test Claim Statutes

Education Code section 47605, subdivision (b)(5)(O)[12] requires each charter school charter to contain, "[a] declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of a charter school...."

Education Code section 47611.5 was also added by the test claim legislation. Subdivision (b) states, "If the charter school is not so deemed a public school employer, the school district where the charter is located shall be deemed the public school employer for the purposes of [the EERA]." Subdivision (f) of section 47611.5 requires, "By March 31, 2000, all existing charter schools ...[to] declare whether or not they shall be deemed a public school employer in accordance with subdivision (b), and such declaration shall not be materially inconsistent with the charter." Subdivision (c) defines the scope of representation to include discipline and dismissal of charter school employees "if the charter ... does not specify that it shall comply with those statutes and regulations ... that establish and regulate tenure or a merit or civil service system."

The EERA, in Government Code section 3540.1, subdivision (k), as amended by the test claim legislation, defines "public school employer" as "the governing board of a school district, a school district, a county board of education, or a county superintendent of schools, *or a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code.*" (Italicized text added by Stats. 1999, ch. 828.)

Related Commission Decisions on Charter Schools

On May 26, 1994, the Commission heard and decided a related test claim: *Charter Schools*, (CSM-4437).[13] The Commission found that Statutes 1992, chapter 781 (Ed. Code, §§ 47605 &

---

[5] Education Code section 3540

[6] Education Code section 3543.

[7] Education Code section 3543.2.

[8] Education Code section 3543.3.

[9] Education Code section 3548. Impasse procedures are also in this section.

[10] Education Code section 3543.

[11] Education Code section 3541.

[12] References herein are to the Education Code unless otherwise indicated.

47607) imposes a reimbursable state-mandated program on school districts for new activities related to initial charter school petitions, and for monitoring and evaluating the performance of charter schools pertaining to the revision or renewal of approved charters.

On November 21, 2002, the Commission adopted its Statement of Decision for the *Charter Schools II* test claim (99-TC-03) finding that Statutes 1998, chapters 34 and 673 (Ed. Code, §§ 47605, subds. (j)(1) & (k)(3), 47605.5, 47607, & 47614) impose reimbursable state-mandated activities on school districts and/or county offices of education activities related to reviewing renewal petitions and permitting charter schools to use school district facilities.

On December 2, 2003, the Commission adopted consolidated parameters and guidelines for the *Charter Schools* and *Charter Schools II* decisions. School districts may charge a fee from one to three percent of the charter school's revenue for "supervisorial oversight" of the charter school.[14] This fee is a recognized offset in the *Charter Schools* parameters and guidelines.

The Commission is scheduled to hear the *Charter Schools III* test claim[15] at the April 2006 Commission hearing, the results of which will be summarized in the final staff analysis. The *Charter Schools III* claim alleges various activities related to charter school funding and accountability, and was filed on behalf of both school districts and charter schools.

Related Commission Decisions on Collective Bargaining/EERA

In the *Collective Bargaining* statement of decision, the Board of Control determined that Statutes 1975, chapter 961 (the EERA) is a reimbursable mandate. Parameters and guidelines were adopted October 1980, and amended seven times before the decision on the next related claim: *Collective Bargaining Agreement Disclosure* (97-TC-08).

In April 1998, the Commission adopted the decision for the *Collective Bargaining Agreement Disclosure* (97-TC-08) test claim. The Commission found that Government Code section 3547.5 (Stats. 1991, ch. 1213) and CDE Management Advisory 92-01 impose a reimbursable mandate for requiring K-14 school districts to publicly disclosing the major provisions of all collective bargaining agreements after negotiations, but before the agreement becomes binding.

The parameters and guidelines for *Collective Bargaining Agreement Disclosure* (97-TC-08) were adopted in August 1998, and consolidated with the *Collective Bargaining* parameters and guidelines. The reimbursable activities in the consolidated parameters and guidelines can be summarized as follows:

---

[13] *Charter Schools* (CSM-4437) Statement of Decision adopted on July 21, 1994; parameters and guidelines adopted on October 18, 1994.

[14] Education Code section 47613 (former section 47613.7, added by Stats. 1998, ch. 34).

[15] Filed on Education Code Sections 41365, 47605, subdivisions (b),(c),(d), (j) and (l), 47604.3, 47607, subdivision (c), 47612.5, 47613 (former § 47613.7), and 47630-47664; Statutes 1996, Chapter 786, Statutes 1998, Chapter 34, Statutes 1998, Chapter 673, Statutes 1999, Chapter 162, Statutes 1999, Chapter 736, Statutes 1999, Chapter 78, California Department of Education Memo (May 22, 2000).

1. Determination of appropriate bargaining units for representation and determination of the exclusive representatives.
   a. Unit determination
   b. Determination of the exclusive representative
2. Elections and decertification elections of unit representatives are reimbursable in the event the Public Employment Relations Board determines that a question of representation exists and orders an election held by secret ballot.
3. Negotiations: reimbursable functions include -- receipt of exclusive representative's initial contract proposal, holding of public hearings, providing a reasonable number of copies of the employer's proposed contract to the public, development and presentation of the initial district contract proposal, negotiation of the contract, reproduction and distribution of the final contract agreement.
4. Impasse proceedings
   a. Mediation
   b. Fact-finding publication of the findings of the fact-finding panel.
5. Collective bargaining agreement disclosure
6. Contract administration and adjudication of contract disputes either by arbitration or litigation. Reimbursable functions include grievances and administration and enforcement of the contract.
7. Unfair labor practice adjudication process and public notice complaints.

In another related decision adopted in December 2005, the *Agency Fee Arrangements* Statement of Decision (CSM 00-TC-17, 01-TC-14), found that a portion of the EERA (Gov. Code, §§ 3543, 3546 & 3546.3, Cal. Code Regs, tit. 8 §§ 34030 & 34055) and its regulations constitute a reimbursable state-mandated program on K-14 school districts for deducting fair share fees and paying the amount to the employee organization, providing the exclusive representative of a public employee with the home address of each member of a bargaining unit, and for filing with PERB a list of names and job titles of persons employed in the unit described in the petition within a specified time.

Claimant Position

Claimant alleges that the test claim statutes impose a reimbursable mandate under section 6 of article XIII B of the California Constitution. After summarizing the test claim statutes, claimant states their consequence will be "school districts (including county superintendents of schools that sponsor charter schools), or the charter school will incur the cost of collective bargaining, depending upon the election of the charter school."[16] Claimant alleges the following activities:

[16] Test Claim, page 3.

- On county superintendents of schools, a higher level of service as the public school employer is required to assume the collective bargaining obligations of Government Code section 3540 through 3549 for charter schools granted under the authority of a county board of education when the charter school elects not to be the public school employer. The county board will incur additional costs of having to conduct a hearing for the material change in an existing charter school's charter in order to comply with the new mandate that all charter schools' charters include a declaration regarding its status as the public school employer. Although this is a new reimbursable activity, this cost will be covered under the existing Charter School mandated reimbursement program.[17]
- On school districts, a higher level of service as the public school employer is required to assume the collective bargaining obligations of Government Code sections 3540 through 3549 for charter schools within their districts when the charter school elects not to be the "public school employer" under Section 47611.5. The school district that granted the charter will incur additional costs of having to conduct a hearing for the material change in an existing charter school's charter in order to comply with the new mandate that all charter schools' charters include a declaration regarding [their] status as the public school employer. Although this is a new reimbursable activity, this cost will be covered under the existing Charter School mandated reimbursement program.[18]
- In those cases where the charter school declares itself to be the "public school employer" ... new reimbursable activities as the "public school employer" required to assume the collective bargaining obligations of Government Code sections 3540 through 3549. In addition to the costs of collective bargaining, an existing charter school is now mandated to amend its charter to include its declaration regarding its status as a "public school employer."[19]

As to the collective bargaining activities, claimant alleges activities "that mirror those already allowed under the Collective Bargaining reimbursement program."[20] Thus, claimant summarizes the activities listed in the *Collective Bargaining* parameter and guidelines listed above.

In comments submitted in July 2000 in response to the Department of Finance, claimant asserts:

> [W]here the charter school elects to be the 'public school employer' it is the charter school that assumes the new program or higher level of service in that the charter school will now be forced to comply with the collective bargaining obligations of the Educational Employment Relations Act.

Claimant agues that charter schools that make this election should be entitled to reimbursement under the current collective bargaining mandate reimbursement program. If, however, the

---

[17] Test Claim, page 3-4.

[18] Test Claim, page 4.

[19] Test Claim, page 4.

[20] Test Claim, page 4, footnote 10.

charter school elects not to be the "public school employer' and the school district or the county office of education assume that role, claimant states that reimbursement should occur under the current collective bargaining program by amending the parameters and guidelines "to reflect the additional authority under which this obligation occurs."

Claimant refutes the assumption that charter school employees, for charter schools that elect not to become the "public school employer," would automatically become part of the existing bargaining units, so no additional costs would be incurred. Claimant states that this would occur in some cases by agreement of the parties; "however, in most cases the charter schools' employees will not have community of interest with school district employees and will not become part of the school districts' bargaining units. Claimant includes with its comments a copy of Assembly Bill No. 842 (Migden), a bill that was introduced in 1999 but not enacted, that would have required charter school employees to be included in existing bargaining units. Claimant attaches Assembly Bill No. 842 (hereafter AB 842) to show that the legislative intent was not for charter employees to join existing bargaining units. Thus, claimant argues that "in most cases local educational agencies would incur costs as outlined in the collective bargaining mandated reimbursement program for all additional activities assumed with these new bargaining units (if formed)."

State Agency Position

In comments submitted in June 2000, the Department of Finance (Finance) states,

> If a charter school elects [not[21]] to be the public school employer of its employees for EERA purpose, and the charter school employees are subsequently placed in the same bargaining units with which the county office of education or school district currently negotiates, the Department of Finance believes no additional State-mandated costs would be incurred.

Finance goes on to comment, "[i]f, however, a charter school declares itself the exclusive public school employer of its employees and, as a consequence, new bargaining units are established with which the county office of education or school district must conduct negotiations, we do believe additional state-mandated costs may be incurred."

No other state agencies submitted comments on the claim.

---

[21] As noted by claimant, Department of Finance comments include a number of typos that lead to contradictory statements. This analysis is based on a reasonable interpretation of those comments as read by the claimant to insert the word "not" into the first sentence of the fourth full paragraph of the Department of Finance comments. The sentence should read, "If a charter school elects not to be the public school employer..."

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[22] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[23] "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."[24] 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.[25]

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.[26]

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.[27] 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

---

[22] Article XIII B, section 6, subdivision (a), (as amended in November 2004) provides:

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

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

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

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

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

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

legislation.[28] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[29]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[30]

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.[31] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[32]

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

A. Are charter schools eligible claimants?

The test claim statutes include, in addition to the Education Code statutes pled by claimant, Government Code section 3540 et seq., the Educational Employment Relations Act (EERA). Because the Board of Control (the Commission's predecessor) already adjudicated the EERA in the *Collective Bargaining* test claim, as discussed above, this analysis of the EERA only applies to charter schools because the Commission does not have jurisdiction to reconsider the original EERA test claim.

Education Code section 47611.5, subdivision (a), states that the EERA applies to charter schools. Under subdivisions (b) and (f) of this section, as added by the test claim legislation, "all existing charter schools must declare whether or not they shall be deemed a public school employer ..." and must do so by March 31, 2000. Therefore, the first part of the analysis under issue 1 addresses whether these activities are subject to article XIII B, section 6 where the charter school has declared itself to be the public school employer. The second part of the analysis addresses whether these activities are subject to article XIII B, section 6 where the school district is the public school employer.

---

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

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

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

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

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

Charter School as "Public School Employer"

By way of background, charter schools are formed through a petition signed by either (1) at least one-half of the parents of the pupils that the charter school estimates will enroll in the school in its first year of operation, or (2) at least one-half of the number of teachers that the charter school estimates will be employed at the school during its first year.[33] Charters are submitted to a school district for approval or denial. The district must approve the charter unless it makes specified written findings regarding defects in the petition, the proposed program, or charter.[34] If the district denies the petition, petitioners can appeal to the county office of education or State Board of Education.[35] In certain situations, petitioners can apply for a charter directly to the county office of education[36] or State Board of Education.[37]

Finance comments, "[i]f, however, a charter school declares itself the exclusive public school employer of its employees and, as a consequence, new bargaining units are established with which the county office of education or school district must conduct negotiations, we do believe additional state-mandates costs may be incurred."

Claimant does not address the issue directly, but states in rebuttal to Finance's comments that if "the charter school elects to be the "public school employer" it is the charter school that assumes the new program or higher level of service in that the charter school will now be forced to comply with the collective bargaining obligations of the Educational Employment Relations Act." [Emphasis in original.]

As discussed below, staff finds that there is not a state mandate subject to article XIII B, section 6 when charter schools are deemed public school employers.

In the *Kern High School Dist.* case,[38] the California Supreme Court considered whether school districts have a right to reimbursement for costs in complying with statutory notice and agenda requirements for various education-related programs that are funded by the state and federal government. The court held that in eight of the nine programs at issue, the claimants were not entitled to reimbursement for notice and agenda costs because district participation in the underlying program was voluntary. As the court stated, "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirement related to that program does not constitute a reimbursable mandate."[39]

---

[33] Education Code section 47605, subdivision (a)(1). In the case of an existing public school conversion to a charter school, the petition must be signed by not less than 50 percent of the permanent status teachers currently employed at the school (Ed. Code, § 47605, subd. (a)(2)).

[34] Education Code section 47605, subdivision (b).

[35] Education Code section 47605, subdivision (j).

[36] Education Code sections 47605.5 and 47605.6.

[37] Education Code section 47605.8.

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

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

In this case, the charter school is *voluntarily* participating in the charter program at issue. Because charter schools are initiated by petition of either parents or teachers, they are created voluntarily. No state mandate requires them to exist. Rather, the charter is more in the nature of a contract than a state-imposed mandate. Consequently, based on the reasoning in the *Kern* case regarding voluntary participation, charters schools are not entitled to reimbursement under article XIII B, section 6.

Moreover, a charter school that elects to be the "public school employer" would be voluntarily subjecting itself to the provisions of the EERA. Section 47611.5 of the test claim statutes states:

> (b) A charter school charter shall contain a declaration regarding whether or not the charter school shall be deemed the exclusive public school employer of the employees at the charter school for the purposes of Section 3540.1 of the Government Code. [¶]...[¶]
> (f) By March 31, 2000, all existing charter schools must declare whether or not they shall be deemed a public school employer in accordance with subdivision (b), and such declaration shall not be materially inconsistent with the charter.

Based on the Supreme Court's reasoning discussed above regarding voluntary participation, charter schools are not entitled to reimbursement under article XIII B, section 6.

Government Code section 17519 defines "school district" for purposes of mandate reimbursement, as "any school district, community college district, or county superintendent of schools." Thus, in addition to the reasons discussed above, charter schools are not eligible for reimbursement because they are not included in this definition.

The Education Code treats charter schools as school districts for some purposes, such as special education,[40] collective bargaining,[41] and apportionment of funds.[42] And charter schools are deemed school districts for purposes of "Sections 8 and 8.5 of Article XVI of the California Constitution [Proposition 98 school funding.]"[43]

These examples, however, underscore that charter schools are not treated as school districts for purposes of mandate reimbursement under article XIII B, section 6. Charter schools are not mentioned in the mandates statutes (Gov. Code, § 17500 et seq.), nor are they considered "school districts" for purposes of mandate reimbursement in the charter school statutes (Ed. Code, § 47600 et seq.). And as mentioned above, except as otherwise specified, charter schools are "exempt from the laws governing school districts."[44] This exemption includes the mandate reimbursement statutes (Gov. Code, § 17500 et seq.).

Charter schools were established in 1992 (Stats. 1992, ch. 781), long after the Commission's statutory scheme was enacted in 1984. Yet in spite of recent amendments to article XIII B,

---

[40] Education Code section 47604 et seq.

[41] Education Code section 47611.5.

[42] Education Code sections 47612, subdivision (c), 47650 and 47651.

[43] Education Code sections 47612, subdivision (c).

[44] Education Code section 47610.

section 6,[45] as well as both the mandates and charter school statutory schemes,[46] the Legislature has not amended either scheme to make charter schools eligible claimants. Because the definition of "school district" in Government Code section 17519 does not include charter schools, they cannot be read into that definition. The Commission, like a court, may not add to or alter the statutory language to accomplish a purpose that does not appear on the face of the statute or from its legislative history, where the language is clear.[47]

As the California Supreme Court has stated, "Where a statute, with reference to one subject [whether school districts includes charter schools] contains a given provision, the omission of such provision from a similar statute concerning a related subject ... is significant to show that a different intention existed."[48] Thus, that the Legislature deemed a "charter school" to be a school district for some purposes (such as special education for example) cannot be interpreted to mean that a "charter school" should be deemed a school district for other purposes, such as mandate reimbursement. The omission of "charter school" from the definition of school districts in Government Code section 17519 is significant to show a different intention: that charter schools are not eligible for mandate reimbursement.

Therefore, staff finds that charter schools are not eligible claimants for purposes of article XIII B, section 6 of the California Constitution, nor are they eligible claimants for purposes of this test claim.

Based on this analysis, staff finds that the requirement for the charter school to be subject to the EERA, as well as the charter school's charter to declare whether or not the charter school shall be deemed to be the exclusive public school employer, and requiring this declaration by March 31, 2000 (Ed. Code, § 47611.5, subds. (b) & (f)) are not activities subject to article XIII B, section 6.

B. School district activities

School District or County Superintendent of Schools as "Public School Employer"

Education Code section 47611.5, subdivision (b), states, "If the charter school is not so deemed a public school employer, the school district where the charter is located shall be deemed the public school employer for the purposes of Chapter 10.7 ... [the EERA]." Since the Legislature has made the school district the default public school employer if the charter school elects not to

---

[45] In November 2004, Proposition 1A was enacted to amend article XIII B, section 6, so that school district mandates are treated differently for purposes of mandate suspension, as well as mandates that "provide or recognize any procedural or substantive protection, right, benefit, or employment status of any local government employee ... or ... local government employee organization." (Cal. Const., art. XIII B, § 6, subds. (b)(4) & (b)(5).)

[46] For charter schools, in addition to the test claim statutes, see e.g., Statutes 2003, chapter 892. For the Commission, see e.g., Statutes 2004, chapter 890, Statutes 2002, chapter 1124, and Statutes 1999, chapter 643.

[47] *In Re. Jennings* (2004) 34 Cal. 4th 254, 265.

[48] *Id.* at page 273.

be the employer, the issue is whether doing so triggers mandated school district activities under article XIII B, section 6.

Claimant alleges the activities that mirror those listed in the *Collective Bargaining* parameters and guidelines are reimbursable for charter school employees: determination of appropriate bargaining units, elections and decertification of elections, negotiations, impasse proceedings, collective bargaining agreement disclosure, contract administration and adjudication of contract disputes, and unfair labor practice adjudication process and public notice complaints.

Staff finds that the test claim statutes impose EERA (collective bargaining) activities on school districts (or county superintendents that act as school districts[49]) for charter school employees. Therefore, staff finds that the test claim legislation is subject to article XIII B, section 6 when the school district acts as the public school employer, (for purposes of the EERA) for charter school employees.[50]

Claimant alleges, as to county superintendents of schools, a higher level of service as the public school employer that is required to assume the collective bargaining obligations of Government Code section 3540 through 3549 for charter schools granted under the authority of a county board of education when the charter school elects not to be the public school employer.

Although a county board of education may grant a charter petition,[51] and may be a 'public school employer,'[52] the test claim statute does not expressly apply to county boards of education. There is no provision under section 47611.5 for a county board to be assigned the public school employer role. According to section 47611.5, subdivision (b), either the charter school elects to be the public school employer, or the school district becomes so by default. Therefore, staff finds that claimant's alleged activity for county boards of education is not a mandate subject to article XIII B, section 6.[53]

---

[49] Education Code section 35160.2 states, "For the purposes of Section 35160, [regarding the authority of school districts] "school district" shall include county superintendents of schools and county boards of education."

[50] On page 4 of the test claim, in footnote 9, claimant states the "school district that granted a charter will incur additional costs ... to conduct a hearing for the material change in an existing ... charter ... to comply with the new mandate that all ... charters include a declaration regarding [their] status as the 'public school employer.' Although this is a new reimbursable activity this cost will be covered under the existing Charter School mandated reimbursement program." Staff notes that the public hearing requirement (in Ed. Code, § 47607) was decided by the Commission in the *Charter Schools* test claim (CSM 4437). Claimant's footnoted comment appears to be an observation. Because claimant alleges neither section 47607, nor activities based on it, staff makes no findings on the hearing activity.

[51] Education Code sections 47605, subdivision (j)(1), 47605.5 and 47605.6.

[52] Government Code section 3540.1, subdivision (k).

[53] On page 4 of the test claim, in footnote 8, claimant states that the "county board of education ... will incur additional costs of having to conduct a hearing for the material change in an existing ... charter in order to comply with the new mandate that all ... charters include a

Findings on denial.

Claimant pleads section 47605, subdivision (b)(5) which requires written findings when denying a charter petition. In subparagraph (O), the findings must state, when applicable, that the petition does not contain a reasonably comprehensive description of "A declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for purposes of the [EERA]."

Although this statute merely describes a provision that the charter must contain, it also requires school districts to make a written finding when denying a charter for lack of this public school employer declaration. Although preexisting law required written findings on denial, the plain language of section 47605, subdivision (b)(5)(O) adds the lack of a public school employer designation as another potential reason for denying a charter petition. Therefore, as a requirement imposed on school districts when making applicable findings, staff finds that section 47605, subdivision (b)(5)(O) is subject to article XIII B, section 6.

Although in the *Charter Schools III* test claim (99-TC-14), the Commission found that making written findings on denial of a charter is a reimbursable activity, the statutes pled in that claim did not contain the public school employer declaration requirement of subdivision (b)(5)(O). Thus, staff finds that it has jurisdiction over this test claim statute, because subdivision (b)(5)(O) was not pled in the *Charter Schools III* test claim.

C. Does the test claim legislation constitute a "program" within the meaning of article XIII B, section 6?

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program," defined as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[54] Only one of these findings is necessary to trigger article XIII B, section 6.[55]

Of the activities discussed above, only the following that are subject to article XIII B, section 6 are now under consideration:

---

declaration regarding [their] status as the 'public school employer.' Although this is a new reimbursable activity this cost will be covered under the existing Charter School mandated reimbursement program." Staff notes that the public hearing requirement for school districts (in Ed. Code, § 47607) was decided by the Commission in the *Charter Schools* test claim (4437). Claimant's footnoted comment appears to be an observation. Because claimant alleges neither section 47607, nor activities based on it, staff makes no findings on the hearing activity.

[54] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[55] *Carmel Valley Fire Protection District v. State of California, et al.* (1987) 190 Cal.App.3d 521, 537.

- The imposition of the EERA (collective bargaining, Gov. Code, § 3540 et seq.) activities on school districts for charter schools employees (Ed. Code, § 47611.5) when the district assumes the role of public school employer.
- Including in written findings when denying a charter petition that the petition does not contain a reasonably comprehensive description of "A declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for purposes of the [EERA]." (Ed Code, § 47605, subd. (b)(5)(O).)

Staff finds that the test claim statutes constitute a program within the meaning of article XIII B, section 6. Although courts have generally held that mandates that affect employee benefits do not constitute a program within the meaning of article XIII B, section 6,[56] the EERA transcends ordinary employee rights or benefits.

For example, Government Code section 3540 specifically declares the EERA's legislative intent: "It is the purpose of this chapter to ... afford certificated employees *a voice in the formation of educational policy.*" [Emphasis added.] Moreover, Government Code section 3543.2 of the EERA includes the following: "[T]he exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law."

The courts have held that although numerous private schools exist, education is a peculiarly governmental function and public education is administered by local agencies to provide a service to the public.[57] Thus, because the test claim statutes affect the educational policy of school districts that are public school employers as to their charter school(s), staff finds that the test claim statutes constitute a program within the meaning of article XIII B, section 6.

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

To determine whether the "program" is new or imposes a higher level of service, the test claim legislation is compared to the legal requirements in effect immediately before enacting the test

---

[56] In *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, the court held that legislation affording local agency employees the same increased level of workers' compensation benefits to employees in private organizations was not a program. Likewise, in *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, the court held that legislation requiring local governments to provide death benefits to local safety officers under both the Public Employees Retirement System and the workers' compensation system was not a program. Also, the court in *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484, determined that a temporary increase in PERS benefits to retired employees, resulting in higher contribution rates for local government, did not constitute a program. And in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, the California Supreme Court determined that providing unemployment compensation protection to a city's employees was not a service to the public.

[57] *Long Beach Unified School Dist.* (1990) 225 Cal.App.3d 155, 172.

claim legislation.[58] And the test claim legislation must increase the level of governmental service provided to the public.[59] Each activity is discussed separately.

EERA

The issue is whether imposing the EERA on charter school employees creates any new school district activities, thereby imposing a new program or higher level of service on school districts. Staff finds that it does not.

Finance, in its June 2000 comments on the test claim, states,

> If a charter school elects [not[60]] to be the public school employer of its employees for EERA purpose, and the charter school employees are subsequently placed in the same bargaining units with which the county office of education or school district currently negotiates, the Department of Finance believes no additional State-mandated costs would be incurred.

Claimant, in response to Finance's comments, states that Finance seems to argue that "if the charter school elects not to be the "public school employer" that the school district and/or county office of education will not assume any additional state mandated costs." Claimant assumes that Finance takes the position that these costs would be covered by the current collective bargaining reimbursement program. According to claimant:

> [I]n those instances where a charter school elects not to be the 'public school employer' and the school district or the county office of education assumes this responsibility that the costs for collective bargaining can be covered under the current collective bargaining mandated reimbursement program. However, the parameters and guidelines for the collective bargaining reimbursement program would have to be amended to reflect the additional authority under which this obligation occurs."

Claimant goes on to refute the assumption that charter school employees, for charter schools that elect not to become the "public school employer," would automatically become part of the existing bargaining units, so no additional costs would be incurred. Claimant states that this would occur in some cases by agreement of the parties; "however, in most cases the charter schools' employees will not have community of interest with school district employees and will not become part of the school districts' bargaining units. Claimant includes with its comments a copy of AB 842 (Migden), a bill introduced in 1999 but not enacted, that would have required charter school employees to be included in existing bargaining units. Claimant includes AB 842,

---

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

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

[60] As noted by claimant, Department of Finance comments include a number of typos that lead to contradictory statements. This analysis is based on a reasonable interpretation of those comments as read by the claimant to insert the word "not" into the first sentence of the fourth full paragraph of the Department of Finance comments. The sentence should read, "If a charter school elects not to be the public school employer..."

apparently attempting to show that the legislative intent was not for charter employees to join existing bargaining units. Claimant argues that "in most cases local educational agencies would incur costs as outlined in the collective bargaining mandated reimbursement program for all additional activities assumed with these new bargaining units (if formed)."

Staff disagrees. Other than claimant's assertions[61] and AB 842 (which was not enacted), claimant provides no evidence or legal authority that charter school employees, in a school district where the charter school is not the public school employer, would not join established collective bargaining units. Rather, the statutory scheme authorizes the new employees to join the established units so that the school district is not required to engage in new activities with regards to the new charter school employees.

As to claimant's assertions regarding AB 842, where the Legislature simultaneously enacts a bill and rejects another, there is inference of legislative intent.[62] The legislative intent of AB 842, however, does not reveal whether charter school employees join existing bargaining units. It merely demonstrates that the Legislature did not enact AB 842 to force them to do so. Thus, legislative rejection of AB 842 sheds little light on the issue of whether charter school employees join existing bargaining units.

Therefore, staff finds that imposing the EERA on charter school employees does not create any new activities – and therefore is not a new program or higher level of service - for school districts.

Findings on Denial

The next issue is whether the following is a new program or higher level of service on school districts: including in written findings when denying a charter petition because the petition does not contain a reasonably comprehensive description of "A declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for purposes of the [EERA]." (Ed Code, § 47605, subd. (b)(5)(O).)

Preexisting law (Stats. 1998, ch. 34) requires the school district to make written findings of fact, as specified, to support denying a charter petition. Preexisting law did not, however, specify the lack of a public school employer declaration as one of the possible findings. Therefore, staff finds that it is a new program or higher level of service for a school district to make written findings of fact when denying a charter petition because the petition does not contain a reasonably comprehensive description of "A declaring whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for purposes of the [EERA]." (Ed Code, § 47605, subd. (b)(5)(O).) Because this is now the sole activity that

---

[61] As to claimant's assertions, statements of fact are to be accompanied by a declaration under penalty of perjury (Cal. Code Regs, tit. 2, § 1183.03, subd. (d)). The record contains no such claimant declaration in its comments in response to Finance, or in any comments on the issue of charter school employees joining existing bargaining units when the school district is the public school employer.

[62] *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3rd 1379, 1396.

constitutes a new program or higher level of service under this test claim, it alone is considered below.

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

In order for the test claim statute to impose a reimbursable state-mandated program under the California Constitution, the test claim legislation must impose costs mandated by the state.[63] In addition, no statutory exceptions listed in Government Code section 17556 can apply. Government Code section 17514 defines "cost mandated by the state" as follows:

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

With its test claim, claimant files a declaration from the Western Placer Unified School District that it "will/has incurred significantly more than $200[64] to implement these new duties mandated by the state for which Western Placer Unified School District has not be [sic] reimbursed..." The new duties for which it claims to have incurred costs, however, does not include the activity of making findings to deny a charter petition for lack of declaration as to the public school employer (Ed. Code, § 47605, subd. (b)(5)(O)). Thus, there is no evidence in the record that the claimant has or will incur the cost of making this written finding.

The Commission must base its findings on substantial evidence in the record.[65]

> ...[S]ubstantial evidence has been defined in two ways: first, as evidence of ponderable legal significance ... reasonable in nature, credible, and of solid value [citation]; and second, as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[66]

The Commission's finding must be supported by:

> ...all relevant evidence in the entire record, considering both the evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by "substantial evidence."[67]

---

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

[64] The current requirement is $1000 in costs (Gov. Code, § 17564, as amended by Stats. 2004, ch. 890).

[65] *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515. Government Code section 17559, subdivision (b).

[66] *Desmond v. County of Contra Costa* (1993) 21 Cal. App. 4th 330, 335.

[67] *Ibid.*

The administrative record, including claimant's declaration, does not indicate that there are costs for making written findings on denial for lack of a declaration in the charter as to the public school employer. Therefore, because of this lack of evidence in the record, staff finds that test claim statute (Ed. Code, § 47605, subd. (b)(5)(O)) does not impose increased "costs mandated by the state" on school districts within the meaning of article XIII B, section 6, and Government Code sections 17514 and 17556.

CONCLUSION

For the reasons indicated above staff finds that, as to the test claim statutes:

- Charter schools are not eligible claimants subject to article XIII B, section 6 of the California Constitution. Thus, the requirement for the charter school to be subject to the EERA, as well as the charter school's charter to declare whether or not the charter school shall be deemed to be the exclusive public school employer, and requiring this declaration by March 31, 2000 (Ed. Code, § 47611.5, subds. (b) & (f)) are not activities subject to article XIII B, section 6.
- Imposing the EERA on charter school employees is not a new program or higher level of service for school districts that are deemed the public school employer.
- There is no evidence in the record that a school district incurs increased costs mandated by the state (within the meaning of Government Code sections 17514 and 17556) to make written findings of fact when denying a charter petition because the petition does not contain a reasonably comprehensive description of "A declaring whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for purposes of the [EERA]." (Ed Code, § 47605, subd. (b)(5)(O).)

Recommendation

Staff recommends that the Commission adopt this analysis and deny the *Charter Schools Collective Bargaining* test claim (99-TC-05).

January 2004

LAO

Assessing California's Charter Schools

ELIZABETH G. HILL • LEGISLATIVE ANALYST

The 2003 statewide evaluation of charter schools, conducted by RAND, concluded that charter schools were cost-effective—achieving academic results similar to those of traditional public schools even though they obtain less state and federal categorical funding. This report summarizes the findings of this evaluation and offers recommendations for improving charter schools in California. Most importantly, we recommend the Legislature restructure the charter school categorical block grant and strengthen charter school oversight and accountability. ■

I. Overview of Charter Schools 4

The "Basics" of Charter Schools in California 6

Major Charter School Legislation 9

Charter School Growth Over Last Decade 11

II. Synopsis of RAND's 2003 Charter School Evaluation 14

III. LAO Recommendations 19

Re-Examining the Need for an Annual Growth Cap 19

Reforming the Charter School Categorical Block Grant 20

Enhancing Charter School Oversight and Accountability 27

Clarifying and Capping Oversight Fees 33

Acknowledgments

This report was prepared by Jennifer Kuhn and reviewed by Rob Manwaring. The Legislative Analyst's Office (LAO) is a nonpartisan office which provides fiscal and policy information and advice to the Legislature.

LAO Publications

To request publications call (916) 445-4656.

This report and others, as well as an E-mail subscription service, are available on the LAO's Internet site at www.lao.ca.gov. The LAO is located at 925 L Street, Suite 1000, Sacramento, CA 95814.

EXECUTIVE SUMMARY

Since they first opened their doors in fall 1993, charter schools in California have grown in number and steadily increased enrollment. Over the last decade, the state has funded two comprehensive charter school evaluations—the findings of which were released in 1997 and 2003. Both evaluations concluded that charter schools are a viable reform strategy—expanding families' choices, encouraging parental involvement, increasing teacher satisfaction, enhancing principals' control over school-site decision making, and broadening the curriculum without sacrificing time spent on core subjects. The most recent evaluation deemed charter schools cost-effective—finding that charter schools achieve academic results similar to those of traditional public schools even though they obtain significantly less state and federal categorical funding. The evaluation also found, however, that the state continues to face challenges in the areas of charter school finance and accountability.

After summarizing the findings of the 2003 evaluation, this report offers recommendations for improving charter school finance and accountability. Most importantly, we recommend the Legislature:

- ***Restructure the Charter School Categorical Block Grant.*** We recommend shifting 14 currently excluded programs into the general block grant, shifting 10 other currently excluded programs into the disadvantaged-student component of the block grant, and rebenching the underlying per pupil funding rates in a cost-neutral manner.

- ***Strengthen Charter School Oversight.*** We recommend that school districts be permitted to opt out of charter authorizing, charter schools be allowed to choose among multiple authorizers, and specific safeguards be created to promote stronger accountability.

- ***Modify Charter School Facility and Oversight Fees.*** We recommend delineating more clearly between facility fees and oversight fees, capping these fees (at 2 percent and 1 percent, respectively, of total charter school revenues), and eliminating the mandate-claims process for oversight costs.

Taken together, these reforms would address many of the weaknesses the 2003 charter school evaluation identified and be a significant step forward in improving charter school funding and oversight in California.

INTRODUCTION

In 1992, California became the second state in the country to enact legislation allowing for the creation of charter schools. The first charter schools in California opened their doors for the 1993-94 school year and, during the past ten years, charter schools have grown in number and steadily increased enrollment. To assess how these schools are using their resources in educating students, the state recently funded a two-year evaluation—the results of which were released on June 30, 2003. The evaluation deemed charter schools cost-effective—achieving academic results similar to those of traditional public schools despite receiving less state funding.

Chapter 34, Statutes of 1998 (AB 544, Lempert), required the Legislative Analyst's Office (LAO) to contract for the statewide evaluation. The LAO contracted with RAND, and the state provided a total of $666,000 for the evaluation. (In addition to this evaluation, the state has funded three other independent charter school studies. For a summary of these other reports, please see the shaded box on page 5.)

Chapter 34 also required the LAO to report to the Legislature on the general effectiveness of charter schools and, specifically, to recommend whether to expand or reduce the state cap on the number of allowable charter schools.

This report responds to this legislative directive. In this report, we:

- Discuss some general similarities and differences among charter schools and track the growth of charter schools nationwide and in California over the last decade.
- Summarize the findings of RAND's charter school evaluation.
- Offer recommendations for: (1) adjusting the state cap on the number of allowable charter schools, (2) improving the charter school funding model, (3) strengthening charter school oversight, and (4) modifying policies relating to oversight fees.

OVERVIEW OF CHARTER SCHOOLS

Charter schools are publicly funded K-12 schools. These schools are subject to state testing and accountability requirements, but they are exempt from many laws relating to specific education programs. Because of these exemptions, charter schools have greater fiscal and programmatic flexibility than traditional public schools. This expanded flexibility was intended to promote innovation in local education practices. Charter schools also were intended to expand students' educational options, thereby generating competition and enhancing incentives for traditional public schools to make educational improvements.

In this section, we:

- Provide some background information on charter schools in California—including information on chartering authorities, types of charter schools, differences

among charter schools' general modes of instruction, and charter school finance.

- Summarize eight especially significant charter school laws.
- Track the growth of charter schools nationwide and in California.

OTHER STATE-INITIATED EVALUATION EFFORTS

In addition to the 2003 RAND evaluation, the state has undertaken several other evaluation activities relating to charter schools, as detailed below.

First Statewide Evaluation Affirmed Charter Schools as Viable Reform Option (1997). The first statewide evaluation was authorized by Chapter 767, Statutes of 1996 (AB 2135, Mazzoni), which appropriated $146,000 for the study. The LAO contracted with SRI International, Inc. (SRI) to conduct the evaluation, and the findings were released in December 1997. SRI found that charter schools were located in all parts of the state, operated in all types of communities, and served all grade levels. It found that statewide charter schools enrolled students who were similar to students in traditional public schools. It also found that charter schools, on average, had smaller student enrollments, higher parental involvement, and teachers who were more satisfied (because they had more control over decisions affecting their classrooms and felt a greater sense of ownership of their school's educational program). SRI did raise concerns, however, with the legal ambiguities surrounding the liability of charter authorizers and the lack of oversight of charter schools' academic outcomes.

State Audit Concludes That Existing Oversight of Charter Schools is Weak (2002). In November 2002, the Bureau of State Audits (BSA) released the findings of its audit of four large charter authorizers—the Fresno, Los Angeles, Oakland, and San Diego City Unified school districts. The BSA found widespread evidence that (1) oversight of charter schools' academic outcomes and fiscal management was weak, (2) charter authorizers could not justify the oversight fees they charged charter schools because they did not track their actual costs, and (3) charter authorizers risked double charging the state because they filed mandate claims for reimbursement of charter school oversight activities even though they could not demonstrate that the oversight fees they already had collected from charter schools were insufficient to cover these costs.

RAND Begins New Study of Charter Schools' Nonclassroom Based Activities (Expected 2004). Chapter 892, Statutes of 2001 (SB 740, O'Connell), authorized a follow-up statewide evaluation on charter schools' nonclassroom based activities. The *2002-03 Budget Act* provided $333,000 for this follow-up study. Specifically, this evaluation is to assess the state's funding system for nonclassroom based activities as well as the State Board of Education's (SBE) regulations for making specific funding determinations for nonclassroom based charter schools. The findings of this evaluation are scheduled to be released on October 1, 2004.

THE "BASICS" OF CHARTER SCHOOLS IN CALIFORNIA

In this section, we provide some basic background information about charter schools in California.

School District Board Most Common Charter Authorizer. Since the inception of charter schools, 258 government agencies have authorized (or officially granted) charters in California. These charter-granting authorizers consist of the SBE, 23 county school boards, and 234 school district boards. School district boards have authorized the vast majority of charter schools (87 percent). Most charter authorizers (69 percent) have approved only one charter. Less than 10 percent have authorized more than three charters.

Approximately One of Every Ten Charter Petitions Denied. To operate in California, a charter school must submit a petition to a charter authorizer. A petition must include specific information that is delineated in statute, such as a description of the education program of the charter school and the student outcomes the school will use to measure its performance. Charter authorizers report denying approximately 10 percent of all submitted petitions. (Given RAND's survey was distributed only to charter authorizers that were currently overseeing charter schools, this percentage is likely to understate the actual denial rate because it does not include data from charter authorizers that have denied *all* submitted petitions. Additionally, it does not account for informal actions on behalf of charter authorizers that might have discouraged groups even from submitting a petition.) Although the original 1992 charter school law did not require charter authorizers to provide reasons for denying a charter petition, later amendments require that charter authorizers now prepare written documentation justifying their denials. The most common reasons charter authorizers report for denying charter petitions are "an unsound educational program" and a concern that the proposed school is "demonstrably unlikely to succeed."

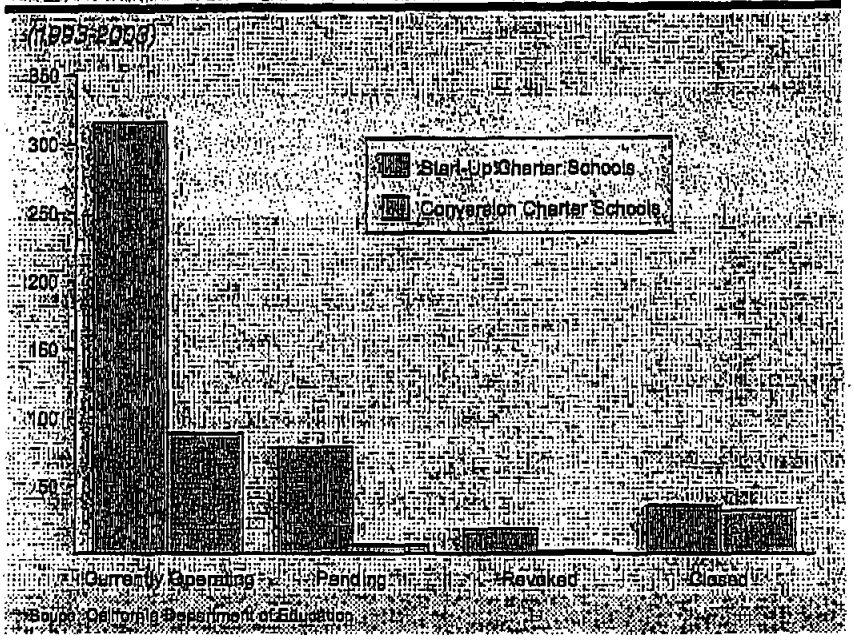
Since 1993, the State Department of Education (SDE) Has Tracked Almost 575 Charter Schools. When a petition is approved or pending, SDE assigns the charter school a unique tracking number. Since the inception of charter schools, SDE has assigned tracking numbers to 573 schools. Of these 573 charter schools, 403 schools (70 percent) are currently operating, 84 schools (15 percent) have petitions pending with a charter authorizer, 20 charters (3 percent) have been revoked, and 66 charter schools (12 percent) have been closed. (In addition to these schools, SDE has issued 31 "inoperative" numbers associated with schools that had approved charters but either never opened or later withdrew their charter.)

"Start-Up" Charter Schools More Common Than Conversion Charter Schools. In California, charter schools may be newly created as a start-up charter school or else a traditional public school may close and reopen as a "conversion" charter school. Figure 1 shows the number of start-up and conversion charter schools that are (1) currently operating, (2) pending, (3) have closed, or (4) have had their charter revoked. As the figure shows, about four out of every five currently operating charter schools are start-up schools whereas one out of every five is a conversion school.

Figure 1

Start-Up Charter Schools More Common Than Conversion Charter Schools

(1993-2003)



Source: California Department of Education

Conversion Charter Schools Serve More Students Than Start-Up Charter Schools. Although start-up charter schools are more common than conversion charter schools, conversion charter schools actually enroll a greater number of students. Of all charter school students in the elementary grades, 72 percent are enrolled in a conversion charter school whereas 28 percent are enrolled in a start-up school. Of all charter school students in the secondary grades, 46 percent are enrolled in a conversion charter school whereas 54 percent are enrolled in a start-up school. (In 2002-03, charter school enrollment was split about evenly between the elementary and secondary grades.)

Charter Schools Offer Two General Modes of Instruction—Classroom-Based and Nonclassroom-Based. Charter schools provide instruction either primarily in a traditional classroom setting or in a nonclassroom setting. The SDE classifies a charter school as a classroom-based school if at least 80 percent of its instructional time is offered on the school site, with the school site being a facility used principally for classroom instruction. A nonclassroom-based school, in contrast, is one in which more than 20 percent of instructional time is offered in a location different from the primary school site. Nonclassroom-based charter schools tend to rely on individualized, self-paced student learning plans. Nonclassroom-based instruction includes independent study, home study, distance study, computer-based study, and work-study. Some of these types of instruction (for example, independent study) are common in traditional public schools as well as charter schools whereas others (for example, home study) are unique to charter schools.

Approximately One-Third of All Charter Schools Are Nonclassroom-Based. In 2001-02, SBE classified 118 charter schools, or approximately one-third of all charter schools, as nonclassroom-based. Start-up charter schools are much more likely to be nonclassroom-based than conversion charter schools (57 percent and 11 percent, respectively). State law prohibits nonclassroom-based schools from hiring teach-

ers without state credentials. Additionally, state law requires SBE to establish general rules for determining the appropriate funding level for nonclassroom-based charter schools. The board's regulations specify that funding determinations are to be based on: (1) the percentage of total expenditures associated with teacher salaries and benefits, (2) the percentage of total expenditures associated with instruction, and (3) the student-teacher ratio. Nonclassroom-based charter schools that devote a greater share of their budget to teacher salaries and instruction and have lower student-teacher ratios are eligible for higher levels of funding.

Charter School Funding Model Intended to Result in Funding Comparable to Traditional Public Schools. In 1999, the Legislature adopted the current charter school funding model. Prior to this time, charter schools received funding on a program-by-program basis through negotiation with their charter authorizer. Under the current model, charter schools receive funds through the following three funding streams.

- ***Revenue Limit Funding.*** Charter schools receive revenue limit funding equal to the average revenue limit of all traditional public schools in the state. A different revenue limit rate is calculated for each of four grade spans—K-3, 4-6, 7-8, and 9-12. As with other public schools, revenue limit funding is continuously appropriated general purpose funding that charter schools may expend at their discretion.

- ***Categorical Block Grant.*** In lieu of applying separately for certain categorical programs, charter schools receive categorical block grant funding, which is specified as a line item in the annual budget act. The block grant allocation to each charter school includes: (1) general block grant funding and (2) disadvantaged student funding. Similar to the revenue limit calculation, the general block grant rate provides per pupil funding equal to the average amount of funding traditional public schools receive in total for certain categorical programs. This rate also is calculated separately for each of the four grade spans. The disadvantaged student component is a single rate equivalent to the statewide average per pupil funding rate provided to traditional public schools for Economic Impact Aid. Unlike other public schools (which may not participate in the categorical block grant), charter schools may expend categorical block grant funding at their discretion and are not bound by the specific programmatic requirements of each categorical program included within the block grant.

- ***Other Categorical Programs.*** Charter schools also may apply separately for categorical programs not included in the categorical block grant. Charter schools that apply for these categorical programs, such as the Governor's Mathematics and Reading Professional Development program or the Principal Training program, are required to abide by all associated programmatic requirements.

MAJOR CHARTER SCHOOL LEGISLATION

This section highlights eight pieces of state legislation that have had an especially strong impact on charter school operations and facilities.

Charter School Operations

Chapter 781, Statutes of 1992 (SB 1448, Hart)—Authorized the Creation of Charter Schools in California. The Charter Schools Act of 1992 was the original law authorizing the creation of publicly funded schools that could operate independently from school districts and be exempt from existing education laws. The law established a statewide cap of 100 charter schools and a districtwide cap of ten charter schools. The law established petition requirements, designed a two-stage appeals process, and specified certain conditions under which charters could be revoked. It required the qualifications of personnel to be specified in a school's charter, but it did not require staff to hold state credentials. The law also stated that the Superintendent of Public Instruction (SPI) was to make annual apportionments to each charter school, but in practice, charter schools initially negotiated funding with the school district rather than receiving it directly from the state. The original law did not address charter school facility issues.

Chapter 34—Instituted Significant Charter School Reforms. This law increased the statewide cap to 250 charter schools for the 1998-99 school year, with an additional 100 charter schools allowed to open annually thereafter, and eliminated the districtwide cap. It slightly eased (1) petition requirements, (2) the petition submittal process, (3) the appeals process, and (4) the revocation process. Unlike the 1992 law, it also required all core-subject teachers to hold a state credential. Additionally, it clarified that charter schools could receive funding directly from the state. It also required school districts to offer charter schools any unused district facilities at no charge, and it capped the oversight charges school districts could assess charter schools.

Chapter 162, Statutes of 1999 (SB 434, Johnston)—Applied Independent Study Laws to Charter Schools. This law required charter schools that offered independent study to comply with all laws and regulations governing independent study generally. This law also required charter schools to offer a minimum number of instructional minutes equal to that of other public schools, maintain written records of pupil attendance, and release these records for audit and inspection. Additionally, it required charter schools to certify that their students participated annually in the state's testing programs.

Chapter 78, Statutes of 1999 (AB 1115, Strom-Martin)—Created Charter School Funding Model. This law clarified the language regarding funding by expressing legislative intent to provide charter schools with operational funding equal to the total operational funding available to similar public schools serving similar student populations. It also established a funding model that allowed charter schools to receive funds either locally through the school district or directly from the state. The model consisted of three basic components: (1) revenue limit funding, (2) categorical block grant funding, and (3) separate categorical program funding—all of which were designed to yield charter school funding rates that were comparable to those of similar public schools.

Chapter 892—Reduced Funding for Nonclassroom-Based Charter Schools. This law required SBE to: (1) adopt regulations governing nonclassroom-based instruction, (2) develop criteria for determining the amount of funding to be provided for it, and (3) make specific funding determinations for individual charter schools. This law included certain guidelines regarding funding levels. Specifically, funding for nonclassroom-based charter schools was to be reduced by no more than 10 percent in 2001-02, no less than 20 percent in 2002-03, and no less than 30 percent in 2003-04. The board, however, retained the discretion, on a case-by-case basis, to adjust funding by different percentages. The board was to make funding determinations on a five-year cycle if a charter school did not make material changes to its charter and was deemed to be in good standing.

Chapter 1058, Statutes of 2002 (AB 1994, Reyes)—Established Geographic Restrictions and Enhanced County Oversight. This law required, with few specified exceptions, that a charter school consist of a single school site located within the geographic jurisdiction of its chartering school district. If adequate justification was provided, the law, however, allowed for two exceptions. Specifically, a group could receive a countywide charter (to operate at multiple sites throughout that county) or a statewide charter (to operate at multiple sites throughout the state). In either case, a charter school group had to justify the educational benefit of operating programs at multiple sites spanning multiple local jurisdictions. Additionally, the law granted County Offices of Education (COEs) general authority to conduct both fiscal and programmatic oversight of charter schools. The law, for example, allowed COEs to conduct an investigation of a charter school based on parental complaints or fiscal irregularities.

Charter School Facilities

Proposition 39 (November 2000)—Required School Districts to Provide "Reasonably Equivalent" Charter School Facilities. This law, approved by the voters at a statewide election, allowed school districts to pass local school facility bonds with a 55 percent vote instead of a two-thirds vote. In addition, the law required school districts to provide charter schools with reasonably equivalent facilities that were sufficient to accommodate all their classroom-based students. This requirement must be met even if unused facilities are not available and the district would incur costs to provide the facilities. The school district, however, is not required to spend its general discretionary revenues to provide charter school facilities. Instead, the district could use other revenue sources, including state and local bonds. The law also: (1) required that charter facilities be reasonably equivalent to other district facilities, (2) allowed school districts that funded charter school facilities with discretionary revenues to charge the associated charter schools a facility fee, and (3) exempted a school district from providing facilities to charter schools that served fewer than 80 students.

Chapter 935, Statutes of 2002, (AB 14, Goldberg) and Proposition 47 (November 2002)—Created Charter Schools Facilities Program and Approved Sizeable Bond Funding. Chapter 935 established a pilot program—the Charter Schools Facilities Program—to determine the optimum method for funding charter school facilities. The law specified that the State Allocation Board (SAB) was to approve a set of projects that was "fairly representative"

of: (1) the various geographic regions of the state; (2) urban, suburban, and rural regions; (3) large, medium, and small schools; (4) and the various grade levels. While ensuring this fair representation was achieved, SAB also was required to give preference to charter schools in overcrowded school districts and low-income areas as well as to charter schools operated by not-for-profit organizations. This facilities program was linked with voter approval of Proposition 47, which provided up to $100 million (of a total of $3.5 billion) for the construction of new charter schools. On July 2, 2003, SAB provided preliminary facility apportionments to six charter schools—committing a total of $97 million in Proposition 47 bond monies.

Charter Schools Have Experienced Notable Growth Over Last Decade

In this section, we track the recent growth of charter schools nationwide and in California.

Charter Schools Spread Across Country in 1990s. During the 1990s, legislation allowing for the creation of charter schools was adopted by most state governments. Figure 2 tracks this growth. Today, 40 states as well as the District of Columbia (DC) have charter school laws.

Almost 2,700 Charter Schools Serving More Than 684,000 Students Nationwide. Currently charter schools are operating in 36 states and DC. In 2002-03, almost 2,700 charter schools served more than 684,000 students nationwide. Of these schools, almost 400 were new charter schools that opened in fall 2002. Figure 3 (see next page) shows the number of charter schools for each state and indicates the percentage of all public K-12 students in each state who attend charter schools. The data are provided for

Figure 2
Charter School Legislation Spreading Across Country[a]

Year Legislation Enacted	State
1991	Minnesota
1992	California
1993	Colorado
	Georgia
	Massachusetts
	Michigan
	New Mexico
	Wisconsin
1994	Arizona
	Hawaii
	Kansas
1995	Alaska
	Arkansas
	Delaware
	Louisiana
	New Hampshire
	Rhode Island
	Texas
	Wyoming
1996[b]	Connecticut
	Florida
	Illinois
	New Jersey
	North Carolina
	South Carolina
1997	Mississippi
	Nevada
	Ohio
	Pennsylvania
1998	Idaho
	Missouri
	New York
	Utah
	Virginia
1999	Oklahoma
	Oregon
2001	Indiana
2002	Iowa
	Tennessee
2003	Maryland

[a] The following ten states currently do not have charter school laws: Alabama, Kentucky, Maine, Montana, Nebraska, North Dakota, South Dakota, Vermont, Washington, and West Virginia.

[b] Indicates states that have charter school laws but no charter schools currently operating.

[c] The District of Columbia also adopted charter school legislation in 1996.

Source: Center for Education Reform.

Briefs and Other Related Documents

Supreme Court of California
In re Michael Lee JENNINGS on Habeas Corpus.
No. S115009.

Aug. 23, 2004.

Background: Defendant was convicted in the Superior Court, Sacramento County, No. 00M07614, Gail D. Ohanesian, J., of statutory misdemeanor offense of purchasing an alcoholic beverage for a person under 21 who thereafter proximately caused great bodily injury. Defendant appealed. The Superior Court, Appellate Division, affirmed and certified the case for transfer to the Court of Appeal. The Court of Appeal declined certification. Defendant petitioned for writ of habeas corpus. The Supreme Court issued an order to show cause on the petition, returnable to the Court of Appeal. The Court of Appeal denied the writ of habeas corpus, ruling that the statute did not require defendant's knowledge that the person for whom he purchased the alcohol was under age 21.

Holdings: The Supreme Court, Werdegar, J., held that:
(1) statute prohibiting the purchasing of alcohol for an underage person did not require proof of knowledge or intent on the part of defendant to establish a violation, and
(2) defendant was entitled to raise a mistake of fact defense concerning the person's age.
Petition for writ of habeas corpus granted, and case remanded to superior court.

Opinion, 131 Cal.Rptr.2d 233, superseded.

West Headnotes

[1] Statutes ⚷181(1)
361k181(1) Most Cited Cases

[1] Statutes ⚷188
361k188 Most Cited Cases
To determine the meaning of a statute, the court looks to the intent of the Legislature in enacting the law, being careful to give the statute's words their plain, commonsense meaning.

[2] Statutes ⚷188
361k188 Most Cited Cases

[2] Statutes ⚷214
361k214 Most Cited Cases
If the language of a statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary.

[3] Statutes ⚷208
361k208 Most Cited Cases

[3] Statutes ⚷223.1
361k223.1 Most Cited Cases
In interpreting a statutory code section, the court must interpret the section in context with the entire statute and the statutory scheme.

[4] Intoxicating Liquors ⚷159(1)
223k159(1) Most Cited Cases
Statute prohibiting the furnishing of alcohol to an underage person applies to any situation in which an individual purchases alcoholic beverages for an underage person. West's Ann.Cal.Bus. & Prof.Code § 25658(c).

[5] Statutes ⚷184
361k184 Most Cited Cases
(Formerly 361k217.2, 361k190)
Where the words of the statute are clear, the court may not add to or alter them to accomplish a purpose that does not appear on the face of the

Copr. © Bancroft-Whitney and West Group 1998

statute or from its legislative history.

[6] Intoxicating Liquors ⚷159(2)
223k159(2) Most Cited Cases
To obtain a conviction under statute prohibiting the furnishing of alcohol to an underage person, the People need not prove the offender knew the person to whom he or she furnished, sold, or gave an alcoholic beverage was in fact not yet 21 years old. West's Ann.Cal.Bus. & Prof.Code § 25658(a).

[7] Criminal Law ⚷20
110k20 Most Cited Cases

[7] Criminal Law ⚷23
110k23 Most Cited Cases
So basic is the requirement that there must be a union of act and wrongful intent or criminal negligence, that it is an invariable element of every crime unless excluded expressly or by necessary implication.

[8] Criminal Law ⚷21
110k21 Most Cited Cases
For certain types of penal laws, often referred to as public welfare offenses, the Legislature does not intend that any proof of scienter or wrongful intent be necessary for conviction; such offenses generally are based upon the violation of statutes which are purely regulatory in nature and involve widespread injury to the public.

[9] Criminal Law ⚷21
110k21 Most Cited Cases

[9] Criminal Law ⚷23
110k23 Most Cited Cases
In determining whether a penal statute requires that the prosecution prove some form of guilty intent, knowledge, or criminal negligence, courts commonly take into account:(1) the legislative history and context; (2) any general provision on mens rea or strict liability crimes; (3) the severity of the punishment provided for the crime; (4) the seriousness of harm to the public that may be expected to follow from the forbidden conduct; (5) the defendant's opportunity to ascertain the true facts; (6) the difficulty prosecutors would have in proving a mental state for the crime; and (7) the number of prosecutions to be expected under the statute.

[10] Courts ⚷89
106k89 Most Cited Cases
An opinion is not authority for propositions not considered.

[11] Intoxicating Liquors ⚷159(2)
223k159(2) Most Cited Cases
Statute prohibiting the purchasing of alcohol for an underage person does not require proof of knowledge or intent on the part of defendant to establish a violation; the legislative history and context of the statute, along with the seriousness of the harm to the public, demonstrate that no knowledge that the accused knew that the person was under 21 years of age should be imposed. West's Ann.Cal.Bus. & Prof.Code § 25658(c).

[12] Statutes ⚷223.1
361k223.1 Most Cited Cases
Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes.

[13] Criminal Law ⚷20
110k20 Most Cited Cases
For crimes which impose severe punishment, the usual presumption that a defendant must know the facts that make his or her conduct illegal should apply.

[14] Criminal Law ⚷33
110k33 Most Cited Cases
Although the People, in a prosecution for purchasing alcohol for an underage person who thereafter caused great bodily injury or death, did not have to prove that defendant knew the person was under 21 years of age, defendant was entitled to raise a mistake of fact defense concerning the person's age. West's Ann.Cal.Bus. & Prof.Code § 25658(c).
See 2 Witkin & Epstein, Cal. Criminal Law (3d ed.

Copr. © Bancroft-Whitney and West Group 1998

2000) Crimes Against Public Peace and Welfare, § 291; Cal. Jur. 3d, Alcoholic Beverages, § 55.

[15] Criminal Law ⟹33
110k33 Most Cited Cases
As a general matter, a mistake of fact defense is not available unless the mistake disproves an element of the offense.

***647 *258 **908 Rothschild, Wishek & Sands, Kelly Lynn Babineau and M. Bradley Wishek, Sacramento, for Petitioner Michael Lee Jennings.

Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Carlos A. Martinez, Mathew Chan, Janet Neeley, David Andrew Eldridge, Stephen G. Herndon and Rachelle A. Newcomb, Deputy *259 Attorneys General, Robert A. Ryan, Jr., County Counsel, and James G. Wright, Deputy County Counsel, for Respondent State of California.

WERDEGAR, J.

Petitioner invited some guests to his home and served them alcoholic beverages. One of the guests, only 19 years old, after leaving the party caused an automobile accident resulting in serious injury. Charged with violating Business and Professions Code [FN1] section 25658, subdivision (c) (section 25658(c)), which prohibits the purchase of an alcoholic beverage for someone under 21 years old who, after drinking, proximately causes death or great bodily injury, petitioner sought to defend against the charge by claiming he did not know his guest was under the legal drinking age and in fact believed he was over 21 years old. The trial court and two levels of appellate courts ruled that because knowledge of age is not an element of the crime, a mistake of fact as to age is not a defense. We agree the People need not prove knowledge of age to establish a violation of section 25658(c), but we conclude petitioner was entitled to defend against the charge by claiming a mistake of fact as to age. Accordingly, we reverse the judgment.

FN1. All further statutory references are to the Business and Professions Code unless otherwise stated.

FACTS [FN2]

FN2. Petitioner waived his right to a jury trial and submitted his case on the police report. The facts are drawn largely from that report.

On May 30, 2000, petitioner Michael Jennings, a supervisor for Armor Steel Company in Rio Linda, invited coworkers Charles Turpin, Curtis Fosnaugh, Daniel Smith and Donald Szalay to his home to view a videotape demonstrating some new machinery the company was to obtain. Szalay stopped at a convenience store and bought a 12-pack of beer to bring to the gathering. At petitioner's direction, his wife went to a store and purchased another 12-pack of beer. The five men sat in the garage and drank beer.

Some time later, the men went into the house where they watched the videotape and drank more beer. Around 6:00 p.m., the party broke up. Fosnaugh left driving a white Ford pickup truck. Turpin then left driving his Volkswagen Beetle, accompanied by Smith. Fosnaugh stopped at a stop sign at the intersection of E Street and 20th Street in Rio Linda. Turpin, intending to overtake and pass Fosnaugh on the left without stopping at the intersection, drove on the wrong side of the ***648 road. By his own estimate, Turpin was driving around 55 miles per hour. Unaware of Turpin's intention to pass on the left, Fosnaugh attempted to make a left turn, resulting in a major collision and serious injuries to Turpin, Smith and Fosnaugh.

*260 Turpin, who had to be pried from his car with the Jaws of Life, told police responding to the scene that he drank about seven beers between 4:00 and 6:00 p.m. The results of a preliminary alcohol screening test indicated Turpin had a blood-alcohol concentration of .124 percent. Later at the hospital, a blood test determined Turpin's blood-alcohol concentration to be .16 percent. Turpin was 19 years old. Fosnaugh was 20 years old.

Copr. © Bancroft-Whitney and West Group 1998

Petitioner was charged with violating section 25658(c), purchasing alcohol for someone under 21 years old who consumes it and "thereby proximately causes great bodily injury or death to himself, herself, or any other person." The People moved in limine to exclude evidence that petitioner was unaware Turpin was not yet 21 years of age. Petitioner opposed the motion and made an offer of proof that he was ignorant of Turpin's age. Specifically, petitioner alleged that a few weeks before the accident, he was with several coworkers drinking beer in front of a local ****909** market after work when a police officer arrived and confronted Turpin, who was holding a beer. Petitioner alleged he heard Turpin tell the officer he was 22 years old. In addition, petitioner alleged that, although he was Turpin's supervisor, he did not process Turpin's employment application (which did not, in any event, have a space for the applicant's age), and Turpin's employment file did not have a photocopy of his driver's license.

The trial court granted the People's motion, ruling that section 25658(c) was a strict liability offense and ignorance of Turpin's age was not a defense. Petitioner then submitted the case on the police report subject to a reservation of the right to challenge on appeal the correctness of the trial court's evidentiary ruling. The trial court found petitioner guilty as charged. The court sentenced him to six months in jail, with sentence suspended and probation granted on conditions including service of 60 days in jail.

DISCUSSION

A. Background

The regulation of alcoholic beverages in this country has taken a long and twisting path (see U.S. Const., 18th Amend. [prohibiting "the manufacture, sale, or transportation of intoxicating liquors" within the U.S.]; *id.*, 21 st Amend. [repealing the 18th Amend.]), but regulation has now devolved to the states, who "enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders." (*Capital Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691, 712, 104 S.Ct. 2694, 81 L.Ed.2d 580.) One active area of California's regulation of alcoholic beverages concerns underage drinkers. No citation to authority is necessary to establish that automobile accidents by underage drinkers lead to the injuries ***261** and deaths of thousands of people in this country every year. Nevertheless, the statistics are sobering. "In 2002, 24% of drivers ages 15 to 20 who died in motor vehicle crashes had been drinking alcohol." (http://www.cdc.gov/ncipc/factsheets/drving.htm [as of Aug. 23, 2004].) "Analysis of data from 1991--1997 found that, consistently, more than one in three teens reported they had ridden with a driver who had been drinking alcohol in the past month. One in six reported having driven after drinking alcohol within the same one-month time period." (http:// www.cdc.gov/ncipc/factsheets/teenmvh.htm *****649** [as of Aug. 23, 2004].) "In 2002, 25 percent of 16--20-year-old passenger vehicle drivers fatally injured in crashes had high blood alcohol concentrations (0.08 percent or more). Teenage drivers with BACs in the 0.05-0.08 percent range are far more likely than sober teenage drivers to be killed in single-vehicle crashes--17 times more likely for males, 7 times more likely for females. At BACs of 0.08-0.10, risks are even higher, 52 times for males, 15 times for females." (http:// www.hwysafety.org/safety%5F facts%20qanda/underage.htm [as of Aug. 23, 2004].)

Given these facts, that our laws shield young people from the dangers of excess alcohol consumption is no surprise. Our state Constitution establishes the legal drinking age at 21; three years past the age of legal majority (see, e.g., Cal. Const., art. II, § 2 [must be at least 18 years old to vote]; Fam.Code, § 6500 [a "minor" is one under 18 years old]; Prob.Code, § 3901, subd. (a) ["adult" defined as one "who has attained the age of 18 years"]), both for purchases and personal consumption at on-sale premises. (Cal. Const., art. XX, § 22.) The "likely purpose" of this constitutional provision "is to protect such persons from exposure to the 'harmful influences' associated with the consumption of such beverages." (*Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 567, 28 Cal.Rptr.2d 638, 869 P.2d

Copr. © Bancroft-Whitney and West Group 1998

1163.)

The Legislature has implemented this constitutional mandate in a number of ways. For example, section 25658, subdivision (a) (§ 25658(a)) makes it a misdemeanor to sell or furnish an alcoholic beverage to any person under the age of 21 years. Section 25658, subdivision (b) makes it a misdemeanor for an underage person to buy alcohol or consume an alcoholic beverage in any on-sale premises. Under a new law enacted in 2003, a parent who permits his or her minor child to drink an intoxicating beverage can under **910 some circumstances be guilty of a misdemeanor. (§ 25658.2.) [FN3]

FN3. Section 25658.2 provides: "(a) A parent or legal guardian who knowingly permits his or her child, or a person in the company of the child, or both, who are under the age of 18 years, to consume an alcoholic beverage or use a controlled substance at the home of the parent or legal guardian is guilty of [a] misdemeanor if all of the following occur:
"(1) As the result of the consumption of an alcoholic beverage or use of a controlled substance at the home of the parent or legal guardian, the child or other underage person has a blood-alcohol concentration of 0.05 percent or greater, as measured by a chemical test, or is under the influence of a controlled substance.
"(2) The parent knowingly permits that child or other underage person, after leaving the parent's or legal guardian's home, to drive a vehicle.
"(3) That child or underage person is found to have caused a traffic collision while driving the vehicle."

*262 Of course, an underage person creates a potentially deadly situation when he or she drives after imbibing. Addressing that situation, the Legislature has provided penalties for persons under the age of 21 who drive with a blood-alcohol concentration much less than that prohibited for persons over 21 years old. For example, the Legislature has enacted what has been termed a "zero tolerance" law (*Coniglio v. Department of Motor Vehicles* (1995) 39 Cal.App.4th 666, 673, 46 Cal.Rptr.2d 123), making it unlawful for a person under 21 years old to operate a motor vehicle with as little as a 0.01 percent blood-alcohol concentration as measured by a preliminary alcohol screening device (Veh.Code, §§ 23136, 13390). Violation of this law carries civil penalties. An underage person ***650 who drives with a 0.05 percent blood-alcohol concentration is subject to a one-year loss of driving privileges as well as other administrative liabilities (*id.*, §§ 23140, 13202.5, subds. (a) & (d)(4), 13352.6; see also *id.*, § 23224 [possession of alcoholic beverages by an underage driver].) A driver 21 years old or older, by contrast, is not subject to criminal penalties until his or her blood-alcohol concentration rises to 0.08 percent or more. (*Id.*, § 23152, subd. (b).) Irrespective of his or her blood-alcohol concentration, of course, a person of any age is subject to criminal penalties if he or she drives while "under the influence of any alcoholic beverage." (*Id.*, § 23152, subd. (a).)

Specifically addressing the circumstance where an individual purchases alcohol for an underage person, section 25658(c) makes such purchase punishable where the underage person, as a consequence of consuming the alcohol, causes great bodily injury or death to anyone. Though just a misdemeanor, the offense is punishable by imprisonment in a county jail for a minimum of six months, by a fine of up to $1,000, or both. (§ 25658, subd. (e)(3).)

Section 25658(c) does not explicitly require that the offender have knowledge, intent, or some other mental state when purchasing the alcoholic beverage, and this lacuna forms the basis of the present dispute. The question is whether we should construe the statute to require some mental state as a necessary element of the crime. Preliminary to that question is a determination of what acts the section prohibits, for if petitioner's actions did not violate section 25658(c), his knowledge or mental state would be irrelevant.

***263 B. What Acts Does Section 25658(c)**

Copr. © Bancroft-Whitney and West Group 1998

Prohibit?

[1][2][3] To determine the meaning of section 25658(c), we look to the intent of the Legislature in enacting the law, "being careful to give the statute's words their plain, commonsense meaning. [Citation.] If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919, 129 Cal.Rptr.2d 811, 62 P.3d 54.) Additionally, we must interpret section 25658(c) in context with the entire statute and the statutory scheme. (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743, 110 Cal.Rptr.2d 828, 28 P.3d 876.)

[4] Section 25658(c) provides in full: "Any person who violates subdivision (a) by purchasing an alcoholic beverage for a person under the age of 21 years and the person under the age of 21 years thereafter consumes the alcohol and thereby proximately causes great bodily injury or death to himself, **911 herself, or any other person, is guilty of a misdemeanor." Subdivision (a), in turn, states that "every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." Consequently, subdivision (c) prohibits the selling, furnishing or giving away of alcohol to an underage person, but only in the circumstance therein specified, namely, by "purchasing" such beverage "for" an underage person. Only persons who (1) furnish or give away alcoholic beverages, (2) by purchasing such beverages, (3) for an underage person can be guilty of violating section 25658(c).

Section 25658(c) plainly embraces the situation in which an underage person, loitering in front of a liquor store, asks an approaching adult to buy alcoholic beverages for him or her, commonly known as the "shoulder tap" situation (see ***651 *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 293, 4 Cal.Rptr.2d 280 [describing how "minors tap adults on the shoulder" as they enter a market and "get them to buy liquor for the minors"]) or, more colloquially, "shoulder tapping" (http:// www.urbandictionary.com/define.php?term=shoulder+tapping [as of Aug. 23, 2004]). In such situations, that the buyer "*purchas* [*ed*] an alcoholic beverage *for* a person under the age of 21 years" (italics added) in violation of section 25658(c) is not open to doubt. Used in this sense, the statutory phrase "purchas[e] ... for" means the offender must stand in the shoes of the underage person and act as a buyer by proxy; the word "for" in this case means "in place of." (Webster's 3d New Internat. Dict. (2002) p. 886, col. 2 [giving example of definition 5a: "go to the store [for] me"].)

*264 That the Legislature's attention was focused on the phenomenon of shoulder tapping when it enacted section 25658(c) is clear from the legislative history. (*In re J.W.* (2002) 29 Cal.4th 200, 211, 126 Cal.Rptr.2d 897, 57 P.3d 363 ["To determine the purpose of legislation, a court may consult contemporary legislative committee analyses of that legislation, which are subject to judicial notice"].) Subdivision (c) of section 25658 began as Assembly Bill No.2029 (1997-1998 Reg. Sess.), introduced by Assemblyman Keeley on February 18, 1998. When the bill was introduced in the Assembly Committee on Public Safety on April 14, 1998, the author's comments were incorporated into the bill's analysis: " 'Last July, a tragedy occurred in the district I represent which brought to my attention the high level of access that minors have to alcohol. Three minors died in a drunk driving accident, in which the driver, a minor, had consumed alcohol that was purchased for him by an adult. The adult served 30 days in a county jail and the driver of the car is serving an eight-year sentence in state prison. [¶] According to the United Way, nationwide, 62% of 12th graders have been drunk. In Santa Cruz County alone, 95% of 11th graders say that they could easily obtain alcohol if they wanted to. *One of the top ways in which minors gain access to alcohol is by 'shoulder tapping,' or asking an adult, often in front of a liquor store, to purchase alcohol for a minor.* [¶] *Adults who do this must be held responsible for their actions.* The intention of [Assembly Bill No.] 2029 is to provide an effective deterrent to adults

Copr. © Bancroft-Whitney and West Group 1998

who are irresponsible enough to buy alcohol for minors.' " (Assem. Com. on Public Safety, Analysis of Assem. Bill No.2029 (1997-1998 Reg. Sess.) Apr. 14, 1998, italics added.) The Superintendent of the San Lorenzo Unified School District provided a similar argument in support of the bill. (*Ibid.*) Assemblyman Keeley's statement was later included in the state Senate's bill analysis. (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1204 (1997-1998 Reg. Sess.) June 23, 1998.) [FN4] No contrary statements of intent appear in any of the legislative history of these bills.

FN4. By this time, Assembly Bill No.2029 had been incorporated into Assembly Bill No. 1204 for technical procedural reasons.

Whether the statute is limited to the shoulder tap situation or embraces other circumstances is a more difficult question. The archetypal shoulder tap scenario involves strangers, a request from an underage person, a business establishment that sells alcohol, and no intent on the buyer's part to **912 share in drinking the purchased beverage. But does the statute apply when, for example, a parent, without solicitation, goes to a grocery store and buys ***652 beer for her underage son? In that hypothetical situation, as apparently in the instant case, no actual request to purchase the alcohol is made. Or does the statute apply when an adult attending a baseball game announces he is going to the concession stand and at the request of an underage friend brings him back a beer? Although that situation involves a request to purchase, the *265 participants (as in this case) are not strangers. Further, does section 25658(c) apply if an adult purchases beer for himself but days later gives one to an underage guest? In that case, no intent to purchase for a third party exists at the time of sale, but the purchaser later provides the alcohol to an underage person. Finally, does the statute apply to the social party host who purchases alcoholic beverages generally for a party but not for any particular guest? In that situation, the host certainly purchased the beverages for the party, [FN5] but did he do so for a particular underage guest?

FN5. In fact, party guest Szalay purchased some of the beer, and petitioner's wife purchased the remainder, at petitioner's request. Presumably petitioner's culpability as a purchaser of intoxicating beverages flows from his status as an aider and abettor, an issue we need not decide here inasmuch as he essentially entered a "slow plea" of guilty by submitting the case on the police report.

[5] In resolving the meaning of section 25658(c), we must be careful not to add requirements to those already supplied by the Legislature. (*Robert F. Kennedy Medical Center v. Belshé* (1996) 13 Cal.4th 748, 756, 55 Cal.Rptr.2d 107, 919 P.2d 721.) "Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562, 7 Cal.Rptr.2d 531, 828 P.2d 672.) Here, although the Legislature was focused on the shoulder tap scenario, the language of section 25658(c) is not so limited. Section 25658(c) imposes no requirement that the underage person make a request to a proxy to buy alcohol, nor that the two principal actors be unknown to each other. Nor is there a statutory requirement that the underage person wait outside the place of sale or that the buyer have no intention to share the beverage. The statute requires only that the offender "purchas[e]" an alcoholic beverage "for" an underage person. That event can occur in a variety of settings. In short, section 25658(c) embraces more than merely shoulder tapping.

Nevertheless, some limits are apparent when we consider section 25658(c) together with section 25658(a). (See *Renee J. v. Superior Court, supra*, 26 Cal.4th at p. 743, 110 Cal.Rptr.2d 828, 28 P.3d 876.) As indicated, subdivision (a) of section 25658 sweeps more broadly than does subdivision (c), criminalizing the selling, furnishing, or giving of alcoholic beverages "*to* any person under the age of 21" (italics added), whereas subdivision (c) criminalizes the violation of subdivision (a) "by purchasing an alcoholic beverage *for* a person under the age of 21 years" (italics added). Viewing together these two subdivisions of the same statute,

Copr. © Bancroft-Whitney and West Group 1998

it is apparent the acts prohibited by subdivision (c) involve a subset of the universe of possible situations in which one might violate subdivision (a). The Legislature's use of the phrase "purchas[e] ... for" delineates a smaller group of prohibited actions by identifying specific goal-directed behavior by the purchaser of alcoholic beverages, involving an identified and particular ***266** underage person. In other words, to violate section 25658(c), one must not only *furnish* alcohol *to* an underage person, one must *purchase* the alcohol *for* that person.

*****653** Although section 25658(a) clearly embraces the social party host (because such persons furnish or give away alcoholic beverages to their guests), the generalized actions of the typical social party host, providing libations for his or her guests, do not run afoul of the more specific section 25658(c) because, as a general matter, such hosts cannot be said to have purchased alcohol "for" any particular guest. [FN6] Although a social host could be said ****913** to have purchased alcoholic beverages for every one of his or her guests, such an interpretation would be unreasonable, as in that case, "purchase for" would mean the same as "furnish to," blurring the distinction between the two subdivisions. As used in section 25658(c), the term "for" is "used as a function word to indicate the person .... that something is to be delivered to." (Webster's 3d New Internat. Dict., *supra,* p. 886, col. 2 [giving example of definition 3d: "any letters [for] me"].)

FN6. We thus disagree with the People's position, stated at oral argument, that to ensure one does not violate section 25658(c), a social host can simply choose not to serve alcoholic beverages.

In light of the plain meaning of the statutory language, we conclude section 25658(c) applies to any situation in which an individual purchases alcoholic beverages for an underage person. This includes, but is not limited to, the buyer-by-proxy and shoulder tap scenarios. We now consider whether section 25658(c), so interpreted, requires proof of some mental state such as knowledge of age.

C. Knowledge of Age

1. *Section 25658(a)*

[6] Because section 25658(c) describes a subset of actions prohibited by section 25658(a), [FN7] if subdivision (a) requires the People to prove a violator knew the age of the person to whom alcohol was furnished, such proof would also be required to show a violation of subdivision (c). Conversely, if subdivision (a) is a strict liability offense, lacking any knowledge requirement, that fact would weigh heavily in our determination whether subdivision (c) requires proof of knowledge. We thus consider whether section 25658(a) requires such proof. We conclude it does not.

FN7. Of course, subdivision (c) has the additional requirement that the underage person actually consume the alcohol "and thereby proximately causes great bodily injury or death to himself, herself, or any other person." Strictly speaking, then, subdivision (c) is not a lesser included offense of subdivision (a).

[7] ***267** For criminal liability to attach to an action, the standard rule is that "there must exist a union, or joint operation of act and intent, or criminal negligence." (Pen.Code, § 20.) "[T]he requirement that, for a criminal conviction, the prosecution prove some form of guilty intent, knowledge, or criminal negligence is of such long standing and so fundamental to our criminal law that penal statutes will often be construed to contain such an element despite their failure expressly to state it. 'Generally, " '[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' ..." [Citation.] In other words, there must be a union of act and wrongful intent, or criminal negligence. [Citations.] "So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication." ' " (*In re Jorge M.* (2000) 23 Cal.4th

Copr. © Bancroft-Whitney and West Group 1998

866, 872, 98 Cal.Rptr.2d 466, 4 P.3d 297 (*Jorge M.*); see 1 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Elements, § 1, pp. 198-199.)

The prevailing trend in the law is against imposing criminal liability without ***654 proof of some mental state where the statute does not evidence the Legislature's intent to impose strict liability. (*People v. Simon* (1995) 9 Cal.4th 493, 521, 37 Cal.Rptr.2d 278, 886 P.2d 1271; *Liparota v. United States* (1985) 471 U.S. 419, 426, 105 S.Ct. 2084, 85 L.Ed.2d 434 [extension of strict liability crimes disfavored]; see 1 Witkin & Epstein, Cal.Criminal Law, *supra,* Elements, § 18, p. 223 [examples given of strict liability crimes are not "indicative of a trend. Indeed, the opposite appears to be true"].)

[8] "Equally well recognized, however, is that for certain types of penal laws, often referred to as public welfare offenses, the Legislature does not intend that any proof of scienter or wrongful intent be necessary for conviction. 'Such offenses generally are based upon the violation of statutes which are purely regulatory in nature and involve widespread injury to the public. [Citation.] "Under many statutes enacted for the protection of the public health and safety, e.g., traffic and food and drug regulations, criminal sanctions are relied upon even if there is no wrongful intent. These offenses usually involve light penalties and no moral obloquy or damage to reputation. Although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than **914 punishment or correction. The offenses are not crimes in the orthodox sense, and wrongful intent is not required in the interest of enforcement." ' " (*Jorge M., supra,* 23 Cal.4th at p. 872, 98 Cal.Rptr.2d 466, 4 P.3d 297.) [FN8] *268 Alcohol-related offenses, such as driving with a prohibited blood-alcohol concentration (*Ostrow v. Municipal Court* (1983) 149 Cal.App.3d 668, 197 Cal.Rptr. 40) and employment of a minor at an establishment selling alcoholic beverages (*Kirby v. Alcoholic Bev. etc. App. Bd.* (1968) 267 Cal.App.2d 895, 73 Cal.Rptr. 352), have been found to constitute such public welfare offenses.

FN8. Examples of public welfare offenses for which criminal liability attaches in the absence of any mens rea include improperly labeling and storing hazardous waste (Health & Saf.Code, § 25190; see *People v. Matthews* (1992) 7 Cal.App.4th 1052, 1057-1058, 9 Cal.Rptr.2d 348), sale of mislabeled motor oil (Bus. & Prof.Code, § 13480; *People v. Travers* (1975) 52 Cal.App.3d 111, 124 Cal.Rptr. 728), sale of food contaminated with fecal matter (*People v. Schwartz* (1937) 70 P.2d 1017, 28 Cal.App.2d Supp. 775), sale of shortweighted food (*In re Marley* (1946) 29 Cal.2d 525, 175 P.2d 832), and use of an unlicensed poison (*Aantex Pest Control Co. v. Structural Pest Control Bd.* (1980) 108 Cal.App.3d 696, 166 Cal.Rptr. 763).

[9] We found in *Jorge M., supra,* 23 Cal.4th 866, 98 Cal.Rptr.2d 466, 4 P.3d 297, a "useful" analytical framework "where the legislative intent is not readily discerned from the text [of the law] itself." (*Id.* at p. 873, 98 Cal.Rptr.2d 466, 4 P.3d 297.) We there explained that "courts have commonly taken into account ...:(1) the legislative history and context; (2) any general provision on mens rea or strict liability crimes; (3) the severity of the punishment provided for the crime ('Other things being equal, the greater the possible punishment, the more likely some fault is required'); (4) the seriousness of harm to the public that may be expected to follow from the forbidden conduct; (5) the defendant's opportunity to ascertain the true facts ('The harder to find out the truth, the more likely the legislature meant to require fault in not knowing'); (6) the difficulty prosecutors would have in proving a mental state for the crime ('The greater the difficulty, the more likely it is that the legislature intended to relieve the prosecution of that burden so that the law could be effectively enforced'); [and] (7) the number of prosecutions to be expected under the statute ('The fewer the expected prosecutions, ***655 the more likely the legislature meant to require the prosecuting officials to go into the issue of fault')." (*Ibid.*)

We need not address all of the *Jorge M.* factors

Copr. © Bancroft-Whitney and West Group 1998

because section 25658(a) falls easily into the category of crimes courts historically have determined to be public welfare offenses for which proof of knowledge or criminal intent is unnecessary. First, the statute does not expressly require a mental state. More to the point, the statute is closely akin to those public welfare offenses that " 'are purely regulatory in nature and involve widespread injury to the public.' " (*Jorge M., supra,* 23 Cal.4th at p. 872, 98 Cal.Rptr.2d 466, 4 P.3d 297.) Like those offenses, section 25658(a) is more regulatory than penal, addressed more to the public welfare than to the individual punishment of the transgressor. As one court has opined when addressing the purpose of section 25658: "[I]t may be assumed that the provisions prohibiting certain transactions with minors are designed to protect them from harmful influences." (*Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 188, 67 Cal.Rptr. 734; accord, *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd., supra,* 7 Cal.4th at p. 567, 28 Cal.Rptr.2d 638, 869 P.2d 1163.)

*269 The statute's goal of avoiding a broader societal harm rather than imposing individual punishment is illustrated by the light penalties prescribed for its violation. Violation of section 25658(a) imposes a $250 fine, between 24 and 32 hours of community service, or a combination thereof. (§ 25658, subd. (e)(1).) For a first offense involving a minor and not simply an underage person, the penalty is a $1,000 fine and at least 24 hours of community service. (*Id.,* subd. (e)(2).) No violation of section 25658(a) results in incarceration of any length. Thus, as for other public welfare offenses, section 25658(a) " ' "involve[s] light penalties and no moral obloquy or damage to reputation. Although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction." ' " **915(*Jorge M., supra,* 23 Cal.4th at p. 872, 98 Cal.Rptr.2d 466, 4 P.3d 297.) The light penalties for violating section 25658 (a) strongly suggest the Legislature has dispensed with any requirement that the People prove knowledge or some other criminal intent.

[10] Petitioner argues section 25658(a) must be interpreted to require knowledge of age despite any explicit statutory requirement, citing *Brockett v. Kitchen Boyd Motor Co.* (1972) 24 Cal.App.3d 87, 100 Cal.Rptr. 752. *Brockett* concerned civil, not criminal, liability. In passing, it stated about section 25658(a): "If one *wilfully* disobeys the law and *knowingly* furnishes liquor to a minor *with knowledge* that the minor is going to drive a vehicle on the public highways, as alleged in this case, he must face the consequences." (*Brockett, supra,* at p. 93, 100 Cal.Rptr. 752, italics added.) Not addressed in *Brockett* is whether one must face the same consequences absent such intent or knowledge. An opinion, of course, is not authority for propositions not considered. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 581, 110 Cal.Rptr.2d 809, 28 P.3d 860.) In any event, *Brockett* relied extensively on *Vesely v. Sager* (1971) 5 Cal.3d 153, 95 Cal.Rptr. 623, 486 P.2d 151, which subsequently was statutorily overruled. (See Bus. & Prof.Code, § 25602, subd. (c); Civ.Code, § 1714, subd. (b).)

More on point is *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd., supra,* 7 Cal.4th at page 569, 28 Cal.Rptr.2d 638, 869 P.2d 1163, where this court held as to seller-licensees that "the laws against sales to minors [citing Cal. Const., art. XX, § 22; Bus. & Prof.Code, § 25658(a)] can be violated *despite* the seller's (or its ***656 agents') lack of knowledge of the purchaser's minority." *Provigo,* then, at least suggests section 25658(a) also does not require proof of knowledge or intent by other persons who provide alcohol to underage persons. We conclude that to obtain a conviction under section 25658(a), the People need not prove the offender knew the person to whom he or she furnished, sold or gave an alcoholic beverage was in fact not yet 21 years old.

*270 2. *Section 25658(c)*

[11] Whether subdivision (c) of section 25658 dispenses with a proof of knowledge requirement is a more complex question. Unlike with subdivision (a), three factors mentioned in *Jorge M., supra,* 23 Cal.4th at page 873, 98 Cal.Rptr.2d 466, 4 P.3d 297

Copr. © Bancroft-Whitney and West Group 1998

--the legislative history and context of the statute, the severity of the punishment, and the seriousness of the harm to the public--have substantial application in the analysis for subdivision (c). Nevertheless, we similarly conclude the People need not prove knowledge or intent to establish a violation of subdivision (c).

First and foremost, the legislative history of section 25658(c) strongly suggests the Legislature intended to impose guilt without a showing the offender knew the age of the person for whom alcohol was purchased. As discussed, *ante,* section 25658(c) was an amendment to the existing statute, responding to an incident in Santa Cruz County in which someone over 21 years old purchased alcoholic beverages for an underage person who thereafter became intoxicated and crashed his car, killing three minors. As originally proposed, Assembly Bill No.2029 would have proscribed "furnish[ing]" an alcoholic beverage to a "minor" if the minor then caused death or great bodily injury. This original version of the bill made the new crime punishable as either a felony or a misdemeanor, commonly called a wobbler. (Assem. Bill No.2029 (1997-1998 Reg. Sess.) as introduced Feb. 18, 1998.) The bill was amended in the Assembly to substitute the phrase "purchasing ... for" in the place of "furnishing ... to." The amendment also deleted reference to a "minor" and replaced it with "a person under the age of 21 years." That the crime could be a felony punishable in state prison remained unchanged. (Assem. Amend. to Assem. Bill No.2029 (1997-1998 Reg. Sess.) Mar. 26, 1998.)

The bill was then referred to the Assembly Committee on Public Safety. Comments to the bill include this telling one: "*This bill requires little or no intent on the part of the purchaser of alcohol for underage persons.* There is no requirement that GBI [great bodily injury] or death be foreseeable to the **916 purchaser, other than the general knowledge that alcohol can sometimes lead to dangerous situations. As is stated above, a commercial vendor is only found civilly liable and guilty of a misdemeanor if he or she sells to an obviously intoxicated minor. [¶] *Should this bill be amended to provide that the purchaser must know, or reasonably should have known, that GBI was a likely result of the purchase of the alcohol for the underage person?* " (Assem. Com. on Public Safety, Analysis of Amend. to Assem. Bill No.2029 (1997-1998 Reg. Sess.) Apr. 14, 1998, italics added, underscoring in original.)

*271 Before the full Assembly a week later, Assembly Bill No.2029 was again amended. Proposed section 25658(c) was then to read in pertinent part: "Any person who violates subdivision (a) by purchasing an alcoholic beverage for a person under the age of 21 years and the person under the age of 21 years thereafter consumes the alcohol and thereby proximately causes great bodily injury to himself, herself, ***657 or any other person is guilty of a public offense punishable by imprisonment in a county jail not to exceed one year or in state prison. *In order to be punishable by imprisonment in the state prison pursuant to this subdivision:* [¶] *(1) The purchaser shall have known or reasonably should have known that the person for whom he or she was purchasing was under the age of 21 years ....*" (Assem. Amend. to Assem. Bill No.2029 (1997-1998 Reg. Sess.) Apr. 21, 1998, italics added.)

As the Legislative Counsel's Digest for this proposed amendment explained, "[t]he bill would require that to be punishable as a felony the purchaser must have known or reasonably should have known that the person for whom he or she was purchasing was under the age of 21 years ...." (Legis. Counsel's Dig., Assem. Bill No.2029 (1997-1998 Reg. Sess.) Apr. 21, 1998.)

The substance of Assembly Bill No.2029 was then added to Assembly Bill No. 1204, then before the state Senate. (Sen. Amend. to Assem. Bill No. 1204 (1997-1998 Reg. Sess.) June 3, 1998.) In the Senate Committee on Public Safety, a question was raised concerning the foreseeability of the injury caused by the underage drinker. "As the opposition notes, this provision would provide a potential prison sentence for an act not directly caused by the person. A 21 year old college student who gives a

Copr. © Bancroft-Whitney and West Group 1998

20 year old friend a beer could be subject to an increased misdemeanor penalty if that 20 year old friend were to trip down a flight of stairs after drinking the beer and breaks his/her arm." (Sen. Com. on Public Safety, Analysis of Amend. to Assem. Bill No. 1204 (1997-1998 Reg. Sess.) June 3, 1998.) "SHOULD WE PUNISH ONE PERSON FOR THE UNFORESEEABLE SUBSEQUENT BEHAVIOR OF ANOTHER BECAUSE THE FIRST PERSON COMMITTED AN OFFENSE?" (*Ibid.*)

Although a concern was raised in the Senate committee about the foreseeability of the injury, no question was raised about the felony provision or its requirement that the offender knew or should have known the age of the person for whom he was buying alcohol. Nevertheless, Assembly Bill No. 1204 was thereafter amended to delete the felony option together with its intent requirement, leaving section 25658(c) as a misdemeanor provision only, with no explicit intent requirement. (Sen. Amend. to Assem. Bill ***272** No. 1204 (1997-1998 Reg. Sess.) June 30, 1998.) It was this version that was eventually passed, enrolled, sent to the Governor, and signed into law. [FN9]

> FN9. As the Court of Appeal explained: "The substance of [Assembly Bill No.] 1204 was then incorporated into a related bill proceeding through the Senate, [Senate Bill No.] 1696, to ensure that its provisions would not be super[s]eded if both bills were enacted and [Senate Bill No.] 1696 was chaptered last. (Legis. Counsel's Dig., Sen. Bill No. 1696, Stats. 1998 (1997–1998 Reg. Sess.).) ([Senate Bill] 1696.) In fact, that is what happened. [Assembly Bill No.] 1204 was chaptered on September 14, 1998. [Senate Bill] 1696 was chaptered on September 18, 1998. Section 25658 was amended to include subdivision (c) by Senate Bill 1696."

The Court of Appeal below reasoned: "A review of this history shows that the Legislature considered incorporating an express mental state element into the statute when the subdivision could be prosecuted as a felony. It may be inferred that the Legislature intended the misdemeanor to be a strict liability statute when it deleted the felony provision ****917** without moving the requirement of a specific mental state into the remaining misdemeanor portion of subdivision (c)." While this inference is *****658** strong, petitioner contends the appellate court's view of the legislative history is simplistic because it fails to view the totality of the legislative history, which indicates a legislative concern with not only the potential offender's knowledge of the drinker's age, but also with his or her subjective awareness of the foreseeability of the harm caused by the drinker.

As our recitation of the legislative history demonstrates, the Legislature was, at various points, concerned *both* with the possibility that one could be convicted of a felony under the new law even though unaware of the age of the person for whom alcohol was bought *and* with the possibility the purchaser could be convicted although unaware the drinker intended to become intoxicated or to drive. But that the Legislature may have entertained multiple concerns about the proposed law does not undermine the obvious inference that in deleting the felony option, with its attached intent requirement, the Legislature intended to leave the new crime a misdemeanor only, with no intent requirement.

Interpretation of section 25658(c) as a strict liability offense is bolstered by a consideration of other statutes addressing related issues, all of which appear in the same portion of the Business and Professions Code as does section 25658. (See art. 3 ["Women and Minors"], ch. 16 ["Regulatory Provisions"], div. 9 ["Alcoholic Beverages"].) For example, section 25658.2, subdivision (a) provides: "A parent or legal guardian who *knowingly* permits his or her child ... under the age of 18 years, to consume an alcoholic beverage ... at the home of the parent or legal guardian [under certain conditions] is guilty of [a] misdemeanor." (Italics added.) Similarly, section 25657, subdivision (b) provides: "In any place of business where alcoholic beverages are ***273** sold to be consumed upon the premises, to employ or *knowingly permit* anyone to loiter in or about said premises for the purpose of

Copr. © Bancroft-Whitney and West Group 1998

begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting [is guilty of a misdemeanor]." (Italics added.) Finally, section 25659.5, subdivision (d) provides: "Any purchaser of keg beer who *knowingly* provides false information as required by subdivision (a) is guilty of a misdemeanor." (Italics added.)

[12] Because the wording of these statutes shows the Legislature if it wishes knows how to express its intent that knowledge be an element of an offense, the absence of such a requirement in section 25658(c) indicates it intended no such requirement. (*People v. Murphy* (2001) 25 Cal.4th 136, 159, 105 Cal.Rptr.2d 387, 19 P.3d 1129.) "It is a settled rule of statutory construction that where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes." (*People v. Norwood* (1972) 26 Cal.App.3d 148, 156, 103 Cal.Rptr. 7.) In sum, the legislative history and context of section 25658(c) tilts heavily in favor of criminal liability without proof of knowledge or intent.

[13] The second factor we find significant is the severity of the punishment. (*Jorge M., supra,* 23 Cal.4th at p. 873, 98 Cal.Rptr.2d 466, 4 P.3d 297.) The greater the punishment for a particular crime, the more likely the Legislature intended to require the state to prove an offender acted with some culpable mental state. "For crimes which impose severe punishment, '... the usual presumption that a defendant must know the facts that make his conduct illegal should apply.' (***659*Staples v. United States* [(1994)] 511 U.S. [600,] 619, [114 S.Ct. 1793, 128 L.Ed.2d 608].)" (*People v. Coria* (1999) 21 Cal.4th 868, 878, 89 Cal.Rptr.2d 650, 985 P.2d 970.) For example, we reasoned in *Jorge M.* that the "Legislature's choice of potential felony [rather than misdemeanor] punishment ... reinforces the presumption expressed by [Penal Code] section 20 and suggests that correspondingly strong evidence of legislative intent is required to exclude mens rea from the offense." (*Jorge M., supra,* at p. 880, 98 Cal.Rptr.2d 466, 4 P.3d 297.)

Section 25658(c) is punishable as a misdemeanor, not a felony. In general, punishment **918 for a misdemeanor cannot exceed confinement in a county jail for up to six months, a fine not to exceed $1,000, or both. (Pen.Code, § 19.) The maximum confinement for a misdemeanor is one year in jail. (*Id.,* § 19.2.) A violation of section 25658(c), though not a felony, provides for a punishment greater than that prescribed for the typical misdemeanor because a violator "shall be punished by imprisonment in a county jail *for a minimum term of *274 six months* not to exceed one year, by a fine not exceeding one thousand dollars ($1,000), or by both imprisonment and fine." (§ 25658, subd. (e)(3), italics added.)

Although the heightened penalty tends to distinguish section 25658(c) from the ordinary misdemeanor and suggests we should imply a mental element to this crime, a higher than normal penalty does not necessarily preclude a crime from being a public welfare offense; the severity of the punishment is, instead, a factor in the overall calculus in determining whether proof of a mental element must be implied. Here, the punishment falls somewhere in the middle, greater than that prescribed for the typical misdemeanor, but less than that for the typical wobbler or felony.

In addition to the potential length of possible incarceration, petitioner contends the reputational injury and personal disgrace he will suffer should his conviction for violating section 25658(c) be allowed to stand are factors relevant to determining the severity of the punishment. We agree. Discussing this issue, Justice Traynor opined for this court: "Under many statutes enacted for the protection of the public health and safety, e.g., traffic and food and drug regulations, criminal sanctions are relied upon even if there is no wrongful intent. *These offenses usually involve light penalties and no moral obloquy or damage to reputation.* Although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction. The offenses are not crimes in the orthodox sense, and wrongful intent is not required in the interest of

Copr. © Bancroft-Whitney and West Group 1998

enforcement." (*People v. Vogel* (1956) 46 Cal.2d 798, 801, fn. 2, 299 P.2d 850, italics added (*Vogel*), quoted in *Jorge M., supra,* 23 Cal.4th at p. 872, 98 Cal.Rptr.2d 466, 4 P.3d 297.) At issue in *Vogel* was the crime of bigamy. Justice Traynor further explained: "The severe penalty for bigamy [then up to a $5,000 fine, confinement in county jail, or in state prison for up to 10 years], *the serious loss of reputation conviction entails,* the infrequency of the offense, and the fact that it has been regarded for centuries as a crime involving moral turpitude, make it extremely unlikely that the Legislature meant to include the morally innocent to make sure the guilty did not escape." (*Vogel, supra,* at p. 804, 299 P.2d 850, fn. omitted, italics added.)

More recently, the Court of Appeal addressed the question whether the crime of misdemeanor animal cruelty (Pen.Code, § 597f, subd. (a)) required a showing of either civil or criminal negligence. (*People v. Speegle* (1997) 53 Cal.App.4th 1405, 62 Cal.Rptr.2d 384.) The court found the ***660 reputational injury associated with the criminal mistreatment and neglect of animals to justify the higher, criminal negligence standard. "In our society, those who mistreat animals are the deserved object of obloquy, and their conduct is wrongful of itself and not just as a matter of legislative declaration." (*Id.* at p. 1415, 62 Cal.Rptr.2d 384.)

*275 Like the bigamist in *Vogel, supra,* 46 Cal.2d 798, 299 P.2d 850, and the defendant who kept, neglected, and starved 200 poodles in *People v. Speegle, supra,* 53 Cal.App.4th 1405, 62 Cal.Rptr.2d 384, a person who purchases alcoholic beverages for an underage person, enabling that person to become intoxicated and to cause "great bodily injury or death," may expect severe censure from the general public. That drunk drivers, and especially underage drunk drivers, cause death and destruction on our highways is common knowledge, and anyone contributing to that societal tragedy would suffer significant reputational injury. Considering the heightened misdemeanor penalty together with the societal condemnation a violator of section 25658(c) would encounter, we conclude the severity of the punishment weighs in favor of requiring some intent element for section 25658(c).

The third factor we find particularly pertinent is the seriousness of the harm or injury **919 to the public. (*Jorge M., supra,* 23 Cal.4th at p. 873, 98 Cal.Rptr.2d 466, 4 P.3d 297.) The more serious and widespread the expected harm from the prohibited conduct, the more likely the Legislature intended to create a public welfare offense for which no proof of knowledge or intent is required. We explained the significance of this factor in *Jorge M.:* "The AWCA [Assault Weapons Control Act] is a remedial law aimed at protecting the public against a highly serious danger to life and safety. The Legislature presumably intended that the law be effectively enforceable, i.e., that its enforcement would actually result in restricting the number of assault weapons in the hands of criminals and the mentally ill. In interpreting the law to further the legislative intent, therefore, we should strive to avoid any construction that would significantly undermine its enforceability. This is not to suggest this court would or should read any element out of a criminal statute simply to ease the People's burden of proof. But, when a crime's statutory definition does not expressly include any scienter element, the fact the Legislature intended the law to remedy a serious and widespread public safety threat militates against the conclusion it also intended impliedly to include in the definition a scienter element especially burdensome to prove." (*Id.* at pp. 880-881, 98 Cal.Rptr.2d 466, 4 P.3d 297.)

The harm that section 25658(c) aims to avoid is the death and great bodily injury of underage drivers, their passengers and other collateral victims. Unlike section 25658(a), which criminalizes the mere furnishing, selling or giving of alcohol to an underage person, section 25658(c) includes two additional and significant elements: consumption of the beverage and serious injury or death. One may fairly conclude the law addresses a "serious and widespread public safety threat." (*Jorge M., supra,* 23 Cal.4th at p. 881, 98 Cal.Rptr.2d 466, 4 P.3d 297.) Implying an intent or knowledge requirement would necessarily undermine the statute's enforceability and reduce its effectiveness in reducing the *276 number of deaths and injuries associated with underage drinking. We conclude this factor militates against inferring an intent

Copr. © Bancroft-Whitney and West Group 1998

requirement for section 25658(c).

Considering these factors together, we find the legislative history of section 25658(c), its context, and the seriousness of ***661 the harm to the public particularly persuasive in demonstrating that no knowledge-of-age requirement should be imposed. Although the public obloquy for violation of the statute and the minimum of six months in jail for its violation result in a more severe penalty than normal for a misdemeanor offense, section 25658(c) remains a misdemeanor, not a felony nor even a wobbler. On balance, we are convinced the legislative history provides the strongest evidence of legislative intent. That history indicates the Legislature intended that a conviction of violating section 25658(c) does not require a showing the offender had knowledge of the imbiber's age or other criminal intent. Accordingly, although the People must prove an accused "purchas[ed]" an alcoholic beverage "for" an underage person, the People need not also prove the accused knew that person was under 21 years of age.

D. The Mistake of Fact as to Age Defense

[14] Although the People need not prove knowledge of age in order to establish a violation of section 25658(c), the question remains whether petitioner was entitled to raise a mistake of fact defense concerning Turpin's age. The Penal Code sets forth the broad outlines of the mistake of fact defense. Section 26 of that code provides: "All persons are capable of committing crimes except [¶] ... [¶] Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." Thus, for example, in a case where a defendant was convicted of murder for shooting his wife, but claimed he honestly believed the gun was not loaded, the trial court erred by refusing to instruct the jury that a person who entertains "an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act and omission lawful, is not guilty of a crime." **920(*People v. Goodman* (1970) 8 Cal.App.3d 705, 709, 87 Cal.Rptr. 665.) [FN10] Similarly, in a case where a defendant, charged with forcible rape and kidnapping, claimed a reasonable belief that the victim consented, we held the jury should have been instructed on a mistake of fact because if a reasonable yet mistaken belief in consent was proved, the accused would not "possess the wrongful intent that is a *277 prerequisite under Penal Code section 20 to a conviction of either kidnapping ... or rape by means of force or threat." (*People v. Mayberry* (1975) 15 Cal.3d 143, 155, 125 Cal.Rptr. 745, 542 P.2d 1337.)

FN10. *People v. Goodman, supra,* 8 Cal.App.3d 705, 87 Cal.Rptr. 665, was disapproved on another ground in *People v. Beagle* (1972) 6 Cal.3d 441, 451-452, 99 Cal.Rptr. 313, 492 P.2d 1.

[15] As a general matter, however, a mistake of fact defense is not available unless the mistake disproves an element of the offense. (*People v. Parker* (1985) 175 Cal.App.3d 818, 822, 223 Cal.Rptr. 284; 1 Witkin & Epstein, Cal.Criminal Law, *supra,* Defenses, § 39, p. 372.) Thus, in *Parker,* the defendant illegally entered a structure, allegedly believing it was a commercial building. Because the building was in fact a residence, he was charged with and convicted of first degree burglary. (Pen.Code, § 459.) On appeal, the appellate court rejected his argument that the trial court had erred by failing to instruct the jury that his mistaken belief the building was an uninhabited structure constituted an affirmative defense. (*Parker, supra,* at p. 821, 223 Cal.Rptr. 284.) The appellate court reasoned that because the prosecution was not required to prove a defendant knew the building entered was a residential one in order to convict of ***662 burglary, "ignorance concerning the residential nature of a building does not render a defendant's unlawful entry into it with a felonious intent innocent conduct." (*Id.* at pp. 822-823, 223 Cal.Rptr. 284.)

Of course, murder (*People v. Goodman, supra,* 8 Cal.App.3d 705, 87 Cal.Rptr. 665), rape (*People v. Mayberry, supra,* 15 Cal.3d 143, 125 Cal.Rptr. 745, 542 P.2d 1337) and burglary (*People v. Parker, supra,* 175 Cal.App.3d 818, 223 Cal.Rptr. 284) all require proof of criminal intent, whereas public

Copr. © Bancroft-Whitney and West Group 1998

welfare offenses such as a violation of section 25658(c) do not. We addressed the mistake of fact defense for public welfare offenses in *People v. McClennegen* (1925) 195 Cal. 445, 234 P. 91, which involved a joint prosecution of several defendants for violating the state's antisyndicalism statute. It was alleged the defendants conspired to effect a change in the "industrial ownership and control in the existing economic and social system" and to "effect political changes in this state and in the United States of America by means and methods denounced by [the antisyndicalism] act." (*Id.* at p. 448, 234 P. 91.) Although we ultimately found the antisyndicalism act did not establish a public welfare crime, we discussed the mental state required for such offenses, which we denoted "statutory crimes." "The commission of various acts are made punishable under our criminal procedure, even though the doer be ignorant of the fact that the doing of the act constitutes an offense. *A mistake of fact, or a want of intent, is not in every case a sufficient defense for the violation of a criminal statute.* Statutes enacted for the protection of public morals, public health, and the public peace and safety are apt illustrations of the rule just announced. [Citations.] ... [¶] '... [T]herefore if a criminal intent is not an essential element of a statutory *278 crime, it is not necessary to prove any intent in order to justify a conviction. Whether a criminal intent or guilty knowledge is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute, in view of its manifest purpose and design. There are many instances in recent times where the Legislature in the exercise of the police power has prohibited, under penalty, the performance of a specific act. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted *and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt.* The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute.' " **921(*Id.* at pp. 469-470, 234 P. 91, italics added.) In other words, for public welfare offenses for which intent need not be proved, a mistake of fact defense was unavailable.

People v. Schwartz, supra, 70 P.2d 1017, 28 Cal.App.2d Supp. 775, illustrates the point. That case involved the sale of impure or adulterated food, a public welfare offense. The court there explained that the defendant "does not need to engage in that business; but if he does engage in that business the law will not permit him to evade his responsibility to the public, declared by law, *by pleading ignorance* of the quality or contents of that which he may lawfully sell only if it is pure." (*Id.* at p. 778, 70 P.2d 1017, italics added.) Similarly, in *People v. Bickerstaff* (1920) 46 Cal.App. 764, 190 P. 656, a case involving the sale of a beverage with greater than 1 percent alcohol, "it is not a defense for the defendant to prove that he did not know the liquor sold by him contained the prohibited ***663 amount of alcohol." (*Id.* at p. 771, 190 P. 656.)

Notwithstanding the foregoing, the modern trend is to require proof of some criminal intent or knowledge in order to secure a criminal conviction. (*People v. Simon, supra,* 9 Cal.4th at p. 521, 37 Cal.Rptr.2d 278, 886 P.2d 1271.) *Vogel, supra,* 46 Cal.2d 798, 299 P.2d 850, is illustrative. In *Vogel,* the defendant was charged with bigamy in violation of Penal Code section 281, which at that time provided that "[e]very person having a husband or wife living, who marries any other person ... is guilty of bigamy." The trial court rejected the defendant's proffered evidence that he reasonably believed his first wife had divorced him, citing *People v. Kelly* (1939) 32 Cal.App.2d 624, 625, 90 P.2d 605, which held that "[a] second marriage under an erroneous assumption that the first marriage has been annulled or dissolved is not a defense to a charge of bigamy."

The *Vogel* court agreed the People need not establish the defendant knew he was still married to his first wife, but need only prove he was in fact still *279 married to her. Nevertheless, we concluded the defendant was entitled to raise a mistake of fact as an affirmative defense, explaining that he would not be "guilty of bigamy, if he had a bona fide and reasonable belief that facts existed

Copr. © Bancroft-Whitney and West Group 1998

that left him free to remarry." (*Vogel, supra,* 46 Cal.2d at p. 801, 299 P.2d 850; see also *People v. Stuart* (1956) 47 Cal.2d 167, 302 P.2d 5 [mistake of fact defense available to charge of selling adulterated drug]; *In re Marley, supra,* 29 Cal.2d at p. 530, 175 P.2d 832 [suggesting but not deciding mistake of fact defense available to charge of shortweighting].)

Most notable, perhaps, of this line of cases is *People v. Hernandez* (1964) 61 Cal.2d 529, 39 Cal.Rptr. 361, 393 P.2d 673. In that case, the defendant was charged with statutory rape (now called unlawful sexual intercourse; see Pen.Code, § 261.5), a crime that does not require proof the defendant knew the prosecutrix's age. The defendant claimed "he had in good faith a reasonable belief that the prosecutrix was 18 years or more of age" (*Hernandez, supra,* at p. 530, 39 Cal.Rptr. 361, 393 P.2d 673), whereas in fact she was 17 years nine months old. Since the 19th century the law had made the defense of mistake of fact as to age unavailable for this crime. (*People v. Ratz* (1896) 115 Cal. 132, 134-135, 46 P. 915.) In an example of an opinion's venerability offering it no protection, this court overruled *Ratz* and held the defendant was entitled to raise a defense of mistake of fact. Citing Penal Code section 20 and *Vogel, supra,* 46 Cal.2d 798, 299 P.2d 850, we stated: "We are persuaded that the reluctance to accord to a charge of statutory rape the defense of a lack of criminal intent has no greater justification than in the case of other statutory crimes, where the Legislature has made identical provision with respect to intent. ' "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense.... [I]t has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication." ' " (*Hernandez, supra,* at pp. 535-536, 39 Cal.Rptr. 361, 393 P.2d 673.)

These cases follow the modern trend away from imposing strict liability for criminal offenses and to require some showing of knowledge **922 or criminal intent, even if only criminal negligence. (See *Jorge M., supra,* 23 Cal.4th at p. 887, 98 Cal.Rptr.2d 466, 4 P.3d 297 ["the People bear the burden of proving the defendant *knew or should have known* the firearm ***664 possessed the characteristics bringing it within the" Assault Weapons Control Act].) In addition to interpreting statutory language to require some showing of criminal intent, as we did in *Jorge M.,* we may permit a conviction absent evidence of knowledge, but allow a defendant to raise a mistake of fact in his defense, as in *Vogel, supra,* 46 Cal.2d 798, 299 P.2d 850, and *People v. Hernandez, supra,* 61 Cal.2d 529, 39 Cal.Rptr. 361, 393 P.2d 673. Although by *280 tradition (and due process) the People often have the burden to prove knowledge or intent, shifting the burden to the defendant to prove his lack of guilty or criminal intent is in some cases also permissible. Thus, for example, addressing the crime of bigamy in *Vogel,* we explained that "guilty knowledge" was " formerly a part of the definition of bigamy [but] was omitted from [Penal Code] section 281 *to reallocate the burden of proof on that issue* in a bigamy trial. Thus, the prosecution makes a prima facie case upon proof that the second marriage was entered into while the first spouse was still living [citations], and his bona fide and reasonable belief that facts existed that left the defendant free to remarry is a defense to be proved by the defendant." (*Vogel, supra,* at pp. 802-803, 299 P.2d 850, italics added, fn. omitted; see also *People v. Taylor* (2001) 93 Cal.App.4th 933, 952-953, 114 Cal.Rptr.2d 23 (conc. & dis. opn. of Morrison, J.) [suggesting the same reallocation of the burden of proving intent in a prosecution for possession of a cane sword in violation of Pen.Code, § 12020, subd. (a)(1)].)

As in *Vogel, supra,* 46 Cal.2d 798, 299 P.2d 850, we conclude that, although the prosecution need not prove an offender's knowledge of age in order to establish a violation of section 25658(c), petitioner was entitled to raise an affirmative defense, for which he would bear the burden of proof, that he honestly and reasonably believed Turpin was at least 21 years old. Recognizing the viability of a mistake of fact defense is consistent with the modern trend away from strict liability for criminal

Copr. © Bancroft-Whitney and West Group 1998

offenses as well as with Penal Code section 20 and the statutory scheme of which Business and Professions Code section 25658(c) is but a part. Article 3, chapter 16, division 9 of the Business and Professions Code contains both section 25658(c) and 25660, and the two statutes must be construed together. (*Renee J. v. Superior Court, supra,* 26 Cal.4th at p. 743, 110 Cal.Rptr.2d 828, 28 P.3d 876.) Section 25660, relating to licensees, provides in pertinent part: "Proof that the defendant-licensee, or his employee or agent, *demanded, was shown and acted in reliance upon such* [*described*] *bona fide evidence* [of majority and identity] in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 *shall be a defense* to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon." (Italics added.) Section 25660 thus specifically authorizes licensees to raise a mistake of fact defense as to the age of a customer to whom alcohol was sold or served. "Although a violation of section 25658 can occur despite the seller's lack of knowledge that the purchaser is under the age of 21, the seller's liability is not absolute because 'the Legislature has furnished a procedure whereby he may protect himself, namely, ... section 25660 [allowing the seller to rely on bona fide evidence of majority and identity].' " (*Provigo Corp. v. Alcoholic Beverage Control Appeals Bd., supra,* 7 Cal.4th at pp. 564-565, 28 Cal.Rptr.2d 638, 869 P.2d 1163.)

***281** Does section 25660 suggest the Legislature's intent to permit a similar defense to nonlicensees? We hold that it does. A contrary conclusion would lead to an absurd *****665** result (see, e.g., *In re J. W., supra,* 29 Cal.4th at p. 210, 126 Cal.Rptr.2d 897, 57 P.3d 363; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77, 124 Cal.Rptr.2d 519, 52 P.3d 695), to wit, while licensees, who may serve alcoholic beverages to dozens or even hundreds of customers in a single night, can demand, check and act in reliance on bona fide evidence of identity and age and thereby enter a safe harbor, protected from criminal liability, a nonlicensee who serves alcoholic beverages only occasionally and to just a few persons, and who similarly demands, checks ****923** and acts in reliance on bona fide evidence of identity and age, and may honestly and reasonably believe the person for whom he or she purchased alcohol was over 21 years old, would absent a mistake of fact defense be subject to criminal liability, punishable by a minimum of six months in jail. (§§ 25658(c), 25658, subd. (e)(3).) The Legislature could not have intended this disparity of treatment.

We conclude the trial court erred in refusing petitioner's offer to prove he honestly and reasonably believed Turpin was over 21 years old.

CONCLUSION

We reach the following conclusions: (1) Section 25658(c) is not limited to the shoulder tap scenario, but applies whenever an offender *purchases* alcoholic beverages *for* an underage person; (2) section 25658(c) does not apply in the typical social party host situation, because the host does not purchase alcohol for any particular guest; (3) the prosecution need not prove an offender knew (or should have known) the age of the person to whom he or she furnished alcohol in order to prove a violation of section 25658(a); (4) the prosecution need not prove an offender knew (or should have known) the age of the person for whom he or she purchased alcohol in order to prove a violation of section 25658(c); and (5) a person charged with violating section 25658(c) may defend against the charge by claiming an honest and reasonable belief that the person for whom he or she purchased alcohol was 21 years of age or older. The defendant bears the burden of proof for this affirmative defense.

Because the trial court refused to admit evidence that petitioner believed Turpin was over 21 years old, it erred. The judgment of the Court of Appeal denying the petition for writ of habeas corpus is reversed and the cause remanded to that court. The Court of Appeal is directed to grant the petition for a writ of habeas corpus, vacate the judgment of the Sacramento County Superior Court in *People v. Michael Lee Jennings,* No. 00M07614, and remand the case to the superior court for further proceedings. The clerk of the ***282** Court of

Copr. © Bancroft-Whitney and West Group 1998

Appeal is directed to remit a certified copy of this opinion to the superior court for filing, and respondent shall serve another copy thereof on the prosecuting attorney in conformity with Penal Code section 1382, subdivision (a)(2). (See *In re Gay* (1998) 19 Cal.4th 771, 830, 80 Cal.Rptr.2d 765, 968 P.2d 476.)

WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, CHIN, BROWN and MORENO, JJ.

34 Cal.4th 254, 95 P.3d 906, 17 Cal.Rptr.3d 645, 04 Cal. Daily Op. Serv. 7765, 2004 Daily Journal D.A.R. 10,456

Briefs and Other Related Documents (Back to top)

• 2003 WL 23873441 (Appellate Petition, Motion and Filing) Petitioner's Reply Brief on the Merits (Sep. 22, 2003)Original Image of this Document (PDF)

• S115009 (Docket) (Apr. 08, 2003)

END OF DOCUMENT

Copr. © Bancroft-Whitney and West Group 1998

DYNA-MED, INC., Plaintiff and Appellant,
v.
FAIR EMPLOYMENT AND HOUSING COMMISSION, Defendant and Respondent
L.A. No. 32145.

Supreme Court of California

Nov 2, 1987.

SUMMARY

The trial court denied an employer's petition for writ of mandate to direct the Fair Employment and Housing Commission to set aside its decision finding the employer had fired an employee in retaliation for her filing an employment discrimination complaint under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), and awarding lost wages plus punitive damages. The employee had initially filed a complaint alleging her employer discriminated with regard to wages and promotional opportunities on the basis of sex. The complaint was resolved by means of a written settlement agreement pursuant to which the employer agreed not to engage in retaliatory action against the employee for filing the complaint. Shortly after executing the agreement, the employer fired the employee. Thereafter, the employee filed a new complaint, alleging that she was fired in retaliation for her original complaint. (Superior Court of San Diego County, No. 501958, Sheridan E. Reed, Judge.) The Court of Appeal, Fourth Dist., Div. One, No. D001228, affirmed.

The Supreme Court, holding that the FEHA does not authorize the Fair Employment and Housing Commission to award punitive damages, reversed the judgment of the Court of Appeal with directions. The court noted that Gov. Code, § 12970, subd. (a) (scope of relief), provides that the commission may issue an order requiring a respondent to take such action, including but not limited to certain prescribed remedies, as in the judgment of the commission will effectuate the purposes of the FEHA. However, it held that such statutory language permits only additional corrective, nonpunitive remedies. Thus, the court held that it could not be inferred that the Legislature intended sub silentio to empower the commission to award punitive damages. (Opinion by Panelli, J., with Lucas, C. J., Mosk, Arguelles, Eagleson and Kaufman, JJ., concurring. Separate dissenting opinion by Broussard, J.) *1380

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d, 1e) Civil Rights § 3--Employment--Fair Employment and Housing Commission--Power to Award Punitive Damages.

In a proceeding under the California Fair Employment and Housing Act, Gov. Code, § 12900 et seq., the Fair Employment and Housing Commission did not have authority to award punitive damages on behalf of an employee who had been fired by her employer five hours after the employer had agreed not to engage in retaliatory actions against the employee for filing a complaint with the commission. Although Gov. Code, § 12970, subd. (a) (scope of relief), provides that the commission may issue an order requiring a respondent to take such action, including but not limited to certain prescribed remedies, as in the judgment of the commission will effectuate the purposes of the act, such statutory language permits only additional corrective, nonpunitive remedies. Thus, the act does not authorize the commission to award punitive damages.

[Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions, note, 85 A.L.R.3d 351.]

(2) Statutes § 21--Construction--Legislative Intent--Purpose of Law.

A court's first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. Where uncertainty exists consideration should be given to the consequences

Copr. © Bancroft-Whitney and West Group 1998

that will flow from a particular interpretation.

(3) Statutes § 21--Construction--Legislative Intent--Legislative History.
Both the legislative history of a statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. A statute should be construed, whenever possible, so as to preserve its constitutionality.

(4) Words, Phrases, and Maxims--Remedy.
A remedy is something that corrects or counteracts an evil: corrective, counteractive, reparation. *1381 It is the legal means to recover a right or to prevent or obtain redress for a wrong.

(5) Damages § 22--Exemplary or Punitive Damages--Purpose.
Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.

(6) Damages § 22.2--Exemplary or Punitive Damages--Availability--Enabling Statute.
The general rule is that where an enabling statute is essentially remedial, and does not carry a penal program declaring certain practices to be crimes or provide penalties or fines in vindication of public rights, an agency does not have discretion to devise punitive measures such as the prescription of penalties or fines. The statutory power to command affirmative action is remedial, not punitive.

(7) Statutes § 44--Construction--Aids--Contemporaneous Administrative Construction.
The contemporaneous construction of a new enactment by the administrative agency charged with its enforcement, although not controlling, is entitled to great weight. However, an administrative agency cannot by its own regulations create a remedy which the Legislature has withheld. Administrative regulations that alter or amend the statute or enlarge or impair its scope are void; courts not only may, but it is their obligation to strike down such regulations.

(8) Statutes § 34--Construction--Language--Words and Phrases--Ejusdem Generis (General Limited by Specific).
The doctrine of *ejusdem generis* states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense it would not have mentioned the particular things or classes of things which would in that event become mere surplusage.

(9) Statutes § 31--Construction--Language--Words and Phrases--Expressio Unius Est Exclusio Alterius (Exclusion of Other Things Not Expressed).
The doctrine of *expressio unius est exclusio alterius* means that the expression of certain things in a statute necessarily involves exclusion of other things not expressed.

(10) Statutes § 33--Construction--Language--Words and Phrases--Noscitur a Sociis (Meaning Derived From Context).
Under the rule *1382 of *noscitur a sociis*, the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.

(11) Statutes § 29--Construction--Language--Legislative Intent--Canons of Construction.
Canons of statutory construction are mere guides and will not be applied so as to defeat the underlying legislative intent otherwise determined.

(12) Damages § 22--Exemplary or Punitive Damages--Caution in Granting.
Civ. Code, § 3294, subd. (a), allowing the award of exemplary damages only when the defendant has been guilty of oppression, fraud, or malice, codifies the universally recognized principle that the law does not favor punitive damages, and they should be granted with the greatest caution.

[See Cal.Jur.3d. Damages, § 116 et seq.; Am.Jur.2d. Damages, § 236 et seq.]

(13) Statutes § 22--Construction--Reasonableness.
Statutes are to be given a reasonable and commonsense interpretation consistent with the apparent legislative purpose and intent, and which, when applied, will result in wise policy rather than mischief or absurdity.

(14) Statutes § 42--Construction--Aids--Erroneous Administrative Construction.
An erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change.

Copr. © Bancroft-Whitney and West Group 1998

(15) Statutes § 42--Construction--Aids--Unpassed Bills.
Unpassed bills, as evidences of legislative intent, have little value.

(16) Statutes § 51--Construction--Codes--Conflicting Provisions-- Surplusage.
Statutes must be harmonized, both internally and with each other, to the extent possible. Interpretive constructions which render some words surplusage are to be avoided.

COUNSEL

Mickeal Gehringer, Michael Wischkaemper, McDonald & Allen, Stephen P. McDonald and Rosemary A. Sullivan for Plaintiff and Appellant. *1383

Gibson, Dunn & Crutcher, Willard Z. Carr, Jr., Paula L. Hemminger, Jerome M. Behrens, Behrens & Viau, James C. Paras, Morrison & Foerster, Stephen A. Bokat, Paula J. Connelly, Michael D. Ott, County Counsel (Madera), and Greg Kamptner, Deputy County Counsel, as Amici Curiae on behalf of Plaintiff and Appellant.

John K. Van de Kamp, Attorney General, Andrea S. Ordin, Chief Assistant Attorney General, Beverly Tucker and Marian M. Johnston, Deputy Attorneys General, for Defendant and Respondent.

Joan M. Graff, Robert Barnes, Rebecca I. McKee, Patricia S. Mar, Martha J. Shaver, Feldman, Waldman & Kline, Judith E. Kurtz and Nancy L. Davis as Amici Curiae on behalf of Defendant and Respondent.

PANELLI, J.

In *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211 [185 Cal.Rptr. 270, 649 P.2d 912] (hereafter *Commodore Home*), we held that a court may award punitive damages in a civil suit for job discrimination pursuant to the California Fair Employment and Housing Act (FEHA or Act) (Gov. Code, § 12900 et seq.). [FN1] The issue in the present case is whether the FEHA authorizes the Fair Employment and Housing Commission (Commission or the commission) to impose punitive damages, a question left unresolved in *Commodore Home*. [FN2] (*Id.* at p. 220.) As will appear, we conclude that the FEHA does not authorize the commission to award punitive damages.

FN1 All further statutory references are to the Government Code unless otherwise indicated.

FN2 The majority in *Commodore Home* assumed for purposes of argument that punitive damages are not available from the commission. (32 Cal.3d at p. 218, fn. 7.) Justice Richardson, dissenting, joined by Justice Kaus, expressly concluded that the FEHA does not allow the commission to award exemplary damages. (32 Cal.3d at p. 228.)

I. Background

The California Fair Employment Practice Act (FEPA) was enacted in 1959 (former Lab. Code, § 1410 et seq.; see Stats. 1959, ch. 121, § 1, pp. 1999-2005) and recodified in 1980 as part of the FEHA (Stats. 1980, ch. 992, § 4, p. 3140 et seq.). "The law establishes that freedom from job discrimination on specified grounds, ... is a civil right. (§ 12921.) It declares that such discrimination is against public policy (§ 12920) and an unlawful employment practice (§ 12940). [Fn. omitted.]" (*Commodore Home, supra*, 32 Cal.3d at p. 213.) The statute creates two administrative bodies: the *1384 Department of Fair Employment and Housing (the department) (§ 12901), whose function is to investigate, conciliate, and seek redress of claimed discrimination (§ 12930), and the commission, which performs adjudicatory and rulemaking functions (§ 12935; see also § 12903). An aggrieved person may file a complaint with the department (§ 12960), which must promptly investigate (§ 12963). If the department deems a claim valid it seeks to resolve the matter - in confidence - by conference, conciliation, and persuasion. (§ 12963.7.) If that fails or seems inappropriate, the department may issue an accusation to be heard by the commission. (§ § 12965, subd. (a), 12969.) The department acts as prosecutor on the accusation and argues the complainant's case before the commission. (*State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, 428 [217 Cal.Rptr. 16, 703 P.2d 354]; *Commodore Home, supra*, 32 Cal.3d at p. 213.)

If an accusation is not issued within 150 days after the filing of the complaint or if the department earlier determines not to prosecute the case and the matter is not otherwise resolved, the department must give the complainant a "right to sue" letter. The complainant

Copr. © Bancroft-Whitney and West Group 1998

may then bring a civil suit in superior court. (§ 12965, subd. (b); see Commodore Home, supra, 32 Cal.3d at pp. 213-214.)

In the instant case Linda Olander initially filed a complaint with the department alleging that Dyna-Med, Inc. (Dyna-Med) discriminated against her with regard to wages and promotional opportunities on the basis of sex in violation of the FEPA. The complaint was resolved by means of a written settlement agreement pursuant to which Dyna-Med agreed, inter alia, not to engage in retaliatory action against Olander for filing the complaint. [FN3] Approximately five hours after executing the agreement, Dyna-Med fired Olander. Olander filed a new complaint, alleging that she was fired in retaliation for her original complaint. Following a hearing, the commission issued its decision ordering Dyna-Med to pay Olander her lost wages, plus $7,500 in punitive damages. [FN4] The superior court denied Dyna-Med's *1385 petition for a writ of mandate. The Court of Appeal affirmed. We granted review.

FN3 Retaliation for filing a complaint was also prohibited by the FEPA. (Former Lab. Code, § 1420, subd. (e); see now Gov. Code, § 12940, subd. (f).)

FN4 The department did not initially ask for punitive damages, but did so only after the administrative law judge's proposed decision, whereupon the commission granted the department leave to amend its accusation to include a prayer for exemplary damages and ordered that the matter be reopened for the taking of additional evidence and argument on the issue. (See § § 11516, 11517, subd. (c).) Following the supplemental hearing, the administrative law judge (ALJ) denied the department's request on grounds that to impose liability on Dyna-Med for exemplary damages would be "fundamentally unfair" and in violation of its right to due process of law in that the amended accusation seeking such damages was based in part on evidence given by Dyna-Med in defense of the original accusation, at which time Dyna-Med had no notice of a possible later charge "in aggravation and substantially enhanced liability, without legal precedent."
In reversing the ALJ, the commission stated that the ALJ found that Dyna-Med's conduct "was sufficiently egregious to support an award" of such damages. The record, however, shows that the ALJ found *only* that the department had "adduced evidence" in support of its allegations that Dyna-Med's violations were particularly "deliberate, egregious or inexcusable" so as to support the award of such damages.

The sole issue before us is whether the FEHA grants the commission authority to award punitive damages. Resolution of this issue depends on the meaning of section 12970, subdivision (a), which sets forth the scope of relief available from the commission. That section provides: "If the commission finds that a respondent has engaged in any unlawful practice under this part, it shall state its findings of fact and determination and shall issue ... an order requiring such respondent to cease and desist from such unlawful practice and to take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part, and including a requirement for report of the manner of compliance."

Before addressing the parties' arguments we state briefly the basis for the Court of Appeal's determination that the commission is authorized to award punitive damages.

"It is undisputed," the Court of Appeal stated, "an administrative agency's power to award such damages must arise from express authorization. Here, the Legislature delegated broad authority to the Commission to fashion appropriate remedies for unlawful employment practices in section 12970, subdivision (a): [¶] 'If the commission finds that a respondent has engaged in any unlawful practice under this part, it ... shall issue and cause to be served on the parties an order requiring such respondent ... to take such action, *including, but not limited to*, hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, *as, in the judgment of the commission*, will effectuate the purposes of this part, and including a requirement for report of the manner of compliance.' ... [¶] Attempting to harmonize this specific provision in context of the entire statutory framework, we find in section 12920 the underlying purpose of the act is to provide effective remedies to eliminate

Copr. © Bancroft-Whitney and West Group 1998

discriminatory employment practices. Consequently, considering the legislative mandate to liberally construe the act to further these purposes (§ 12993), we conclude it has statutorily authorized the Commission to impose punitive damages where *1386 necessary to effectively remedy and eliminate unlawful FEHA employment practices." (Italics in original.)

In the Court of Appeal's judgment, the facts of the instant case "prove ordinary restitutionary remedies are often ineffective in eliminating discriminatory practices." [FN5] The court thus determined that "in light of the limited remedial effect of [the] permissible compensatory remedies, the award of punitive damages may be the only method of fulfilling the purposes of the act, including encouraging plaintiffs to seek relief by increasing their potential recovery. ..."

FN5 The court stated that awards of back pay are frequently insignificant because interim earnings are deducted or offset; the value of reinstatement may be negligible because by the time employment discrimination cases are resolved, the plaintiff has had to find another job; and upgrading, back pay and reinstatement in cases of retaliation, as here, may not be effective deterrents or satisfactory remedies because the original work environment may no longer be conducive to the complainant's continued employment.

II. Discussion

(1a) Petitioner Dyna-Med and its amici [FN6] argue that although the Court of Appeal correctly recognized that the statutory language and legislative history of section 12970, subdivision (a) are determinative of the issue before us, the court misread the statute and misapplied common principles of statutory construction in concluding that the Legislature has authorized the commission to award punitive damages.

FN6 Amici appearing in support of Dyna-Med are the Chamber of Commerce of the United States, the California Chamber of Commerce, the Merchants and Manufacturers Association, the County of Madera, and Friendly Ford Peugeot. Arguments advanced by Dyna-Med and its supporting amici will hereafter be referred to as Dyna-Med's arguments.

Respondent Commission and its amici [FN7] maintain that the FEHA is unambiguous in authorizing broad relief limited only by the judgment of the commission as to what will effectuate the purposes of the Act, and that the commission has properly determined that the award of exemplary damages in appropriate cases is necessary to deter deliberate discrimination.

FN7 Amici appearing in support of the commission are the Employment Law Center of the Legal Aid Society of San Francisco and Equal Rights Advocates, Inc. Arguments advanced by the commission and its supporting amici will hereafter be referred to as Commission's arguments.

A. *Statutory Language*

(2) Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary *1387 import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844 [157 Cal.Rptr. 676, 598 P.2d 836]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224], and cases cited; see also *Brown v. Superior Court* (1984) 37 Cal.3d 477, 484-485 [208 Cal.Rptr. 724, 691 P.2d 272].) Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. (*Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688 [104 Cal.Rptr. 110].) (3) Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. (*California Mfrs. Assn., supra*, 24 Cal.3d at p. 844; see also *Steilberg v. Lackner* (1977) 69 Cal.App.3d 780, 785 [138 Cal.Rptr. 378].) A statute should be construed whenever possible so as to preserve its constitutionality. (See *Department of Corrections v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 197, 207 [152 Cal.Rptr. 345, 589 P.2d 853]; *County of Los*

Copr. © Bancroft-Whitney and West Group 1998

Angeles v. Riley (1936) 6 Cal.2d 625, 628-629 [59 P.2d 139, 106 A.L.R. 903]; *County of Los Angeles v. Legg* (1936) 5 Cal.2d 349, 353 [55 P.2d 206].)

We consider, therefore, the statutory language in the context of the legislative purpose. The Legislature has declared that the purpose of the FEHA is to provide effective remedies which will eliminate discriminatory practices. (§ 12920.) (4) Webster's Dictionary defines a "remedy" in part as "something that corrects or counteracts an evil: corrective, counteractive, reparation .... [T]he legal means to recover a right or to prevent or obtain redress for a wrong. ..." (Webster's New Internat. Dict. (3d ed. 1961) p. 1920, col. 1.) Here the statutorily authorized remedies - hiring, reinstatement, upgrading with or without back pay, restoration to membership in a respondent labor organization - are exclusively corrective and equitable in kind. They relate to matters which serve to make the aggrieved employee whole in the context of the employment.

Punitive damages, by contrast, are neither equitable nor corrective; punitive damages serve but one purpose - to punish and through punishment, to deter. (5) "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." (*Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 266-267 [69 L.Ed.2d 616, 632, 101 S.Ct. 2748]; see ***1388***Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)

(6) The general rule is that "[w]here the enabling statute is essentially remedial, and does not carry a penal program declaring certain practices to be crimes or provide penalties or fines in vindication of public rights, an agency does not have discretion to devise punitive measures such as the prescription of penalties or fines. The statutory power to command affirmative action is remedial, not punitive." (Modjeska, Administrative Law Practice and Procedure (1982) Sanctions and Remedies, § 5:9, pp. 170-171, fns. omitted; see *Edison Co. v. Labor Board* (1938) 305 U.S. 197, 235-236 [83 L.Ed. 126, 143, 59 S.Ct. 206]; see also *Youst v. Longo* (1987) 43 Cal.3d 64, 82-83 [233 Cal.Rptr. 294, 729 P.2d 728] [where regulatory scheme provides for one kind of relief and is silent on another, it should be construed to exclude the latter].)

(1b) Commission acknowledges that punitive damages are different in kind from the enumerated remedies, but argues that in certain cases, as here, where there was "intentional egregious" discrimination and the make-whole remedies are inappropriate, [FN8] the imposition of exemplary damages is necessary as a deterrent to effectuate the purpose of the Act to eliminate employment discrimination. Citing the statutory directive that the provisions of the Act shall be liberally construed (§ 12993), Commission argues that the language empowering it to take such action "including, but not limited to," the specified actions, is sufficiently broad to authorize it to award punitive damages. By regulation since repealed and in its precedential decisions, the commission has itself so interpreted the statute. [FN9]

FN8 Olander did not seek reinstatement at Dyna-Med. See also footnote 5, *ante*.

FN9 In 1980 the commission promulgated a regulation which provided: "While normal monetary relief shall include relief in the nature of back pay, reasonable exemplary or compensatory damages may be awarded in situations involving violations which are particularly deliberate, egregious or inexcusable." (Former Cal. Admin. Code, tit. 2, § 7286.9, subd. (c), Cal. Admin. Notice Register, tit. 2, Register 80, No. 25-A - 6-21-80; see also *D.F.E.H. v. Ambylou Enterprises, Inc.* (1982) FEHC No. 82-06 [CEB precedential decisions 1982-1982, CEB 3].) This regulation was applied in the instant case. Although the regulation was repealed in 1985 (Cal. Admin. Notice Register, tit. 2, Register 85, No. 20 - 5-16-85), the commission continues to award exemplary as well as compensatory damages.
Neither the regulation nor the precedential decisions stating the commission's authority to award punitive damages was in effect at the time of Olander's discharge.

(7) The contemporaneous construction of a new enactment by the administrative agency charged with its enforcement, although not controlling, is entitled to great weight. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281]; *People v. McGee* (1977) 19 Cal.3d 948, 961 [***1389**140 Cal.Rptr. 657, 568 P.2d 382]; *City of Los Angeles v. Rancho Homes, Inc.* (1953) 40 Cal.2d 764,

Copr. © Bancroft-Whitney and West Group 1998

770-771 [256 P.2d 305].) The commission's interpretation of the Act as authorizing it to award punitive damages was not, however, "contemporaneous." Not until 1980 - more than 20 years after the Act's enactment - did the commission undertake to award damages. (See fn. 9, *ante*.) The final meaning of a statute, moreover, rests with the courts. An administrative agency cannot by its own regulations create a remedy which the Legislature has withheld. (*Commodore Home, supra*, 32 Cal.3d at p. 227 (dis. opn. of Richardson, J.); see *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 117 [172 Cal.Rptr. 194, 624 P.2d 244]; *J. R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 29 [160 Cal.Rptr. 710, 603 P.2d 1306]; *Morris v. Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689, 433 P.2d 697].) "'Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations.' [*Morris v. Williams, supra*, and cases cited.] And this is the rule even when, as here, the statute is subsequently reenacted without change.' [Citation.]" (*American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 618-619 [186 Cal.Rptr. 345, 651 P.2d 1151] (dis. opn. of Mosk, J.). See also *Nadler v. California Veterans Board* (1984) 152 Cal.App.3d 707, 718-719 [199 Cal.Rptr. 546].)

(1c) We take no issue with the premise that exemplary damages would serve to deter discrimination. Nor do we dispute that the phrase "including, but not limited to" is a phrase of enlargement. (See *American National Ins. Co. v. Employment & Housing Com., supra*, 32 Cal.3d at p. 611 (dis. opn. of Mosk, J.); *Fraser v. Bentel* (1911) 161 Cal. 390, 394 [119 P. 509]; 2A Sutherland, Statutory Construction (4th ed. 1984) § 47.07, p. 133 [hereafter Sutherland].) Nevertheless, given the extraordinary nature of punitive damages, these factors, in our view, are insufficient to support an inference that the Legislature intended sub silentio to empower the commission to impose punitive damages. Commission's argument, taken to its logical conclusion, would authorize every administrative agency granted remedial powers to impose punitive damages so long as the statute directs that its provisions are to be liberally construed to effectuate its purposes. [FN10]

FN10 The Court of Appeal reached just this conclusion. According to the Court of Appeal: "If the Legislature gives an agency responsibility to protect the public and authorizes it to take the appropriate steps necessary to carry out the purposes of an act it enforces, then such an agency should be authorized to determine claims for punitive damages."

Seeking to alleviate concern that a "flood of agencies" would arrogate to themselves similar authority, Commission states that only four other agencies have been granted comparable statutory authority to order actions that will effectuate the purposes of the acts they enforce - the Agricultural Labor *1390 Relations Board (ALRB) (Lab. Code, § 1160.3); the Public Employment Relations Board (PERB) (§ 3541.5); the State Personnel Board (§ 19702, subd. (e)); and the California Horse Racing Board (Bus. & Prof. Code, § 19440) - and none awards punitive damages.

That no similarly empowered agency awards punitive damages lends support, in our view, to the conclusion that the power to make punitive assessments will not be implied merely from a legislative directive that an act's remedial provisions are to be liberally construed to effectuate its purposes. Indeed, in *Youst v. Longo, supra*, 43 Cal.3d 64, we specifically determined that the broad powers the Legislature vested in the California Horse Racing Board do not include the power to award compensatory or punitive tort damages. "[T]he power to award compensatory and punitive tort damages to an injured party is a judicial function. Although the [Horse Racing] Board has very broad power to regulate and discipline wrongful conduct which involves horseracing in California, the relevant statutes do not authorize affirmative compensatory relief such as tort damages." (*Id.* at p. 80, italics omitted.)

As the United States Supreme Court stated in another context: "[I]t is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end. [¶] ... [A]ffirmative action to 'effectuate the policies of this Act' is action to achieve the remedial objectives which the Act sets forth." (*Republic Steel Corp. v. Labor Board* (1940) 311 U.S. 7, 12 [85 L.Ed. 6, 10, 61 S.Ct. 77]; accord, *Carpenters Local v. Labor Board* (1961) 365 U.S. 651, 655 [6 L.Ed.2d 1,

Copr. © Bancroft-Whitney and West Group 1998

4, 81 S.Ct. 875]; see *Laflin & Laflin v. Agricultural Labor Relations Bd.* (1985) 166 Cal.App.3d 368, 380-381 [212 Cal.Rptr. 415].)

A more reasonable reading of the phrase "including, but not limited to," is that the Legislature intended to authorize the commission to take such other remedial action as in its judgment seems appropriate to redress a particular unlawful employment practice and to prevent its recurrence, thus eliminating the practice. [FN11] (8)(See fn. 12.) , (9)(See fn. 13.) , (10)(See fn. 14.) A reading of the phrase as permitting only additional corrective remedies *1391 comports with the statutory construction doctrines of *ejusdem generis*, [FN12] *expressio unius est exclusio alterius* [FN13] and *noscitur a sociis*. [FN14] (See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, supra*, 25 Cal.3d at pp. 330-331 [applying *ejusdem generis*]; see also *Richerson v. Jones* (3d Cir. 1977) 551 F.2d 918, 927 [*ejusdem generis* invoked in concluding that the Federal Equal Employment Opportunity Act of 1972 does not authorize punitive assessments].) (11), (1d) Although these canons of construction are mere guides and will not be applied so as to defeat the underlying legislative intent otherwise determined (*Cal. State Employees' Assn. v. Regents of University of California* (1968) 267 Cal.App.2d 667, 670 [73 Cal.Rptr. 449]), their application here to limit the commission's authority to the ordering of corrective, nonpunitive action is consistent with both the remedial purpose of the Act and the ordinary import of the statutory language.

FN11 For example, in a recent age and race discrimination case involving the termination of a Black attorney, the negotiated settlement agreement provided for a year's severance pay and a special retirement plan, plus the company's informing all its supervisors that harassment is illegal and contrary to company policy. (*Arco Settles With Former Employee*, The Recorder (Mar. 10, 1987) p. 2, col. 4.)

FN12 "'[T]he doctrine of *ejusdem generis* ... states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage.'" (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317, 331, fn. 10 [158 Cal.Rptr. 370, 599 P.2d 676], quoting *Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 819 [100 Cal.Rptr. 501].)

FN13 *Expressio unius est exclusio alterius* means that "the expression of certain things in a statute necessarily involves exclusion of other things not expressed. ..." (*Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397, 403 [135 Cal.Rptr. 266].)

FN14 Under the rule of *noscitur a sociis*, "'the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.'" (*People v. Stout* (1971) 18 Cal.App.3d 172, 177 [95 Cal.Rptr. 593], quoting *Vilardo v. County of Sacramento* (1942) 54 Cal.App.2d 413, 420 [129 P.2d 165].)

This reading, moreover, harmonizes the various parts of the statute. Section 12964, referring to resolution of allegedly unlawful practices through conciliation, provides that "such resolutions may be in the nature of, but are not limited to, types of remedies that might be ordered after accusation and hearing," i.e., the section 12970 remedies. While the corrective remedies enumerated in section 12970 are appropriate to impose in the context of a resolution by conciliation, punitive damages are antithetical to the conciliation process and, as indicated, are not "in the nature of" the type of remedy authorized by section 12970.

A construction of section 12970 that limits the commission to corrective, nonpunitive remedies also harmonizes the Act with the statutory provisions governing the award of punitive damages in civil actions. (12) Civil Code section 3294, subdivision (a) allows the award of exemplary damages only when the defendant has been guilty of "oppression, fraud, or malice." *1392 This provision codifies the universally recognized principle that "[t]he law does not favor punitive damages and they should be granted with the greatest caution." (*Beck v. State Farm Mut. Auto. Ins. Co.* (1976) 54 Cal.App.3d 347, 355 [126 Cal.Rptr. 602].) Although the commission

Copr. © Bancroft-Whitney and West Group 1998

evidently has adopted the statutory standard, nothing in the FEHA requires it to do so or provides any guidelines for the award of punitive damages. [FN15]

FN15 We observe that the standard initially adopted by the commission and applied in this case - authorizing the award of punitive damages in cases of violations that are "particularly deliberate, egregious or inexcusable" (see fn. 9, *ante*) - was not in conformity with the statutory standard.

Further, subdivision (b) of Civil Code section 3294 provides that in an action for the breach of an obligation not arising out of contract, an employer shall not be liable for exemplary damages based on the conduct of his employee unless "the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct ... or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." Because the FEHA contains no comparable limitation on an employer's liability for his employee's wrongful acts (see § § 12926, subd. (c), 12940, subd. (a)), interpreting the Act as authorizing the commission to award punitive damages would expose an employer in an administrative proceeding to greater derivative liability than in a judicial action.

Finally, Civil Code section 3295 precludes discovery of a defendant's financial condition in actions seeking exemplary damages until the plaintiff has established a prima facie entitlement thereto. (See generally *Rawnsley v. Superior Court* (1986) 183 Cal.App.3d 86, 90-91 [227 Cal.Rptr. 806].) This protection is inapplicable to administrative proceedings (see Code Civ. Proc., § 22 [defining "action"]) and no comparable provision appears in the FEHA.

(13) Statutes are to be given a reasonable and commonsense interpretation consistent with the apparent legislative purpose and intent "and which, when applied, will result in wise policy rather than mischief or absurdity." (*Honey Springs Homeowners Assn. v. Board of Supervisors* (1984) 157 Cal.App.3d 1122, 1136, fn. 11 [203 Cal.Rptr. 886].) Absent express language dictating otherwise, it will not be presumed that the Legislature intended to authorize an administrative agency - free of guidelines or limitation - to award punitive damages in proceedings lacking the protections mandated in a court of law. *1393

As we recognized in a related context, the Legislature's objective in providing for an administrative rather than a judicial resolution of discrimination complaints was to provide a "speedy and informal" process unburdened with "procedural technicalities." (*Stearns v. Fair Employment Practice Com.* (1971) 6 Cal.3d 205, 214 [98 Cal.Rptr. 467, 490 P.2d 1155] [concerning transfer to the Commission's predecessor of housing discrimination complaints].) "To achieve this end the [Fair Employment Practices Commission] established procedures that are as simple and uncomplicated as possible. Complaints are drafted by laymen; the commission informally attempts to eliminate discriminatory practices before instituting formal accusations; the commission, on a finding of discrimination, may fashion remedies both to correct unique cases of such practice as well as to curb its general incidence." (*Ibid.*) The award of punitive damages - "traditionally ... limited to the judicial forum with its more extensive procedural protections" (*Commodore Home, supra*, 32 Cal.3d at p. 217, fn. 6; see also *Curtis v. Loether* (1974) 415 U.S. 189, 196-197 [39 L.Ed.2d 260, 268, 94 S.Ct. 1005]) - has no place in this scheme.

(1e) In sum, we are of the view that the statutory language, given its ordinary import and construed in context of the purposes and objectives of the law, together with the Legislature's silence on the issue of punitive damages, compels the conclusion that the Legislature did not intend to grant the commission authority to award punitive damages. If, as Commission argues, the inability to award such damages deprives it of an effective means to redress and prevent unlawful discrimination, it is for the Legislature, rather than this court, to remedy this defect. We are not, however, convinced that the commission lacks sufficient means to redress and eliminate discrimination. The Act authorizes class actions and permits the director of the department to address systematic problems, such as pattern and practice matters, by bringing a complaint on his or her own motion. (§ § 12960, 12961; *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 867 [193 Cal.Rptr. 760].) The commission, in turn, has broad authority to fashion an appropriate remedy without resort to punitive damages. (See, e.g., fn. 11, *ante*; cf. *McDaniel v. Cory* (Alaska 1981) 631 P.2d 82, 88.)

Copr. © Bancroft-Whitney and West Group 1998

The statutory scheme provides for compliance review and judicial enforcement of commission orders (§ 12973) and makes it a misdemeanor offense for any person wilfully to violate an order of the commission (§ 12975).

Although we believe that statutory interpretation disposes of the issue, we nevertheless address the additional arguments advanced by the parties.

B. *Legislative History*

In support of their respective arguments, both parties cite the legislative history of the Act and the Legislature's failure since its enactment to modify it or adopt various proposed amendments. *1394

As indicated above, the FEPA was enacted in 1959 (former Lab. Code, § 1410 et seq.). That same year the Legislature also enacted the Hawkins Act (former Health & Saf. Code, § 35700 et seq., enacted by Stats. 1959, ch. 1681, § 1, pp. 4074-4077), prohibiting housing discrimination, and the Unruh Civil Rights Act (Civ. Code, § § 51-52, enacted by Stats. 1959, ch. 1866, § § 1-4, p. 4424, replacing former Civ. Code, § § 51-54, added by Stats. 1905, ch. 413, § § 1-4, pp. 553-554), prohibiting discrimination in business establishments. (See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 500 [86 Cal.Rptr. 88, 468 P.2d 216] [concurrent enactment of FEPA and Civil Rights Act evinced legislative intent to exclude employment discrimination from the latter act].) While both the Hawkins and Unruh Acts provided for judicial relief and authorized the award of damages, [FN16] the FEPA provided for administrative relief and made no mention of damages.

FN16 The Hawkins Act permitted complainants to sue for both equitable relief and damages in an amount of not less than $500. (Stats. 1959, ch. 1681, § 1, at p. 4076.) The Civil Rights Act authorized the award of actual damages, plus punitive damages in the amount of $250. (Stats. 1959, ch. 1866, § 2, p. 4424.)

In 1963 the Hawkins Act was replaced by the Rumford Fair Housing Act (former Health & Saf. Code, § 35700 et seq., enacted by Stats. 1963, ch. 1853, § § 1-4, pp. 3823-3830), which for the first time afforded an administrative remedy for housing discrimination. Although the Rumford Act retained language authorizing the award of damages, it transformed the statutory minimum recoverable in judicial proceedings (see fn. 16, *ante*) into a statutory maximum in administrative proceedings. [FN17] In 1980 the employment and housing statutory schemes were combined to form the FEHA, with enforcement of both sections of the Act vested in the commission. (Stats. 1980, ch. 992, § 4, pp. 3140-3142.)

FN17 The Rumford Act initially empowered the commission's predecessor, the Fair Employment Practices Commission (FEPC), if it determined that certain make-whole remedies were not available, to award damages in an amount not to exceed $500. (Stats. 1963, ch. 1853, § 2, pp. 3828-3829.) In 1975 the maximum damage award was increased to $1,000. (Stats. 1975, ch. 280, § 1, p. 701.) In 1977 the act was amended to authorize the FEPC to order payment of "actual and punitive" damages not exceeding $1,000. The 1977 amendment also for the first time described the FEPC's authority to require remedial action in housing discrimination cases as "including, but not limited to" the actions specified. (Stats. 1977, ch. 1187, § 10, p. 3893; ch. 1188, § 13.1, pp. 3905-3906.) In 1981 the statute was rewritten to remove the limit on the amount of compensatory damages, while retaining a $1,000 limit, adjusted for inflation, on punitive damages. (§ 12987, subd. (2), Stats. 1981, ch. 899, § 3, p. 3424.)

Dyna-Med argues that in light of the parallel development of legislation governing employment and housing discrimination and the ultimate union of the respective acts in one, with common enforcement procedures, it is significant that the Legislature, while authorizing the award of damages in housing cases, has never done so in employment cases. Had the Legislature intended to authorize the commission to award damages in employment *1395 cases, it knew how to do so, as it demonstrated in enacting the other civil rights statutes.

Commission, in turn, asserts that the separate origins of the housing and employment discrimination statutes explain why one explicitly allows damages and the other does not. Moreover, the remedy provisions in the housing section expressly note punitive damages only to limit their availability. (§ 12987, subd. (2).) [FN18] Consequently, the absence of any express reference to such damages within the employment context should be construed not as a

Copr. © Bancroft-Whitney and West Group 1998

lack of authority, but rather, as a lack of limitation on such damages.

FN18 As indicated, section 12987, as amended 1981, provides for the payment of punitive damages not to exceed $1,000, adjusted annually for inflation, and the payment of actual damages. Before its amendment, the section provided for the payment of actual and punitive damages not to exceed $1,000. (See fn. 17, *ante*.)

Commission's argument is unpersuasive. A review of the relevant statutes discloses that when the Legislature intends to authorize an agency to award damages for discrimination, it does so expressly (e.g., § 12987, subd. (2) [housing]; § 19702, subd. (e) [civil service]; cf. Civ. Code, § 52, subd. (a) [civil action against business establishments]), and when it authorizes the award of a penalty or punitive damages, it limits the amount (§ 12987, subd. (2) [$1,000]; cf. Civ. Code, § 52, subd. (a) [no more than three times actual damages]).

Commission observes that since 1980 when it first interpreted the FEHA as authorizing the award of punitive damages, the Legislature has amended the Act several times without addressing the remedy provisions. [FN19] This inaction, Commission argues, is an indication that its ruling was consistent with the Legislature's intent. (See *Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 922 [156 P.2d 1]; *Action Trailer Sales, Inc. v. State Bd. of Equalization* (1975) 54 Cal.App.3d 125, 133-134 [126 Cal.Rptr. 339].)

FN19 During the 1981-1982 legislative session, the Legislature twice declined to enact statutes (Sen. Bill No. 516; Assem. Bill No. 879) which, in part, would have prohibited the commission from awarding punitive damages. (See Sen. Final Hist. (1981-1982 Reg. Sess.) p. 339; 1 Assem. Final Hist. (1981-1982 Reg. Sess.) p. 647.)

Dyna-Med, by contrast, relies on a bill introduced but not enacted by the Legislature in 1976 (Assem. Bill No. 3124, 2 Assem. Final Hist. (1975-1976 Sess.) p. 1658), which would expressly have authorized the commission to award limited damages in employment discrimination cases, and on the provision of Senate Bill No. 2012, introduced in 1984, which would have amended section 12970, subdivision (a) to specifically authorize compensatory and punitive damages as "declaratory of existing law," but which was removed before the bill's enactment (see Stats. 1984, ch. 1754, § 3, p. 6406). *1396

We find the subsequent legislative history of the statute ambiguous and of little assistance in discerning its meaning. The Legislature's failure to modify the statute so as to require an interpretation contrary to the commission's construction is not determinative: (14) "[A]n erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change. [Citations.]" (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757-758 [151 P.2d 233, 155 A.L.R. 405].) Similarly inconclusive is the Legislature's rejection of specific provisions which would have expressly allowed the award of damages. (15) Unpassed bills, as evidences of legislative intent, have little value. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 735, fn. 7 [180 Cal.Rptr. 496, 640 P.2d 115, 30 A.L.R.4th 1161]; *Miles v. Workers' Comp. Appeals Bd.* (1977) 67 Cal.App.3d 243, 248, fn. 4 [136 Cal.Rptr. 508]; see also *United States v. Wise* (1962) 370 U.S. 405, 411 [8 L.Ed.2d 590, 594-595, 82 S.Ct. 1354]; 2A Sutherland, *supra*, § 49.10, pp. 407-408.) This is particularly true here, where the rejected provisions manifest conflicting legislative intents: the 1976 provision would have limited the amount of damages the commission could award; the 1981-1982 provisions would have prohibited the commission from awarding punitive damages (see fn. 19, *ante*); and the 1984 amendment would have authorized the award of compensatory and punitive damages "as declaratory of existing law." (See generally *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 58 [69 Cal.Rptr. 480].)

Were we, however, to consider unpassed legislation, we would find it significant that at the same time the Legislature rejected the provision declaring the commission's authority to award damages, it amended the Civil Service Act to grant the Personnel Board authority identical to the commission's, *plus* the power to award compensatory damages. (Stats. 1984, ch. 1754, § 6, pp. 6408-6409; see § 19702, subd. (e).) [FN20] Where the Legislature simultaneously empowers one agency to award damages and declines similarly to empower another, there is a strong inference of a legislative intent to withhold the authority from the nonempowered agency. (See *City of Port Hueneme v. City of Oxnard*

Copr. © Bancroft-Whitney and West Group 1998

(1959) 52 Cal.2d 385, 395 [341 P.2d 318].) *1397

FN20 Subdivision (e), enacted 1984, provides in relevant part: "If the board finds that discrimination has occurred ... the board shall issue ... an order requiring the appointing authority to cause the discrimination to cease and desist and to take such action, *including, but not limited to*, hiring, reinstatement or upgrading of employees, with or without back pay, *and compensatory damages*, which, in the judgment of the board, will effectuate the purposes of this part. Consistent with this authority, the board may establish rules governing the award of compensatory damages." (Italics added.)
Subdivision (a) of section 19702 was amended at the same time to provide that "discrimination" includes harassment and that this provision "is declaratory of existing law." (Stats. 1984, ch. 1754, § 6, p. 1173.)

Further, if, as Commission argues, the nonexhaustive language of section 12970 were sufficient to embrace the authority to award damages, the specific references to damages in both the Civil Service Act and the housing section of the FEHA [FN21] would be mere surplusage. (16) "[S]tatutes must be harmonized, both internally and with each other, to the extent possible. [Citations.] Interpretive constructions which render some words surplusage ... are to be avoided. [Citations.]" (*California Mfrs. Assn. v. Public Utilities Com., supra*, 24 Cal.3d at p. 844.)

FN21 Section 12987 provides in pertinent part that in housing discrimination cases the commission shall issue an order requiring the respondent to "cease and desist from such [discriminatory] practice and to take such actions, as, in the judgment of the commission, will effectuate the purpose of this part, *including, but not limited to*, any of the following: [¶] (1) The sale or rental of the housing accommodation ... or ... of a like housing accommodation, ... or the provision of financial assistance, ... [¶] (2) *The payment of punitive damages in an amount not to exceed one thousand dollars dollars ($1,000)*, adjusted annually in accordance with the Consumer Price Index, *and the payment of actual damages*. [¶] (3) Affirmative or prospective relief."

As Justice Richardson, dissenting in *Commodore Home*, stated: "The express provision for damages in this parallel statutory scheme [the housing section of the FEHA] - strongly suggests ... that the omission of [a punitive damages remedy] from the employment discrimination provisions was intentional. The Legislature has clearly demonstrated that it knows how to add a punitive remedy to this statute when it wishes to do so." (32 Cal.3d at p. 225.)

C. *Federal and Other State Legislation*

The remedy language of section 12970 bears a close resemblance to section 10(c) of the National Labor Relations Act (NLRA)(29 U.S.C.A. § 151 et seq., § 160(c)) relating to unfair labor practices, which authorizes the National Labor Relations Board (NLRB) to issue a cease and desist order and require the violator "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter ...." Federal courts have continually interpreted the NLRA as not allowing monetary remedies other than back pay. (See *Edison Co. v. Labor Board, supra*, 305 U.S. 197, 235-236 [83 L.Ed.2d 126, 143]; *Van Hoomissen v. Xerox Corporation* (N.D.Cal. 1973) 368 F.Supp. 829, 837; see also *Commodore Home, supra*, 32 Cal.3d at p. 224 (dis. opn. of Richardson, J.).) Title VII of the federal Civil Rights Act of 1964, relating to employment discrimination, in section 706(g) similarly authorizes the trial court to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..., or any other equitable relief as the court deems appropriate." (42 U.S.C.A. § 2000e-5(g).) This language, which was *1398 modeled after the NLRA (*Richerson v. Jones, supra*, 551 F.2d 918, 927), also has been interpreted by the majority of federal courts as barring monetary remedies other than back pay (*Great American Fed. S. & L. Assn. v. Novotny* (1979) 442 U.S. 366, 374-375 [60 L.Ed.2d 957, 965-966, 99 S.Ct. 2345]; see, e.g., *Shah v. Mt. Zion Hospital & Medical Ctr.* (9th Cir. 1981) 642 F.2d 268, 272; *Richerson v. Jones, supra*, at pp. 926-927; *Van Hoomissen v. Xerox Corporation, supra*, 368 F.Supp. 829, 836-838; *Commodore Home, supra*, at p. 225 and cases cited (dis. opn. of Richardson, J.)).

Dyna-Med invokes the principle that the use of identical language in analogous statutes requires like interpretation. (*Belridge Farms v. Agriculture Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665].) Commission argues

Copr. © Bancroft-Whitney and West Group 1998

that the foregoing principle is inapposite because of the limiting reference in the NLRA to *affirmative* action and in title VII to *equitable* relief, as contrasted with section 12970's reference without modification to "action." Commission points further to the differing purposes of the NLRA and the FEPA: the first exists to promote industrial peace and stability through collective bargaining and to create a cooperative atmosphere of recognition between labor and management (*Carey v. Westinghouse Corp.* (1964) 375 U.S. 261, 271 [11 L.Ed.2d 320, 327-328, 84 S.Ct. 401]; *N.L.R.B. v. Pincus Bros., Inc.-Maxwell* (3rd Cir. 1980) 620 F.2d 367, 372-373; *Bloom v. N.L.R.B.* (D.C. Cir. 1979) 603 F.2d 1015, 1019), whereas the latter is designed to provide effective remedies to vindicate the individual's constitutional right to be free from employment discrimination and to eliminate discriminatory employment practices (*State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d at 432).

When first enacted, the FEPA, like the NLRA, combined the prosecutorial and adjudicative functions and provided only for administrative relief. [FN22] (Stats. 1959, ch. 121, § 1, pp. 1999-2005; see *Commodore Home, supra*, 32 Cal.3d at p. 218; cf. NLRA, § 10(b) & (c), 49 Stat. at pp. 453-454; *Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1, 24-25 [81 L.Ed. 893, 904- 905, 57 S.Ct. 615]; *Haleston Drug Stores v. National Labor Relations Bd., supra*, 187 F.2d 418, 421.) The FEPA also contained the identical "affirmative action" language as the NLRA. (Stats. 1959, *supra*, at p. 2004; *Commodore Home, supra*, 32 Cal.3d at p. 224 (dis. opn. of Richardson, J.).) In 1969 the Legislature amended Labor Code section 1426 to delete the word "affirmative." (Stats. 1969, ch. 526, § 1, p. 1142.) The legislative history *1399 suggests that this amendment was passed not to expand the power of the FEPC, but rather, to avoid confusion with the newly acquired meaning of "affirmative action" that was embraced in a 1967 amendment authorizing the FEPC to engage in "affirmative actions" with employers, employment agencies, and labor organizations. [FN23] (See former Lab. Code, § § 1413, subd. (g), 1431, added by Stats. 1967, ch. 1506, § § 1-2, pp. 3573-3574; see now § § 12927, subd. (a), 12988 [concerning housing discrimination].) Both the Enrolled Bill Report of the Department of Industrial Relations and the Enrolled Bill Memorandum of the Governor's Legislative Secretary state that the aim of the amendment was to "clear up any ambiguities ... between the two sections of the law. In other words," according to the report and memo, "*Affirmative Action* in AB 544 [the 1967 amendment] was a little broader than Affirmative Action in Section 1426 of the Labor Code [the remedies provision]." (Italics in original; see also *Commodore Home, supra*, 32 Cal.3d at p. 224 (dis. opn. of Richardson, J.).) Deletion of the word "affirmative" thus is not dispositive of the Legislature's intent concerning application to the commission of federal precedent.

FN22 A 1947 amendment to the NLRA separated the prosecuting and adjudicating functions within the NLRB. (NLRA, § 3(d), 29 U.S.C.A. § 153(d); *Haleston Drug Stores v. National Labor Relations Bd.* (9th Cir. 1951) 187 F.2d 418, 421.) In 1977 the FEPA was amended to achieve a comparable separation within the department and to establish the private right of action when the department fails to act. (Stats. 1977, ch. 1188, § § 18-37, pp. 3906-3912.)

FN23 The 1967 amendment authorized the Division of Fair Employment Practices to engage in "affirmative actions" with employers, employment agencies, and labor organizations, and defined "affirmative actions" as any educational activity for the purpose of securing greater employment opportunities for members of racial, religious, or nationality minority groups and any promotional activity designed to the same end on a voluntary basis. The amendment further provided that it should not be construed to promote employment on a preferential or quota basis. (Stats. 1967, ch. 1506, § § 1-5, pp. 3574-3575.)

In *Commodore Home*, in the context of a civil action for punitive damages, we stated that differences between the federal laws and the FEHA - the NLRA provides no right of civil action and title VII provides only for judicial handling of federal discrimination claims - "diminish the weight of the federal precedents." (32 Cal.3d at p. 217.) The NLRA, we observed, "specifies remedies the board may impose, and the cases hold merely that its language prevents *that agency* from assessing compensatory or punitive damages. [¶] Contrastingly, title VII ... expressly describes remedies that courts may assess. ... [¶] The FEHA, on the other hand, provides separate routes to resolution of claims; first, a complaint to the Department; second, if that agency fails to act, a private court action. The statute discusses remedies

Copr. © Bancroft-Whitney and West Group 1998

only in the first context; here we are concerned with those available in the second. Federal precedents do not address that problem. [Fn. omitted.]" (*Ibid.*, italics added.)

In the instant case, by contrast, the issue is the nature of administrative remedies - the only remedies provided by the NLRA and initially provided by the FEPA. In these circumstances federal precedent under the NLRA would seem to be apposite. Because the FEPA when first enacted had the *1400 identical language and procedure as the NLRA, it can reasonably be presumed that the Legislature intended the state agency to have the same powers - and only those powers - as its federal counterpart. (See *Belridge Farms v. Agricultural Labor Relations Bd., supra*, 21 Cal.3d at p. 557; cf. *Van Hoomissen v. Xerox Corporation, supra*, 368 F.Supp. at p. 837 [interpreting title VII in light of NLRA].) This is true notwithstanding the differing intents of the two acts, particularly since the remedial portion of each is designed to protect an employee against discriminatory practices. [FN24]

FN24 Section 8(3) and (4) of the NLRA (29 U.S.C.A. § 158(a)(3) and (4)) makes it an unfair labor practice to discriminate against employees for union membership or charges filed under the NLRA. Section 10(a) (29 U.S.C.A. § 160(a)) authorizes the NLRB to prevent unfair labor practices. (See generally *Labor Board v. Jones & Laughlin, supra*, 301 U.S. at pp. 30, 32 [81 L.Ed.2d at pp. 907-908, 908-909].)

Although courts in other states are divided on the availability of compensatory damages under statutory schemes similar to the FEHA (see Annot. (1978) 85 A.L.R.3d 351, 356-357), we are unaware of any case upholding the award of punitive damages. Rather, the courts seem uniformly to hold that the authority of a state agency to assess exemplary damages must be express and will not be implied from a broad authority to implement the objectives of the fair employment statute. (E.g., *Woods v. Midwest Conveyor Co., Inc.* (1982) 231 Kan. 763 [648 P.2d 234, 244-245]; *McDaniel v. Cory, supra*, 631 P.2d 82, 86-89; *Ohio Civil Rights Commission v. Lysyi* (1974) 38 Ohio St.2d 217 [67 Ohio Ops.2d 287, 313 N.E.2d 3, 6-7, 70 A.L.R.3d 1137]; see also *High v. Sperry Corp.* (S.D. Iowa 1984) 581 F.Supp. 1246, 1248; see Annot., *supra*, 85 A.L.R.3d at p. 357.)

D. *Equal Protection and Policy Considerations*

The FEHA, as indicated, provides two avenues for resolution of claims: "first, a complaint to the Department; second, if that agency fails to act, a private court action." (*Commodore Home, supra*, 32 Cal.3d at p. 217; see § § 12960, 12965, subd. (b).) Observing that punitive damages are available to persons who pursue court action (*Commodore Home, supra*, 32 Cal.3d at p. 221), Commission argues that the denial of such damages to administrative complainants will create a disparate situation that will undermine the administrative avenue and thwart the Act's primary objective of resolving discrimination complaints through the administrative procedure: complainants will be encouraged to bypass the administrative forum in favor of court action; the department will forego seeking administrative relief in the most egregious cases when punitive damages are appropriate and be unable to engage in effective "conference, conciliation and persuasion" efforts to resolve the dispute (§ 12963.7); and because complete administrative relief *1401 will be unavailable, the victims of the most outrageous situations will be forced to await relief from our already overburdened courts.

Further, denying exemplary damages in the administrative adjudication, Commission asserts, will create two classes of complainants: those who can afford to hire a private attorney and file a civil action and those "equally or even more deserving victims who lack the resources to pursue litigation by themselves and rely, instead, on the administrative process." Because economic standing is often strongly correlated with race, sex and other forms of prohibited discrimination (see *Brown v. Superior Court, supra*, 37 Cal.3d 477, 486), denial of the opportunity to obtain a punitive damages award solely because of the complainant's economic or social circumstances is contrary to the Legislature's intent to eliminate discrimination and raises serious equal protection concerns.

Commission's policy and equal protection arguments rest on speculative and seemingly conflicting premises: on the one hand, that when a case is appropriate for punitive damages, complainants will bypass the administrative forum and the department will forego seeking administrative relief, thus defeating the Act's objective of administrative resolution; and, on the other hand, that given the substantial volume of complaints received, the department pursues only the most egregious cases, with the result that claimants with weaker cases who

Copr. © Bancroft-Whitney and West Group 1998

can afford to sue will have access to exemplary damages while the most worthy victims whose cases are heard by the commission will be denied such recompense. We are aware of no authority supportive of either premise. Although Justice Richardson, dissenting in *Commodore Home*, spoke of the anomaly of allowing punitive damages to "accusors who have been unsuccessful administratively before the commission, [while denying] such damages to those whose claims have been successfully established" (32 Cal.3d at p. 222), this comment mistakenly assumes that a civil action is open only to those whose complaints the commission has refused to prosecute and overlooks the department's evident policy to permit any complainant to sue who wishes to, as well as the unlikelihood in any event of judicial recovery by a litigant whose claim the department has in fact found unworthy.

Concerning department policy, a former counsel to the department states: "Some respondents have asserted that a private right of action cannot be pursued before 150 days have passed, but this argument has not been accepted by most courts to which it is addressed. Because the investigation process ... takes time, and because the Department, as a matter of sound administrative policy, handles employment cases on a first-in-first-out basis, it is virtually impossible for an accusation to issue in an employment case before 150 days have passed. Furthermore, because of the incredible volume ***1402** of cases handled by the Department - 8,105 in fiscal year 1982 - it would be a waste of resources to investigate a case the Department knows will be pursued in court. It is, therefore, the policy not to proceed on any case which will be pursued elsewhere. This decision is clearly within the Department's discretion. ..." (Gelb & Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination* (1983) 34 Hastings L.J. 1055, 1066, fn. 87; see *Commodore Home, supra*, 32 Cal.3d at p. 218, fn. 8; *Carter v. Smith Food King* (9th Cir. 1985) 765 F.2d 916, 922-923.)

Thus, while the department no doubt pursues only cases it deems meritorious (*State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d at p. 434, fn. 14; see *Mahdavi v. Fair Employment Practice Com.* (1977) 67 Cal.App.3d 326 [136 Cal.Rptr. 421]; *Marshall v. Fair Employment Practice Com.* (1971) 21 Cal.App.3d 680 [98 Cal.Rptr. 698]), because its case load precludes the pursuit of all such claims, any complainant who so wishes may bring a private court action. In these circumstance neither policy considerations nor equal protection concerns require that the administrative and judicial remedies be identical. To the contrary, the separate avenues justify different remedies. We recognized as much in *Commodore Home* where, having noted that "the FEHA leaves an aggrieved party on his own if the Department declines to pursue an administrative claim in his behalf," we stated that "[t]o limit the damages available in a lawsuit might substantially deter the pursuit of meritorious claims, ..." (32 Cal.3d at pp. 220-221.)

Nor is an indigent complainant denied an equal opportunity to go to court. An eligible plaintiff may sue in forma pauperis (§ 68511.3, subd. (b); Cal. Rules of Court, rule 985; *Isrin v. Superior Court* (1965) 63 Cal.2d 153 [45 Cal.Rptr. 320, 403 P.2d 728]) and a complainant whose case is appropriate for the award of punitive damages is unlikely to have difficulty finding an attorney willing to serve on a contingent fee basis. Further, the court has discretion to award litigation expenses to the successful employee. (§ 12965, subd. (b).)

One recognized purpose of punitive damages is to make a civil action economically feasible. As one commentator has stated: "All serious misdeeds cannot possibly be punished by government prosecution. ... [L]imited judicial and prosecutorial resources permit prosecution for only a fraction of the crimes and violations committed. For these reasons, individual members of society must play a significant role in instituting actions to impose sanctions for serious misconduct. Society's interest in bringing a wrongdoer to justice is especially strong where the wrongdoer's conduct exceeds all bounds of decency. [¶] The doctrine of punitive damages promotes this interest. By offering the potential for recovery in excess of actual ***1403** damages, the doctrine encourages plaintiffs to bring such actions. This is particularly important where actual damages are minimal. ... Punitive damages thus can be characterized as a reward for the plaintiff's valuable role as a 'private attorney general.' Even where compensatory damages are substantial, an award of punitive damages helps to finance deserving claims by defraying the expenses of the action, such as attorneys' fees, that generally are not recoverable in American courts." (Mallor & Roberts, *Punitive Damages: Toward a Principled Approach* (1980) 31 Hastings L.J. 639, 649-650, fns. omitted.)

Moreover, in appropriate cases a complainant can

Copr. © Bancroft-Whitney and West Group 1998

seek punitive damages by filing an independent civil action alleging tort causes of action either with or without an FEHA count. (*Commodore Home, supra,* 32 Cal.3d at p. 220; see *Brown v. Superior Court, supra,* 37 Cal.3d at pp. 486-487; *Agarwal v. Johnson* (1979) 25 Cal.3d 932 [160 Cal.Rptr. 141, 603 P.2d 58]; cf. *Alcorn v. Anbro Engineering, Inc., supra,* 2 Cal.3d 493.) "The FEHA was meant to supplement, not supplant or be supplanted by, existing antidiscrimination remedies, in order to give employees the maximum opportunity to vindicate their civil rights against discrimination." (*State Personnel Bd. v. Fair Employment & Housing Com., supra,* 39 Cal.3d at p. 431, citing § 12993, subd. (a).)

Although Commission asserts that denying it authority to award punitive damages will impede the administrative resolution of cases, the converse may well be true. As we recognized in *Commodore Home,* "One basis for federal holdings under title VII is a fear that the availability of punitive damages might hamper the EEOC's efforts to resolve discrimination disputes by ' conference, conciliation, and persuasion.' [Citations.]" (32 Cal.3d at p. 217; cf. *Naton v. Bank of California* (9th Cir. 1981) 649 F.2d 691, 699 [same re pain and suffering damages under Federal Age Discrimination in Employment Act].) In *Rogers v. Exxon Research & Engineering Co.* (3d Cir. 1977) 550 F.2d 834, cited by the Ninth Circuit in *Naton, supra,* the court stated with respect to emotional distress damages: "While the existence of such an item of damages might strengthen the claimant's bargaining position with the employer, *it would also introduce an element of uncertainty which would impair the conciliation process.* Haggling over an appropriate sum could become a three-sided conflict among the employer, the Secretary, and the claimant." (*Id.* at p. 841, italics added.) A fortiori the availability without limitation of punitive damages - usually a matter within the broad discretion of the jury after consideration of the defendant's wealth, the egregiousness of his conduct and the amount of the plaintiff's actual damages (see *Wetherbee v. United Ins. Co.* (1971) 18 Cal.App.3d 266, 270-272 [95 Cal.Rptr. 678]; BAJI No. 14.71 (7th ed. 1986); 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § § 867-869, pp. 3155-3158, *1404 (1984 Supp.) § § 869A-869B, pp. 553-557) - would introduce an element of uncertainty detrimental to the conciliation process.

Nor does effective conciliation require that the administrative and judicial remedies be identical. Rejecting such a contention in *Commodore Home, supra,* we stated: "We are not persuaded. In the first place there is no right to sue, even after conciliation breaks down, unless the Department fails to file an accusation before the Commission. To that extent the availability of court remedies remains within the Department's control. More importantly, the compliance structure of the FEHA encourages cooperation in the administrative process. While that process continues the Department acts on the victim's behalf and absorbs costs of pursuing his claim. Court action inevitably is speculative, and the FEHA makes civil suit the claimant's sole responsibility. That helps deter strategies of 'holding out' for court damages in inappropriate cases. Further, the possibility that an action might lead to punitive damages may enhance the willingness of persons charged with violations to offer fair settlements during the conciliation process. [Fn. omitted.]" (32 Cal.3d at p. 218.)

In short, Commission's policy and equal protection arguments are fallacious. If a complainant wants relatively prompt restitutionary redress free of personal financial risk he or she can elect the administrative avenue of relief, with all expenses paid by the department. (*State Personnel Bd. v. Fair Employment Housing & Com., supra,* 39 Cal.3d at p. 432.) If, however, the complainant prefers to seek the potentially more lucrative redress of punitive damages, he or she can go to court like any other litigant.

III. Conclusion

In view of the foregoing, we conclude that the commission is not authorized to award punitive damages. [FN25] The Court of Appeal therefore erred in affirming the judgment of the trial court.

FN25 Because our disposition rests on statutory interpretation, we need not now address whether the power to award unlimited punitive damages could be lodged in an administrative tribunal and we express no opinion concerning the validity of legislation seeking to grant such authority.

The judgment of the Court of Appeal is reversed. The Court of Appeal is directed to enter judgment reversing the trial court and directing it to issue a writ of mandate commanding Commission to vacate and set aside that part of its decision awarding Olander punitive damages and thereafter to take such further action not inconsistent with this opinion as it deems appropriate.

Copr. © Bancroft-Whitney and West Group 1998

Lucas, C. J., Mosk, J., Arguelles, J., Eagleson, J., and Kaufman, J., concurred. *1405

BROUSSARD, J.

I dissent. I adopt part III of the well-reasoned opinion of the Court of Appeal (prepared by Justice Work and concurred in by Acting Presiding Justice Staniforth and Justice Wiener) as my own opinion, with a few alterations. [FN1]

FN1 Brackets together, in this manner [] *without enclosing material*, are used to indicate deletions from the opinion of the Court of Appeal; brackets *enclosing material* (other than editor's added parallel citations) are, unless otherwise indicated, used to denote insertions or additions by this court. We thus avoid the extension of quotation marks within quotation marks, which would be incident to the use of such conventional punctuation, and at the same time accurately indicate the matter quoted. Footnotes in the Court of Appeal opinion have been renumbered sequentially.

Dyna-Med, [Inc. (Dyna-Med),] supported by amici[i] Merchants and Manufacturers Association (MMA) [and others], [FN2] set forth multiple challenges to the [Fair Employment and Housing] Commission's [(Commission)] authority to award punitive damages. In essence, they contend [the Fair Employment and Housing Act's (]FEHA [or act)] language and legislative history preclude awarding punitive damages at the agency level. They stress the statutory language, construed according to settled rules of statutory construction, does not empower the Commission to award punitive damages but limits it to remedial action designed to effectuate the underlying purposes of the act. Absent express legislative authorization, they argue it is the settled rule an administrative agency may not lawfully impose a penalty, whether civil or criminal in character.

FN2 Future referrals to Dyna-Med's arguments in this opinion also include those of amici[i].

Moreover, emphasizing the similarity between the language of title VII of the Federal Civil Rights Act of 1964 (title VII) and the FEHA, Dyna-Med relies on federal court precedent holding punitive damages are not available. Additionally, noting the housing discrimination provisions of the FEHA specifically authorize the Commission to order the payment of "punitive damages in an amount not to exceed one thousand dollars ($1,000)" ([Gov. Code,] § 12987, subd. (2) [all further statutory references are to the Government Code unless otherwise indicated]), it argues the express provision for such punitive damages in a parallel statutory scheme strongly suggests the omission of this remedy from the employment discrimination provisions was intentional. (See *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 225 (dis. [opn.]) [185 Cal.Rptr. 270, 649 P.2d 912].) Consequently, [Dyna-Med] contends that had the Legislature intended to allow recovery of extraordinary remedies such as punitive damages within the employment context, it could and would have expressly so provided. Dyna-Med asserts its construction is compelled by public policy, claiming injecting punitive damages within this administrative context furthers neither the general principle of equal employment opportunity, nor voluntary resolution and conciliation. Finally, [Dyna-Med] stress[es] that procedures *1406 of administrative agencies often disregard traditional rules of evidence, severely limit discovery and are unfettered by safeguards insuring due process to litigants in the courts.

Applying the rules of construction summarized in *Honey Springs Homeowners Assn. v. Board of Supervisors* (1984) 157 Cal.App.3d 1122, 1136 [1137], fn. 11 [203 Cal.Rptr. 886], we [must] interpret the FEHA to ascertain and effectuate the purpose of the law, attempting to give effect to the usual and ordinary import of the statutory language; harmonizing any provision within the context of the statutory framework as a whole; seeking a reasonable and commonsense interpretation consistent with the apparent legislative purpose and intent, practical rather than technical in character and upon application resultant of wise policy rather than absurdity; and, considering generally the context, the object in view, the evils to be remedied, the history of the times, legislation upon the same subject, public policy and contemporaneous construction.

The [Fair Employment Practice Act (]FEPA[)] was enacted in 1959 and recodified in 1980 as part of the FEHA. The FEHA sets forth a comprehensive scheme for combating employment discrimination, recognizing "the need to protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination. (§ 12920.)" (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 485

Copr. © Bancroft-Whitney and West Group 1998

[208 Cal.Rptr. 724, 691 P.2d 272].) The act declares that freedom from discriminatory practices in seeking, obtaining, and holding employment is a civil right. (§ 12921.) In fact, section 12920 recognizes "the practice of denying employment opportunity and discriminating [in] the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." Such discrimination is contrary to public policy (§ 12920) and is an unlawful employment practice (§ 12940). The express underlying purpose of the act is "to provide effective remedies which will eliminate such discriminatory practices." (§ 12920.) The Legislature has directed that the FEHA is to be construed "liberally" to accomplish its underlying purposes. (§ 12993.) [FN3]

FN3 Generally, "[t]he purpose of the FEHA is to provide effective remedies for the vindication of constitutionally recognized civil rights, and to eliminate discriminatory practices on the basis of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex and age. (See § § 12920, 12921; Cal. Const., art. I, § 8.)" *State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, 432 [217 Cal.Rptr. 16, 703 P.2d 354].)

The FEHA establishes the Department [of Fair Employment and Housing (the Department)] (§ 12901) to investigate, conciliate, and seek redress of claimed discrimination (§ 12930). Complaints (§ 12960) must be promptly ***1407** investigated (§ 12963). If it deems a claim valid, then it seeks to resolve the matter - in confidence - by conference, conciliation, and persuasion. (§ 12963.7.) If that fails or seems inappropriate the Department may issue an accusation to be heard by the Commission. (§ § 12965, subd. (a), 12969; see too § 12930.) The Commission then determines whether an accused employer, union, or employment agency has violated the act. If it finds a violation it must "issue ... an order requiring such [violator] to cease and desist from such unlawful practice and to take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part. ..." (§ 12970, subd. (a).) If the Department fails to issue an accusation within 150 days after the filing of the complaint and the matter is not otherwise resolved, it must give complainant a right-to-sue letter. Only then may that person sue in the superior court under the FEHA (§ 12965, subd. (b)). [FN4] (See *Commodore Home Systems, Inc. v. Superior Court, supra*, 32 Cal.3d 211, 213-214; *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 865-868 [193 Cal.Rptr. 760]; see also *State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d 422, 432 [433].) [FN5]

FN4 However, the court in *Commodore Home Systems, Inc. v. Superior Court, supra*, noted: "Declarations by the Director and the general counsel of the Department advise that right-to-sue letters are the rule, not the exception, because the Department rarely is able to complete investigations, pursue conciliation, and issue accusations within the 150- day period. For that reason, a right-to-sue letter is issued, even in advance of 150 days, to any person who states in writing that he wants to withdraw his complaint and file a civil action. We express no opinion on the propriety of that practice. ..." (32 Cal.3d at p. 218, fn. 8.)

FN5 In 1980, the Commission adopted a regulation providing that "[w]hile normal monetary relief shall include relief in the nature of back pay, reasonable exemplary or compensatory damages may be awarded in situations involving violations which are particularly deliberate, egregious or inexcusable." (Cal. Admin. Code, tit. 2, § 7286.9, subd. (c).) The Commission clarified the meaning of this regulation in its precedential decision, *D.F.E.H. v. Ambylou Enterprises* (1982) F.E.H.C. Dec. No. 82-06 at pages 8, 9-17, where it adopted the standards normally applied by the courts in assessing exemplary and compensatory damages. It was, however, repealed on May 16, 1985 (effective 30th day thereafter, Cal. Admin. Register 85, No. 20) to eliminate the articulated "incorrect" legal standard for awarding exemplary or compensatory damages. The repeal was not intended to affect the Commission's authority to award such relief in appropriate cases as derived from the FEHA. (Cal. Admin. Code, tit. 2, § 7286.9, Cal. Admin. Code. Supp., Register

Copr. © Bancroft-Whitney and West Group 1998

85, No. 20, p. 134.)

[My] conclusion [that] the Commission is empowered to award punitive damages arises from the statutory authority summarized above. It is undisputed an administrative agency's power to award such damages must arise from express statutory authorization. Here, the Legislature delegated broad authority to the Commission to fashion appropriate remedies for unlawful employment practices in section 12970, subdivision (a): "If the commission finds that a respondent has engaged in any unlawful practice under this *1408 part, it ... shall issue and cause to be served on the parties an order requiring such respondent ... to take such action, *including, but not limited to*, hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, *as, in the judgment of the commission, will effectuate the purposes of this part*, and including a requirement for report of the manner of compliance." (Italics added.) Attempting to harmonize this specific provision in context of the entire statutory framework, [I] find in section 12920 the underlying purpose of the act is to provide effective remedies to eliminate discriminatory employment practices. Consequently, considering the legislative mandate to liberally construe the act to further these purposes (§ 12993), [I] conclude it has statutorily authorized the Commission to impose punitive damages where necessary to effectively remedy and eliminate unlawful FEHA employment practices. For, the Commission "may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers. [Citations.]"' (*Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 617 [200 Cal.Rptr. 575] [quoting *Dickey v. Raisin Proration Zone No. 1* (1944) 24 Cal.2d 796, 810 (151 P.2d 505, 157 A.L.R. 324)].)

Contrary to Dyna-Med's assertions, imposing punitive damages for deliberate violations is designed to effectively eliminate discriminatory employment practices. Potential liability for punitive damages is a substantial incentive for employers to eliminate, or refrain from committing, unlawful employment practices. Further, the possibility of "punitive damages may enhance the willingness of persons charged with violations to offer fair settlements during the conciliation process. [Fn. omitted.]" (*Commodore Home Systems, Inc. v. Superior Court*, *supra*, 32 Cal.3d 211, 218.) Moreover, such damages are designed not only to punish the wrongdoer, but also to set an example to deter others from similar conduct.

The facts of this case prove ordinary restitutionary remedies are often ineffective in eliminating discriminatory practices. Awards of back pay are frequently insignificant because interim earnings are deducted or offset. Also, the value of reinstatement may be negligible because by the time employment discrimination cases are resolved, the plaintiff has had to find another job. Upgrading, back pay and reinstatement in cases of retaliation may not be effective deterrents or satisfactory remedies for complainants because the original work environment may no longer be conducive to continued employment. Consequently, in light of the limited remedial effect of these permissible compensatory remedies, the award of punitive damages may be the only method of fulfilling the purposes of the act, including encouraging plaintiffs to seek relief by increasing their potential recovery *1409 (see *Claiborne v. Illinois Central Railroad* (E.D.La. 1975) 401 F.Supp. 1022, 1026, affd. in part and vacated in part (5th Cir. 1978) 583 F.2d 143).

Although the language of section 12970, subdivision (a) is broad enough to encompass the award of punitive damages, Dyna-Med challenges this construction, claiming the statutory construction doctrines of *ejusdem generis*, [FN6] *expressio unius est exclusio alterius*, [FN7] and *noscitur a sociis* [FN8] compel a narrow interpretation limiting the Commission to ordering only affirmative, equitable, remedial relief.

FN6 "'[T]he doctrine of *ejusdem generis* ... states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage.'" (*Sears[,] Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317, 331, fn. 10 [158 Cal.Rptr. 370, 599 P.2d 676], quoting *Scally v. Pacific Gas & Electric Co.*

Copr. © Bancroft-Whitney and West Group 1998

(1972) 23 Cal.App.3d 806, 819 [100 Cal.Rptr. 501].)

FN7 *Expressio unius est exclusio alterius* means that "the expression of certain things in a statute necessarily involves exclusion of other things not expressed. ..." (*Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397, 403 [135 Cal.Rptr. 266].)

FN8 Under the rule of *noscitur a sociis*, "'the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.'" (*People v. Stout* (1971) 18 Cal.App.3d 172, 177 [95 Cal.Rptr. 593], quoting Vilardo v. County of Sacramento (1942) 54 Cal.App.2d 413, 420 [129 P.2d 165].)

Dyna-Med argues applying the doctrine of *ejusdem generis* to section 12970, subdivision (a) requires the authorizing language to be viewed in the light of the limited nature of the remedies specifically listed before the general language. In other words, because the only remedy enumerated involving the award of monetary or legal relief is the awarding of backpay [*sic*], it concludes the general remedy language may not be construed to expand the authorized remedies to embrace punitive damages, because the phrase is limited by specific examples of the relief available, all of which are traditional "make-whole" remedies. It asserts the same result is arrived at by employing the other cited rules of statutory construction, because the Legislature demonstrated an intent not to authorize the exercise of any additional power unequivocally empowering the Commission to take affirmative action and then listing examples of such affirmative "make-whole" relief.

Properly analyzed, these rules do not sustain Dyna-Med's proffered statutory construction. These principles are mere guides to determining legislative intent and will not be applied to defeat the underlying legislative intent. (*Cal. State Employees' Assn. v. Regents of University of California* (1968) 267 Cal.App.2d 667, 670 [73 Cal.Rptr. 449]; *Claiborne v. Illinois Central Railroad, supra*, 401 F.Supp. 1022, 1026.) Moreover, in evaluating legislative *1410 intent from first gleaning the language of the statute, we should seek to avoid making any language mere surplusage and thus rendered useless. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224]; *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297, 305 [193 Cal.Rptr. 343].) Applying the proffered rules of statutory construction effectively deprives the phrase "including but not limited to" of any meaning, when in fact it evinces clear legislative intent to expand, not limit, the list of remedies. (See *America National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 611 [186 Cal.Rptr. 345, 651 P.2d 115] (dis. opn.); *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1977) 69 Cal.App.3d 884, 890 [138 Cal.Rptr. 509].)

Dyna-Med next argues the underlying legislative history of the FEHA, and specifically section 12970, shows the Commission did not intend to allow punitive damages. It argues the FEHA was modeled after the remedy language of the National Labor Relations Act (NLRA) which has been interpreted as not permitting punitive damages; the FEHA authorizes "affirmative action including (but not limited to)" similar to the NLRA which has been construed by the courts as authorizing only remedial relief; and the Legislature's enactment of a parallel statutory scheme relating to housing discrimination expressly providing for punitive damages suggests the omission of this remedy from the employment discrimination provisions was intentional.

The cited language of subdivision (a) of section 12970 appeared originally in former Labor Code section 1426, adopted in 1959 as part of the FEPA, which was later recodified and substantially reenacted in section 12970, subdivision (a). Without question, the phrase in dispute resembles section 10(c) of the NLRA (29 U.S.C.A. § 151 et seq., § 160(c)), which directs the National Labor Relations Board (NLRB) upon a finding of an unfair labor practice to issue a cease and desist order requiring the violator to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]. ..." This language in 1938 was interpreted by the United States Supreme Court as not allowing punitive damages. (*Edison Co. v. Labor Board* (1938) 305 U.S. 197, 235-236 [83 L.Ed. 126, 143, 59 S.Ct. 206, 219-220].) [FN9] *1411

FN9 In *Edison* the Supreme Court stated: "That section [29 U.S.C. § 160(c)] authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices 'and to take such affirmative action, including reinstatement of employees with

Copr. © Bancroft-Whitney and West Group 1998

or without back pay, as will effectuate the policies of this Act.' [] We think that this authority to order affirmative action does not go so far as to confer punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board [] be of the opinion that the policies of the Act might be effectuated by such an order.

"The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." (305 U.S. 197, 235-236 [83 L.Ed. 126, 143]; *Commodore Home Systems, Inc. v. Superior Court, supra*, 32 Cal.3d 211, 224 (dis. opn.).)

In 1969, the word "affirmative" preceding the word "action" was removed from section 12970, subdivision (a). (Stats. 1969, ch. 526, § 1, p. 1142.) [FN10] Because this language was not otherwise modified in any relevant manner by the Legislature, Dyna-Med relies on federal precedent construing the NLRA as well as title VII of the Federal Civil Rights Act of 1964 which contains similar language within section 706(g), authorizing the trial court to enjoin intentional violations of the Civil Rights Act and to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate. ..." (42 U.S.C. § 2000e-5(g).) [FN11] Its reliance on federal precedent is misplaced. [FN12]

FN10 The Attorney General notes the apparent reason for this change was to distinguish the "action" which the Commission could order from the narrow definition of "affirmative actions" as educational and promotional activities which was added to FEHA's predecessor statute in 1967. (See former Lab. Code, § 1413, subd. (g), added by § 5 of Stats. 1967, ch. 1506, § 1, at p. 3573.) This construction is also proffered by Dyna-Med and amicus MMA. Because [I] do not rely on that legislative modification, [I] do not comment on the correctness of that assertion.

FN11 "The authority of courts to grant relief in actions brought under the Equal Employment Opportunity Act of 1972 is governed by the same statutory provision which applies in actions under Title VII of the Civil Rights Act of 1964 [()42 U.S.C. § 2000e-5(g).()] [Fn. omitted.] [That section] authorizes courts to order 'such affirmative action as may be necessary' to remedy unlawful employment practices." (*Richerson v. Jones* (3d Cir. 1977) 551 F.2d 918, 923.)

FN12 [I am] aware the majority in *Commodore Home Systems, Inc. v. Superior Court, supra*, 32 Cal.3d 211, 217, when determining that the FEHA does not limit the relief a court may grant in a statutory suit charging employment discrimination and that all relief generally available in noncontractual actions, including punitive damages may be obtained in such a civil action under the FEHA, noted differences between the NLRA as well as section 706(g)of title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(g)) which diminish the weight of federal precedent interpreting the federal statutes as not authorizing awards of either general compensatory or punitive damages. However, because [I] believe the [distinctions] in *Commodore* rested substantially on the precise context of the issue the court was reviewing (i.e., the separate and distinct route to resolution of claims through private court action, and not administrative relief), [I] do not rely on [them] here.

Critical differences between the NLRA and the FEHA convince [me] the federal precedent is not apposite. (See, e.g., *Edison Co. v. Labor Board, supra*, 305 U.S. 197, 235-236 [83 L.Ed. 126 [143, 59 S.Ct. 206, 219-220]]; see also *Pearson v. Western Elec. Co., etc.* (10th Cir. 1976) 542 F.2d 1150, 1152; *Van Hoomissen v. Xerox Corporation* (N.D.Cal. 1973) 368 F.Supp. 829, 837.) Granted, "[w]hen legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would *1412 be given a like interpretation. This rule is applicable to state statutes which are patterned

Copr. © Bancroft-Whitney and West Group 1998

after the federal statutes. [Citations.]"' (*Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665], quoting *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960) 54 Cal.2d 684, 688-689 [8 Cal.Rptr. 1, 355 P.2d 905]; *Union Oil Associates v. Johnson* (1935) 2 Cal.2d 727, 734-735 [43 P.2d 291, 98 A.L.R. 1499].) However, this recognized principle of statutory construction rests upon the predicate the latter statute involved the same or an analogous subject which has similar [or] identical language. Here, the subjects are not analogous. The underlying purposes of the NLRA and the FEHA (or FEPA) differ. The former exists to prevent industrial unrest and strife or, in other words, to promote industrial peace (*Carey v. Westinghouse Corp.* (1964) 375 U.S. 261, 271 [11 L.Ed.2d 320, 328, 84 S.Ct. 401]), while the latter exists to eliminate specific discriminatory practices (*State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d 422, 432). More specifically, the NLRA regulates and encourages collective bargaining between employers and employees (*Carey v. Westinghouse Corp., supra*, 375 U.S. at p. 271 [11 L.Ed.2d at p. 328, 84 S.Ct. at p. 409]; *N.L.R.B. v. Pincus Bros., Inc.-Maxwell* (3d Cir. 1980) 620 F.2d 367, 376; *Bloom v. N.L.R.B.* (D.C. Cir. 1979) 603 F.2d 1015, 1019), while the FEHA makes employment discrimination against certain enumerated groups illegal. The former is designed to protect the rights of workers to organize into bargaining units and to create a cooperative atmosphere of recognition between labor and management. (See *N.L.R.B. v. Knuth Bros., Inc.* (7th Cir. 1976) 537 F.2d 950, 957.) On the other hand, the latter is designed to protect the individual's constitutional right to be free from discrimination within the employment setting (*State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d at p. 432), not to create a spirit of cooperation between labor and management. Instead, the FEHA was designed to provide an efficient administrative remedy to enforce an employee's right to be treated equally and to insure employers refrain from committing discriminating employment practices. Moreover, the NLRA does not provide a claimant with an analogous right to independently pursue an unfair labor practices claim in the courts upon administrative default or issuance of a right-to-sue letter, while the FEHA provides both judicial and administrative remedial procedures, requiring sensitivity to consistency in available relief. [FN13]
*1413

FN13 While comparing the NLRA with title VII, the court in *Claiborne v. Illinois Central Railroad, supra*, 401 F.Supp. 1022, 1024-1025, aptly explained: "Moreover, the aim of the N.L.R.A. was to establish a framework within which management and labor could resolve their conflicts, whether by collective bargaining or economic warfare, *e.g.*, strikes and lockouts. The N.L.R.A. was not meant to be outcome determinative, *i.e.*, it was not to ensure that management or labor wins every conflict. It simply defined permissible methods of engaging in industrial conflict and sought to channel labor/management conflict into peaceful negotiations. Title VII is radically different. It seeks to end all employment discrimination. It does not define permissible methods of discrimination nor does it establish a framework allowing for employment discrimination. Its aim is to be outcome determinative and to see that employees who are discriminated against win every conflict.

"Punitive damages under the N.L.R.A. are inappropriate because they would only serve to exacerbate conflict between management and labor within the permissible sphere of industrial conflict, *i.e.*, strikes and lock-outs. The party assessed punitive damages could seek revenge in the next strike or be recalcitrant at the bargaining table. This would undermine the spirit of cooperation that is necessary for good-faith collective bargaining and the peaceful resolution of industrial conflicts. Such revenge seeking would be almost impossible to prove unless the party accused of it stated this was a reason for its action. Punitive damages might also create a sense of moral superiority in the side receiving them, discouraging that side from negotiating and avoiding strikes because it felt it was 'right.' Furthermore, punitive damages might permit the N.L.R.B. to destroy the equality of power between management and labor that Congress intended to create by the N.L.R.A. [(]Note, Tort Remedies for Employment Discrimination Under Title VII, 54 Va.L.Rev. 491, 502 (1968).[)]

"No such dangers exist under Title VII. Employment discrimination is not negotiable so there is no negotiating process to undermine. Where there is employment

Copr. © Bancroft-Whitney and West Group 1998

discrimination, there is no equality of power to be maintained, since employment discrimination is absolutely prohibited. Finally, there is no permissible area of conflict where revenge for punitive damages might be sought. Indeed, the possibility of punitive damages under Title VII should encourage an end to employment discrimination [...]. Accordingly, the profoundly different aims of Title VII and the N.L.R.A. should lead to a different, not similar, decision on punitive damages."

Upon reviewing the *Claiborne* court's decision, the Fifth Circuit stated: "Without approving or disapproving the lower court's resolution of the Title VII issue, its discussion of Title VII and the different purposes of the Civil Rights Act as compared to the [NLRA] ... is fully persuasive that an award of punitive damages does not so conflict with the purpose embodied in Title VII that it should be disallowed in a combined [Title VII and 42 United States Code section 1981] suit." (*Claiborne v. Illinois Cent. R.R.* (5th Cir. 1978) 583 F.2d 143, 154.)

Dyna-Med's reliance on title VII cases is similarly misplaced. (See, e.g., *Shah v. Mt. Zion Hospital & Medical Ctr.* (9th Cir. 1981) 642 F.2d 268, 272; *DeGrace v. Rumsfeld* (1st Cir. 1980) 614 F.2d 796, 808; *Richerson v. Jones, supra*, 551 F.2d 918, 926; *Pearson v. Western Electric Co., supra*, 42 F.2d 1150, 1152.) 42 United States Code section 2000e-5(g) of title VII significantly provides: "[T]he court may ... order such affirmative action as may be appropriate, which may include, but is not limited to, ... *or any equitable relief* as the court deems appropriate." (Italics added.) Several decisions have focused on this phrase "any other equitable relief" in determining that punitive damages are not awardable, for they are traditionally not available in equity. (See *Shah v. Mt. Zion Hospital & Medical Ctr., supra*, 642 F.2d 268, 272.; *Miller v. Texas State Bd. of Barber Examiners* (5th Cir. 1980) 615 F.2d 650, 654; *Richerson v. Jones, supra*, 551 F.2d 918, 927.) Consequently, these courts have understandably held the explicit reference to *equitable*, and the silence with regard to *legal*, relief suggests the unavailability of punitive damages under title VII. In contrast, the FEHA expressly empowers the Commission to take whatever *action* is necessary to effectuate its policies, without an express limitation to equitable relief or complete silence as to legal relief. The absence of such qualifying language ***1414** and complete silence regarding legal damages in the FEHA further dissuades [me] from following the cited federal precedent. [FN14]

FN14 Amicus MMA contends the title VII cases are not distinguishable here because of the inclusion of the term "equitable" in the remedies section of the statute, citing the remedy language contained in the Federal Age Discrimination [in] Employment Act (ADEA) (29 U.S.C. § 621 et seq.). 29 United States Code section 626(b) pertinently provides: "In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. ..."

MMA notes that every circuit court which has considered the issue of whether the ADEA permits the disposition of punitive and pain and suffering damages has held in the negative. (See *Slatin v. Stanford Research Institute* (4th Cir. 1979) 590 F.2d 1292; *Vazquez v. Eastern Air Lines, Inc.* (1st Cir. 1978) 579 F.2d 107; *Dean v. American Sec. Ins. Co.* (5th Cir. 1977) 559 F.2d 1036; *Rogers v. Exxon Research & Engineering Co.* (3d Cir. 1977) 550 F.2d 834; *Naton v. Bank of California* (9th Cir. 1981) 649 F.2d 691.) In deciding pain and suffering or punitive damages are not necessary to effectuate the purposes of the ADEA, the *Dean* and *Rogers v. Exxon* cases rely heavily on the provision for liquidated damages in cases of willful violations of the ADEA. (*Rogers v. Exxon, supra*, at p. 840; *Dean v. American Sec. Ins. Co., supra*, at p. 1039.) After reviewing the legislative history, *Dean* states the sponsor of the bill "held the view that [] liquidated damages could effectively supply the deterrent and punitive damages which both criminal penalties and punitive damages normally serve. [Fn. omitted.]" (*Id.*, at p. 1040.) There is no analogous provision specifying the type of damages that can be awarded in cases of willful violations in the FEHA, and thus we do not

Copr. © Bancroft-Whitney and West Group 1998

find the ADEA cases controlling. I note that although three of the courts (*Rogers, supra*, at [p. 841]; *Naton, supra*, at p. 699, and *Slatin, supra*, at p. 1296) expressed concern that pain and suffering damages would negatively impact the conciliation process, the court in *Vazquez, supra*, 579 F.2d 107, expressly rejected the proposition, concluding that a contrary result might be so logically reached (i.e., the employer might be less likely to compromise a claim if he knows no pain and suffering damages can be awarded against him). (*Id.*, at p. 111.)

[][T]he FEHA provides alternative avenues of relief through either the administrative or the judicial process. As already explained, both procedures commence with the filing of a complaint with the Department. (§ 12960.) Under the judicial route, a complainant receives a right-to-sue notice and files an action in court. (§ 12965, subd. (b).) Under the administrative route, the Department investigates the complaint (§ 12963), conducts discovery (§ § 12963.1-12963.5), attempts conciliation (§ 12963.7), files an accusation with the Commission (§ 12965, subd. (a)), and presents the case to the Commission (§ 12969). The decision, however, whether to go to court does not rest with the claimant. Rather, the Department has exclusive jurisdiction over the case for 150 days (§ § 12960, 12965, subd. (b)), and must give a right-to-sue letter to the claimant if an accusation is not issued within the time period before the claimant may file a court action. However, although this private right of action under section 12965, subdivision (b), appears to be contingent upon the Department's decision not to prosecute or the lapse of 150 days, "[a]s a practical matter ... parties who intend to pursue their case in court are given 'right to sue' letters in every case, even ***1415** in advance of the 150-day limit." (*State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d 422, 433, fn. 11.) Where the Department decides to administratively handle the case, the complainant may not pursue a civil action. (See generally *Snipes v. City of Bakersfield, supra*, 145 Cal.App.3d 861, 865-868.) In essence, this administrative process was designed to be supported completely by the Department's own staff of investigators, attorneys and other personnel to prosecute the alleged violation rather than bestowing that responsibility upon a complainant. (See [*State Personnel Bd., supra*], at p. 432.) In fact, the [L]egislature originally provided for only the administrative route and later added the judicial avenue of relief, but retained the former apparently to highlight its intent the administrative process was designed to handle the bulk of the cases and its belief the administrative process would operate effectively to eliminate employment discrimination. Indeed, "[t]he FEPC has been entrusted with the duty of effectuating the declared policy of the state to protect and safeguard the rights and opportunities of all persons to seek, obtain and hold employment without discrimination." (*Northern Inyo Hosp. v. Fair Emp. Practice Com.* (1974) 38 Cal.App.3d 14, 25 [112 Cal.Rptr. 872].)

In *Commodore Home Systems, Inc. v. Superior Court, supra*, 32 Cal.3d 211, 221, this [] Court held compensatory and punitive damages are available to persons who "elect" the judicial avenue of relief under the FEHA. [FN15] Thus, an anomaly arises if punitive damages are not likewise available within the administrative avenue of relief. As Justice Richardson pointed out in his dissent in *Commodore, supra*, at pages 222-223, "it would be wholly anomalous to allow punitive damages to accusors [*sic*] who have been unsuccessful administratively before the commission, but to deny such damages to those whose claims have been successfully established. The result of any such disparity of remedy would be to encourage [claimants to file insufficient or inadequate] complaints with the commission in order to avoid or circumvent administrative proceedings in the hope of obtaining punitive damages in subsequent civil actions. Such a consequence would be contrary to FEHA's policy of eliminating employment discrimination through administrative 'conference, conciliation, and persuasion.' (Gov. Code, § 12963.7, subd. (a).)" Moreover, given the substantial volume of complaints received by the Department, if it pursued only the strongest cases with the most egregious FEHA violations, then ironically claimants with weaker cases who could afford to pursue judicial action would have access to compensatory and exemplary damages while stronger cases heard by the Commission would not. A construction permitting this would defeat ***1416** an underlying purpose for administrative relief, to wit, to provide an administrative scheme and forum for complainants to vindicate their employment rights, regardless of economic status. Indeed, public policy prohibiting employment discrimination practices cannot permit an individual claimant's affluence to determine whether he/she is entitled to effective relief. Absent the availability of similar relief, it is inevitable that equal protection violations will occur. [FN16]

Copr. © Bancroft-Whitney and West Group 1998

FN15 The question whether the Commission can award compensatory and punitive damages was expressly reserved[.] [] (Commodore Home Systems Inc. v. Superior Court, supra, 32 Cal.3d 211, [215, 220]; State Personnel Bd. v. Fair Employment & Housing Com., supra, 39 Cal.3d 422, 429, 434, fn. 12.)

FN16 The depth of the impact of the possibility of disparity in available remedies is far greater than initially meets the eye with regard to the indigent or less sophisticated claimants who cannot mount or sustain a lengthy civil action. Those individuals will be denied an opportunity to obtain an award of punitive damages solely because of their economic or social circumstances. Not only is this distinction among claimants irrelevant, but it is contrary to the Legislature's intent to eliminate employment discrimination, and violates the basic principles of equal protection. Unfortunately, economic status is often strongly correlated to race, sex, and various other forms of discrimination prohibited by the FEHA. If such victims of employment discrimination, often unemployed at the time they seek relief, cannot obtain full relief through the administrative proceedings made available to them, then in essence the FEHA will foster discrimination rather than eliminate it as judicial relief to this class is not economically feasible. The Legislature intended to create an expeditious, complete, administrative remedy, not an inferior mode of relief occasionally available to the unfortunate.

Moreover, if the Commission is prohibited from awarding punitive damages while courts are free to do so, the underlying purposes of the administrative avenue of adjudication will be undermined. The Commission was created to interpret and implement the act and concomitantly to develop expertise in employment discrimination practices in California. (See § 12935; see generally State Personnel Bd. v. Fair Employment & Housing Com., supra, 39 Cal.3d 422, 432.) By establishing an administrative avenue of relief in the Commission with such expertise, the FEHA is designed to promote efficient resolution of discrimination complaints while removing additional pressure from the state's overburdened judicial system. In fact, if the Commission was prohibited from awarding punitive damages while the courts were free to do so, the Department might forego seeking administrative relief, thus delaying any relief and embroiling the discriminated person in unwanted courtroom proceedings. Further, this affects the fulfillment of the Department's role in that particular case with regard to conference, conciliation and persuasion efforts to resolve the dispute. [I] believe [this] construction [] provides "a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity." (Honey Springs Homeowners Assn.[, Inc.] v. Board of Supervisors, supra, 157 Cal.App.3d 1122, 1136, fn. 11; United Business Com. v. City of San Diego (1979) 91 Cal.App.3d 156, 170 [154 Cal.Rptr. 263].)

Further, the Commission is authorized to interpret the FEHA both by regulation (§ 12935, subd. (a)(1)) and a system of precedential opinions *1417 (§ 12935, subd. (h)). Although the ultimate interpretation of a statute rests with the courts, consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect and enforcing it, is entitled to great weight and will be followed unless clearly erroneous. (Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal.3d 458, 491 [156 Cal.Rptr. 14, 595 P.2d 592]; Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 658, 668 [150 Cal.Rptr. 250, 586 P.2d 564]; DeYoung v. City of San Diego (1983) 147 Cal.App.3d 11, 18 [194 Cal.Rptr. 722].) [] [I]n 1980, the Commission promulgated title 2, California Administrative Code section 7286.9, subdivision (c) providing: "While normal monetary relief shall include relief in the nature of back pay, reasonable exemplary or compensatory damages may be awarded in situations involving violations which are particularly deliberate, egregious or inexcusable." Although this regulation was repealed in 1985 as setting forth an incorrect and misleading standard, the Commission held in *D.F.E.H. v. Ambylou Enterprises, Inc.* (1982) F.E.H.C. Dec. No. 82-06), compensatory and punitive damages are available under the FEHA (*id.*, at p. 8); punitive damages are designed to punish a wrongdoer and provide an example to deter others from similar conduct as are permissible in a court of law (*id.*, at p. 13); and the availability of such damages is governed by Civil Code section 3294. (*Id.*, at p. 13.) In *D.F.E.H. v.*

Copr. © Bancroft-Whitney and West Group 1998

Fresno Hilton Hotel (1984) F.E.H.C. Dec. No. 84-03, app[eal] pending[], the Commission held that under section 12970, subdivision (a), it could award both compensatory (*id.*, at pp. 34-36) and punitive (*id.*, at pp. 36-40) damages. The Commission declared: "The purpose of awarding punitive damages is to punish or [] make an example of respondent, when it [has] engaged in, condoned, or ratified conduct which is oppressive, fraudulent or malicious. (Civ. Code, § 3294)" (*Id.*, at p. 37; see also *D.F.E.H. v. Donald Schriver, Inc.* (1984) F.E.H.C. Dec. No. 84-07, app. pending, declaring the Commission is authorized to award punitive damages (*id.*, at [p.] 18) [] follow[ing] the judicial standard set forth in Civ. Code, § 3294 (*id.*, at pp. 18-22).)

Since the Commission first interpreted section 12970, subdivision (a) in 1980, the Legislature has amended the FEHA on numerous occasions without addressing the language in dispute regarding the Commission's authority to award appropriate effective relief. "[W]here the Legislature has failed to modify the statute so as to require an interpretation contrary to the regulation, that fact may be considered to be an indication that the ruling was consistent with the Legislature's intent." (*Action Trailer Sales, Inc. v. State Bd. of Equalization* (1975) 54 Cal.App.3d 125, 133-13[4] [126 Cal.Rptr. 339]; see also *Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 922 [156 P.2d 1].) *1418

Dyna-Med relies upon a bill introduced but not enacted by the Legislature in 1976 (Assem. Bill No. 3124) (2 Assem. Final Hist. (1975-1976 Reg. Sess.) p. 1658) which would have expressly authorized the Commission to award damages in employment discrimination cases in an amount not to exceed $500. [FN17] [Dyna-Med's] reliance on proposed, but unpassed legislation is misplaced. (*National Elevator Services, Inc. v. Department of Industrial Relations* (1982) 136 Cal.App.3d 131, 141 [186 Cal.Rptr. 165]; *Miles v. Workers' Comp. Appeals Bd.* (1977) 67 Cal.App.3d 243, 248, fn. 4 [136 Cal.Rptr. 508]; *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 58 [69 Cal.Rptr. 480]; see *United States v. Wise* (1962) 370 U.S. 405, 411 [8 L.Ed.2d 590, 594-595, 82 S.Ct. 1354].)

FN17 The Legislature attempted in 1983-1984 to amend section 12970, subdivision (a) to specifically authorize compensatory and punitive damages as "declaratory of existing law" in Senate Bill No. 2012; however, this language was removed before its enactment. (Stats. 1984, ch. 1754, § 3, p. 6406.)
During the 1981-1982 legislative session, the Legislature twice declined to enact statutes which would have prohibited the Commission from awarding punitive damages in Senate Bill No. 516 and Assembly Bill No. 879.

Dyna-Med next argues the express authorization in section 12987, subdivision (2) for the Commission to award actual and punitive damages up to $1,000 in housing discrimination cases and the omission of a similar provision in the employment discrimination provisions of the FEHA, suggests the Legislature did not intend punitive damages be available to remedy discriminatory employment practices. It further notes this distinction exists between the federal fair housing and fair employment statutes causing the courts to hold a specific punitive damage provision in the former implies punitive damages are not available under the employment provisions. (See tit. VIII of the Civil Rights Act, 42 U.S.C. § 3612(c), relating to fair housing which specifically permits recovery up to $1,000 in punitive damages in comparison to the absence of any corresponding authorization for punitive damages in tit. VII; see, e.g., *Richerson v. Jones, supra*, 551 F.2d 918, 927-928.) Accordingly, it contends that had the Legislature intended to empower the Commission to award punitive damages, it would have [] so [provided as] it had [] in parallel legislation. Again, [I am] unpersuaded.

In 1959, when the FEPA was enacted, the Legislature also enacted the Hawkins Act (former Health & Saf. Code, § 35700 et seq., enacted by Stats. 1959, ch. 1681, § 1, p. 4074), prohibiting housing discrimination [in publicly assisted housing], and the Unruh Civil Rights Act (enacted by Stats. 1959, ch. 1866, § § 1-4, p. 4424; Civ. Code, § 51 et seq.), prohibiting discrimination in business establishments. In 1963, the Hawkins Act was replaced by the Rumford Fair Housing Act (former Health & Saf. Code, § 35700 et seq., enacted by Stats. 1963, ch. 1853, § § 1-2, p. 3823). The Hawkins Act originally permitted complainants to sue for the award of damages of not *1419 less than $500. (Former Health & Saf. Code, § 35730.) However, in 1963 when the Hawkins Act was replaced by the Rumford Act (Stats. 1963, ch. 1853, § 2, p. 3823 et seq.), the Commission was empowered to order a violator to pay damages (not exceeding $500) if the Commission determined

Copr. © Bancroft-Whitney and West Group 1998

certain other delineated remedies were not available (*id.*, at pp. 3828-3829). In 1975, the maximum damage award was increased to $1,000. (Stats. 1975, ch. 280, § 1, p. 701.) In 1977, the Commission was authorized to order such action by a violator as deemed appropriate to serve the law, including, but not limited to the sale or rental of the same or similar housing, the provision of nondiscriminatory purchase, rental and financing terms, and "[t]he payment of actual and punitive damages" not exceeding $1,000 (Stats. 1977, ch. 1187, § 10, p. 3893; ch. 1188, § 13.1, pp. 3905-3906). Essentially, this statutory scheme was then carried into the FEHA when the employment and housing statutory schemes were combined.

As the foregoing history illustrates, although both the housing and employment discrimination statutes are now contained within a single act, the FEHA, they followed different legislative routes of treatment resulting in totally separate, original enactments. The Legislature has consistently placed limitations on remedies available in the housing context while at the same time granting the Commission broad discretion to fashion appropriate awards in the employment context. Consequently, because the limitation on recovery within the housing context in section 12987, subdivision (2) expressly notes punitive damages only to limit the availability of such damages, the absence of any express reference to such damages in section 12970, subdivision (a) within the employment context should not be construed as a lack of authority, but rather a lack of statutory limitation on such damages.

Further, [this] construction of the FEHA coincides with public policy. The public commitment to eliminate discrimination as explicitly set forth in section 12920 and characterized as a civil right in section 12921, is constitutionally guaranteed by article I, section 8 of the California Constitution. Section 8 provides: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." "The right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness." (*Sail'er Inn [, Inc.] v. Kirby* (1971) 5 Cal.3d 1, 17 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351].)

Dyna-Med next contends the absence of procedural safeguards existing within the judicial system requires a conclusion punitive damages not be available in administrative proceedings. [I] recognize there may be differences in general procedure, rules of evidence, discovery, etc. However, the Commission is expressly permitted to award punitive damages in housing ***1420** discrimination cases. Moreover, both the Administrative Procedure Act (APA) (§ 11500 et seq.) and Code of Civil Procedure section 1094.5 provide procedural protections to insure due process concerns are satisfied. [] ([See] *American National Ins. Co. v. Fair Employment & Housing Com., supra*, 32 Cal.3d 603, 607 [substantial evidence review by superior court]; [see also] *State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d 422, 433, and *Kerrigan v. Fair Employment Practice Com.* (1979) 91 Cal.App.3d 43, 51 [154 Cal.Rptr. 29] [] [independent judgment review] [].) In any event, "[Commission] hearings are always full evidentiary proceedings governed by the California rules of evidence and conducted in accordance with the California Administrative Procedure Act. (§ § 11500 et seq., 12972.) A record is preserved to facilitate judicial review, and the [Commission] is required to issue a decision setting forth findings of fact and conclusions of law in every contested case. (§ § 11517, subd. (b), 11518.) Cross-examination is, of course, permitted. ..." (*State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d 422, 433.)

Finally, Dyna-Med direly predicts giving the Commission authority to award punitive damages will open a Pandora's Box concerning the authority of administrative agencies generally to award punitive damages. However, although many administrative agencies are governed by the APA, it is the FEHA, not the APA, which gives the Commission the authority to order "such action ... as, in the judgment of the commission [,] will effectuate the purposes" of the FEHA (§ 12970, subd. (a)). If the Legislature gives an agency responsibility to protect the public and authorizes it to take the appropriate steps necessary to carry out the purposes of an act it enforces, then such an agency should be authorized to determine claims for punitive damages. Whether other administrative agencies have, or will be given, such authorization can only be determined upon a review of those agencies own statutory authority, a review not necessary to this appeal. ***1421**

Cal.,1987.

Dyna-Med, Inc. v. Fair Employment and Housing Com'n

END OF DOCUMENT

Copr. © Bancroft-Whitney and West Group 1998

TOPANGA ASSOCIATION FOR A SCENIC COMMUNITY, Plaintiff and Appellant,
v.
COUNTY OF LOS ANGELES et al., Defendants and Respondents; JAMES WARREN BASSLER et al., Real Parties in Interest and Respondents
L.A. No. 30139.

Supreme Court of California

May 17, 1974.

SUMMARY

In administrative mandamus proceedings, the trial court refused to disturb a variance granted by a county agency permitting a mobile home park on about 28 acres of an area zoned for light agriculture and single family residences. (Superior Court of Los Angeles County, No. C-7268, Robert A. Wenke, Judge.)

The Supreme Court reversed and remanded the cause to the trial court with directions to issue a writ of mandamus requiring the county board of supervisors to vacate the order awarding a variance. The trial court was also directed to grant any further, appropriate relief. It was expressly held that regardless of the terms of a local zoning ordinance, the governing administrative agency, in adjudicating an application for a variance, must make findings such as will enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise the court of the basis of the agency's action. Also, it was held that as a prerequisite to sustaining a variance, the court must determine that substantial evidence supports the agency's findings and that they support the agency's decision. It was pointed out that Gov. Code, § 65906, outlining the circumstances under which a variance may be properly granted, emphasizes disparities between properties, rather than the treatment of the subject property's characteristics in the abstract. The court noted that the agency's report focussed almost exclusively on the qualities of the subject property and failed to provide comparative information on the surrounding properties, with the result that the agency's summary of "factual *507 data," on which its decision apparently rested, did not include facts sufficient to satisfy the Government Code provision.

In Bank. (Opinion by Tobriner, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Zoning and Planning § 4--Variances--Findings.
Regardless of whether the local zoning ordinance commands that the variance board set forth findings, that body must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis of the board's action.

(2) Zoning and Planning § 4--Variances--Judicial Review.
Before sustaining a zoning variance, a reviewing court must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision. And in making these determinations, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision.

(3) Zoning and Planning § 4--Variances--Administrative Mandamus.
Code Civ. Proc., § 1094.5, governing judicial review of administrative agencies' adjudicatory decisions by mandamus, applies to the review of zoning variances awarded by bodies such as the Los Angeles County Regional Planning Commission.

(4) Administrative Law § 139--Administrative Mandamus--Court's Duties.
Code Civ. Proc., § 1094.5, relating to administrative mandamus, contemplates that, at a minimum, the reviewing court must determine both whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision.

(5) Administrative Law § 143--Administrative Mandamus--Record of Administrative Proceeding.
Implicit in Code Civ. Proc., § 1094.5, relating to administrative mandamus, is a requirement that the administrative agency which renders the challenged decision set forth findings *508 to bridge the

Copr. © Bancroft-Whitney and West Group 1998

analytic gap between the raw evidence and the ultimate decision or order.

[See **Cal.Jur.2d**, Zoning, § 209; **Am.Jur.**, Zoning (1st ed § 225).]

(6) Zoning and Planning § 4--Findings--Contents.
Although a zoning variance board's findings need not be stated with the formality required in judicial proceedings, they must expose the board's mode of analysis to an extent sufficient to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action. (Not approving the language in *Kappadahl v. Alcan Pacific Co.* (1963) 222 Cal.App.2d 626, 639 [35 Cal.Rptr. 354]; *Ames v. City of Pasadena* (1959) 167 Cal.App.2d 510, 516 [334 P.2d 653], which endorses the practice of setting forth findings solely in the language of the applicable legislation.)

(7) Zoning and Planning § 4--Granting of Variance as Quasi-judicial Administrative Function.
Although the adoption of zoning regulations is a legislative function, the granting of variances is a quasi-judicial, administrative function.

(8) Zoning and Planning § 6(1)--Contractual Nature of Zoning Scheme.
A zoning scheme is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted. The rationale is that such mutual restriction can enhance total community welfare.

(9) Zoning and Planning § 4--Variances--Need for Compliance With All Legislative Requirements.
Inasmuch as a zoning variance may be sustained only if all applicable legislative requirements have been satisfied, the question whether a particular variance which had been granted by a county agency conformed to the criteria set forth in an applicable county ordinance became immaterial in the Supreme Court's administrative mandamus review of the variance once that court had concluded that the criteria set forth in Gov. Code, § 65906, for the granting of a variance had not been met.

(10) Zoning and Planning § 4--Variances--Statutory Criteria.
Gov. Code, § 65906, setting forth criteria for the granting of a zoning variance, emphasizes disparities between properties, not treatment of the subject property's ***509** characteristics in the abstract, and contemplates that, at best, only a small fraction of any one zone can qualify for a variance.

(11) Zoning and Planning § 4--Variances--Applicant's Burdens.
Speculation about land neighboring on land for which a zoning variance is sought will not support the award of a variance. The party seeking the variance must shoulder the burden of demonstrating to the applicable agency that the subject property satisfies the requirements for the variance sought. Neither the agency nor the reviewing court may assume without evidentiary basis that the character of neighboring property is different from that of the property for which the variance is sought.

(12) Zoning and Planning § 4--Limitations on Granting of Variances.
Radical alteration of the nature of an entire zone is a proper subject for legislation but not for piecemeal adjudication by an administrative agency through the granting of variances for large parcels.

(13) Zoning and Planning § 4--Prohibition of Variance Granting "Special Privilege."
In the absence of an affirmative showing that a particular parcel in a certain zone differed substantially and in relevant aspects from other parcels therein, a variance granted with respect to that parcel amounted to the kind of "special privilege" explicitly prohibited by Gov. Code, § 65906, establishing criteria for granting variances.

COUNSEL

Amdur, Bryson, Caplan & Morton and David L. Caplan for Plaintiff and Appellant.

John D. Maharg, County Counsel, Joe Ben Hudgens, John W. Whitsett and David H. Breier, Deputy County Counsel, for Defendants and Respondents.

Arnold J. Provisor for Real Parties in Interest.

TOBRINER, J.

We examine, in this case, aspects of the functions served by administrative agencies in the granting of zoning variances and of courts in reviewing these proceedings by means of administrative mandamus. We ***510** conclude that variance boards like the ones involved in the present case must render findings to support their ultimate rulings. We also conclude that when called upon to scrutinize a grant of a variance, a reviewing court must determine whether substantial

Copr. © Bancroft-Whitney and West Group 1998

evidence supports the findings of the administrative board and whether the findings support the board's action. [FN1] We determine in the present case that the last of these requisites has not been fulfilled.

FN1 We recently held in Strumsky v. San Diego County Employees Retirement Association (1974) 11 Cal.3d 28 [112 Cal.Rptr. 805, 520 P.2d 29], that if the order or decision of a local administrative agency substantially affects a "fundamental vested right," a court to which a petition for a writ of mandamus has been addressed upon the ground that the evidence does not support the findings must exercise its independent judgment in reviewing the evidence and must find abuse of discretion if the weight of the evidence fails to support the findings. Petitioner does not suggest, nor do we find, that the present case touches upon any fundamental vested right. (See generally Bixby v. Pierno (1971) 4 Cal.3d 130, 144-147 [93 Cal.Rptr. 234, 481 P.2d 242]; Temescal Water Co. v. Dept. Public Works (1955) 44 Cal.2d 90, 103 [280 P.2d 1].)

The parties in this action dispute the future of approximately 28 acres in Topanga Canyon located in the Santa Barbara Mountains region of Los Angeles County. A county ordinance zones the property for light agriculture and single family residences; [FN2] it also prescribes a one-acre minimum lot size. Upon recommendation of its zoning board and despite the opposition of appellant-petitioner - an incorporated nonprofit organization composed of taxpayers and owners of real property in the canyon - the Los Angeles County Regional Planning Commission granted to the Topanga Canyon Investment Company a variance to establish a 93-space mobile home park on this acreage. [FN3] Petitioner appealed without success to the county board of supervisors, thereby exhausting its administrative remedies. Petitioner then sought relief by means of administrative mandamus, again unsuccessfully, in Los Angeles County Superior Court and the Court of Appeal for the Second District.

FN2 Los Angeles County Zoning Ordinance No. 7276.

FN3 Originally the real party in interest, the Topanga Canyon Investment Company has been replaced by a group of successoral real parties in interest. We focus our analysis on the building plans of the original real party in interest since it was upon the basis of these plans that the zoning authorities granted the variance challenged by petitioner.

In reviewing the denial of mandamus below, we first consider the proper role of agency and reviewing court with respect to the grant of variances. We then apply the proper standard of review to the facts of the case in order to determine whether we should sustain the action of the Los Angeles County Regional Planning Commission. *511

1. *An administrative grant of a variance must be accompanied by administrative findings. A court reviewing that grant must determine whether substantial evidence supports the findings and whether the findings support the conclusion that all applicable legislative requirements for a variance have been satisfied.*

A comprehensive zoning plan could affect owners of some parcels unfairly if no means were provided to permit flexibility. Accordingly, in an effort to achieve substantial parity and perhaps also in order to insulate zoning schemes from constitutional attack, [FN4] our Legislature laid a foundation for the granting of variances. Enacted in 1965, section 65906 of the Government Code establishes criteria for these grants; it provides: "Variances from the terms of the zoning ordinance shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification [¶] Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated." [FN5]

FN4 1 Appendix to Journal of the Senate (1970 Reg. Sess.) Final Report of the Joint Committee on Open Space Land (1970) pages 94-95; Bowden, *Article XVIII - Opening the Door to Open Space Control* (1970) 1 Pacific L.J. 461, 506. See Metcalf v. County of Los Angeles (1944) 24 Cal.2d 267, 270-271 [148 P.2d 645]; Gaylord, *Zoning: Variances, Exceptions and*

Copr. © Bancroft-Whitney and West Group 1998

Conditional Use Permits in California (1958) 5 U.C.L.A. L.Rev. 179; Comment, *The General Welfare, Welfare Economics, and Zoning Variances* (1965) 38 So.Cal.L.Rev. 548, 573. See generally Note, Administrative Discretion in Zoning (1969) 82 Harv.L.Rev. 668, 671. The primary constitutional concern is that as applied to a particular land parcel, a zoning regulation might constitute a compensable "taking" of property.

FN5 A third paragraph added to section 65906 declares: "A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property." This paragraph serves to preclude "use" variances, but apparently does not prohibit so-called "bulk" variances, those which prescribe setbacks, building heights, and the like. The paragraph became effective on November 23, 1970, 19 days after the Los Angeles County Regional Planning Commission granted the variance here at issue. Petitioner does not contend that the paragraph is applicable to the present case.

Applicable to all zoning jurisdictions except chartered cities (Gov. Code, § 65803), section 65906 may be supplemented by harmonious local legislation. [FN6] We note that Los Angeles County has enacted an ordinance which, ***512** if harmonious with section 65906, would govern the Topanga Canyon property here under consideration. Los Angeles County's Zoning Ordinance No. 1494, section 522, provides: [FN7] "An exception [variance] may ... be granted where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance, and in the granting of such exception the spirit of the ordinance will be observed, public safety secured, and substantial justice done."

FN6 Government Code section 65800 declares that the code chapter of which section 65906 is a part is intended to provide minimum limitations within which counties and cities can exercise maximum control over local zoning matters. Article XI, section 11 of the California Constitution declares that "[a]ny county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

FN7 This section recently was repealed but was in force when the zoning agencies rendered their decisions in the present case. For purposes of more succinct presentation, we refer in text to the section in the present tense.

Both state and local laws thus were designed to establish requirements which had to be satisfied before the Topanga Canyon Investment Company should have been granted its variance. Although the cases have held that substantial evidence must support the award of a variance in order to insure that such legislative requirements have been satisfied [FN8] (see, e.g., *Siller v. Board of Supervisors* (1962) 58 Cal.2d 479, 482 [25 Cal.Rptr. 73, 375 P.2d 41]; *Bradbeer v. England* (1951) 104 Cal.App.2d 704, 707 [232 P.2d 308]), they have failed to clarify whether the administrative agency must always set forth findings and have not illuminated the proper relationship between the evidence, findings, and ultimate agency action. [FN9]

FN8 The rule stated finds its source in authorities holding that all adjudicatory determinations of local agencies are entitled to no more than substantial evidence review. As indicated above (fn. 1, *ante*) those authorities no longer state the law with respect to adjudicatory determinations of such agencies which affect fundamental vested rights. Since no such right is involved in this case, however, the substantial evidence standard remains applicable. We note by way of caution, however, that merely because a case is said to involve a "variance" does not necessarily dictate a conclusion that no fundamental vested right is involved. The term "variance" is sometimes used, for example, to refer to permits for nonconforming uses which predate a zoning scheme. (See Hagman, Larson, & Martin, Cal. Zoning Practice (Cont. Ed. Bar) pp. 383-384.)

FN9 For descriptions of the history of judicial action in this state with respect to zoning variance grants, see Bowden, *Article XVIII - Opening the Door to Open Space Control* (1970) 1 Pacific L.J. 461, 507-509; 1 Appendix to Journal of the Senate (1970 Reg. Sess.) Final Report of the Joint

Copr. © Bancroft-Whitney and West Group 1998

Committee on Open Space Land (1970) pages 95-98; Hagman, Larson,& Martin, Cal. Zoning Practice, *supra*, pages 287-291.

One of the first decisions to emphasize the importance of judicial scrutiny of the record in order to determine whether substantial evidence supported administrative findings that the property in question met the legislative variance requirements was that penned by Justice Molinari in ***513** *Cow Hollow Improvement Club v. Board of Permit Appeals* (1966) 245 Cal.App.2d 160 [53 Cal.Rptr. 610]. Less than one year later, we followed the approach of that case in *Broadway, Laguna etc. Assn.* v. *Board of Permit Appeals* (1967) 66 Cal.2d 767 [59 Cal.Rptr. 146, 427 P.2d 810], and ordered that a zoning board's grant of a variance be set aside because the party seeking the variance had failed to adduce sufficient evidence to support administrative findings that the evidence satisfied the requisites for a variance set forth in the same San Francisco ordinance.

Understandably, however, the impact of these opinions remained uncertain. The San Francisco ordinance applicable in *Cow Hollow* and *Broadway* explicitly required the zoning board to specify its subsidiary findings and ultimate conclusions; this circumstance raised the question whether a court should require findings and examine their sufficiency in a case in which the applicable local legislation did not explicitly command the administrative body to set forth findings. Indeed language in *Broadway* intimated that such a case was distinguishable. (*Broadway, Laguna etc. Assn.* v. *Board of Permit Appeals, supra*, at pp. 772-773. See also *Stoddard v. Edelman* (1970) 4 Cal.App.3d 544, 549 [84 Cal.Rptr. 443]. Cf. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 270 [104 Cal.Rptr. 761, 502 P.2d 1049].) Further, neither *Cow Hollow* nor *Broadway* confronted Government Code section 65906, since both cases concerned a chartered city. [FN10] There thus also remained uncertainty with respect to cases involving zoning jurisdictions other than chartered cities.

FN10 See page 511, *ante*.

Nevertheless, in an opinion subsequent to *Broadway*, *Hamilton v. Board of Supervisors* (1969) 269 Cal.App.2d 64 [75 Cal.Rptr. 106], a Court of Appeal set aside the grant of a variance by a planning commission under circumstances different from those in *Broadway* and *Cow Hollow*. The zoning jurisdiction involved in that controversy was a county, not a chartered city, and the court's opinion did not suggest that any applicable ordinance required administrative findings. Deeming Government Code section 65906 "concededly controlling," (*Hamilton v. Board of Supervisors, supra*, at p. 67), the court undertook the task of squaring the findings announced by the commission with the commission's grant of the variance and concluded that the findings were insufficient to sustain the variance.

(1) Consistent with the reasoning underlying these cases, we hold that ***514** regardless of whether the local ordinance commands that the variance board set forth findings, [FN11] that body must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action. (2) We hold further that a reviewing court, before sustaining the grant of a variance, must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision. In making these determinations, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision.

FN11 We note the apparent applicability of section 639 of the Los Angeles County Zoning Ordinance which was in effect at the time respondent granted the variance. That section provided: "After a hearing by a zoning board the said zoning board shall report to the commission its findings and recommend the action which it concludes the commission should take." As explained in text, however, we rest our ruling upon Code of Civil Procedure section 1094.5.

Our analysis begins with consideration of Code of Civil Procedure section 1094.5, the state's administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. (3) Without doubt, this provision applies to the review of variances awarded by bodies such as the Los Angeles County zoning agencies that participated in the present case. [FN12] (4) Section 1094.5 clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the administrative ***515** agency's findings and whether the findings support the agency's decision. Subdivision (b) of section 1094.5 prescribes that when petitioned for a writ of mandamus, a court's inquiry should extend, among other issues, to

Copr. © Bancroft-Whitney and West Group 1998

whether "there was any prejudicial abuse of discretion." Subdivision (b) then defines "abuse of discretion" to include instances in which the administrative order or decision "is not supported by the findings, *or* the findings are not supported by the evidence." (Italics added.) Subdivision (c) declares that "*in all ... cases*" (italics added) other than those in which the reviewing court is authorized by law to judge the evidence independently, [FN13] "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (See *Zakessian v. City of Sausalito* (1972) 28 Cal.App.3d 794, 798 [105 Cal.Rptr. 105].)

FN12 *Allen v. Humboldt County Board of Supervisors* (1963) 220 Cal.App.2d 877, 882 [34 Cal.Rptr. 232]. See also *Siller v. Board of Supervisors* (1962) 58 Cal.2d 479, 481 [25 Cal.Rptr. 73, 375 P.2d 4]. The California Judicial Council's report reflects a clear desire that section 1094.5 apply to all agencies, regardless of whether they are subject to the Administrative Procedure Act and regardless of their state or local character. (See Judicial Council of Cal., 10th Biennial Rep. (1944) pp. 26, 45. See also *Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 101 [280 P.2d 1]; Deering, Cal. Administrative Mandamus (1966) p. 7.) "In the absence of compelling language in [a] statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report." (*Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 397 [184 P.2d 323].) Section 1094.5 makes administrative mandamus available for review of "any final administrative order or decision made as the result of a proceeding in which *by law* a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer." (Italics added.) Government Code section 65901 satisfies these requisites with respect to variances granted by jurisdictions other than chartered cities such as Los Angeles County's zoning agencies. Section 65901 provides, in part: "The board of zoning adjustment or zoning administrator shall hear and decide applications for conditional uses or other permits when the zoning ordinance provides therefor and establishes criteria for determining such matters, and applications for variances from the terms of the zoning ordinance."

FN13 See footnote 1, *supra*.

(5) We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. If the Legislature had desired otherwise, it could have declared as a possible basis for issuing mandamus the absence of substantial evidence to support the administrative agency's action. By focusing, instead, upon the relationships between evidence and findings and between findings and ultimate action, the Legislature sought to direct the reviswing court's attention to the analytic route the administrative agency traveled from evidence to action. In so doing, we believe that the Legislature must have contemplated that the agency would reveal this route. Reference, in section 1094.5, to the reviewing court's duty to compare the evidence and ultimate decision to "*the* findings" (italics added) we believe leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as to the administrative agency's basis for decision.

Our ruling in this regard finds support in persuasive policy considerations. (See generally 2 Davis, Administrative Law Treatise (1958) § 16.05, pp. 444- 449; Forkosch, A Treatise on Administrative Law (1956) § 253, pp. 458-464.) According to Professor Kenneth Culp Davis, the requirement that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-made law (see, e.g., *Zielsy v. Town Plan and Zon. Com'n of Town of Bloomfield* (1963) 151 Conn. 265 [196 A.2d 758]; *Stoll v. Gulf Oil Corp.* (1958) 79 Ohio L.Abs. 145 [155 N.E.2d 83]), and is "remarkably uniform in both federal and state *516 courts." As stated by the United States Supreme Court, the "accepted ideal ... is that 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.' (*S.E.C. v. Chenery Corp.* (1943) 318 U.S. 80, 94.)" (2 Davis, *supra*, § 16.01, pp. 435-436. See also *Saginaw Broadcasting Co. v. Federal C. Com'n* (1938) 96 F.2d 554, 559 [68 App.D.C. 282].)

Among other functions, a findings requirement serves to conduce the administrative body to draw

Copr. © Bancroft-Whitney and West Group 1998

legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. (See 2 Cooper, State Administrative Law (1965) pp. 467-468; Feller, *Prospectus for the Further Study of Federal Administrative Law* (1938) 47 Yale L.J. 647, 666. Cf. Comment, *Judicial Control Over Zoning Boards of Appeal: Suggestions for Reform* (1965) 12 U.C.L.A. L.Rev. 937, 952.) [FN14] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. (See California Motor Transport Co. v. Public Utilities Com. (1963) 59 Cal.2d 270, 274 [28 Cal.Rptr. 868, 379 P.2d 324]; Swars v. Council of City of Vallejo (1949) 33 Cal.2d 867, 871 [206 P.2d 355].)

FN14 Although at first blush, judicial enforcement of a findings requirement would appear to constrict the role of administrative agencies, in reality, the effect could be to the contrary. Because, notes Judge Bazelon, it provides a framework for principled decision-making, a findings requirement serves to "diminish the importance of judicial review by enhancing the integrity of the administrative process." (Environmental Defense Fund, Inc. v. Ruckelshaus (D.C.Cir. 1971) 439 F.2d 584, 598.) By exposing the administrative agency's mode of analysis, findings help to constrict and define the scope of the judicial function. "We must know what [an administrative] decision means," observed Mr. Justice Cardozo, "before the duty becomes ours to say whether it is right or wrong." (United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co. (1935) 294 U.S. 499, 511 [79 L.Ed. 1023, 1032, 55 S.Ct. 462].)

Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. [FN15] (6)(See fn. 16.) Moreover, ***517** properly constituted findings [FN16] enable the parties to the agency proceeding to determine whether and on what basis they should seek review. (See *In re Sturm* (1974) *ante*, pp. 258, 267 [113 Cal.Rptr. 361, 521 P.2d 97]; Swars v. Council of City of Vallejo, supra, at p. 871.) They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable.

FN15 "Given express findings, the court can determine whether the findings are supported by substantial evidence, and whether the findings warrant the decision of the board. If no findings are made, and if the court elects not to remand, its clumsy alternative is to read the record, speculate upon the portions which probably were believed by the board, guess at the conclusions drawn from credited portions, construct a basis for decision, and try to determine whether a decision thus arrived at should be sustained. In the process, the court is required to do much that is assigned to the board. ..." (3 Anderson, American Law of Zoning (1968) § 16.41, p. 242.)

FN16 Although a variance board's findings "need not be stated with the formality required in judicial proceedings" (Swars v. Council of City of Vallejo, supra, at p. 872), they nevertheless must expose the board's mode of analysis to an extent sufficient to serve the purposes stated herein. We do not approve of the language in Kappadahl v. Alcan Pacific Co. (1963) 222 Cal.App.2d 626, 639 [35 Cal.Rptr. 354], and Ames v. City of Pasadena (1959) 167 Cal.App.2d 510, 516 [334 P.2d 653], which endorses the practice of setting forth findings solely in the language of the applicable legislation.

By setting forth a reasonable requirement for findings and clarifying the standard of judicial review, we believe we promote the achievement of the intended scheme of land use control. Vigorous and meaningful judicial review facilitates, among other factors, the intended division of decision-making labor. (7) Whereas the adoption of zoning regulations is a legislative function (Gov. Code, § 65850), the granting of variances is a quasi-judicial, administrative one. (See Johnston v. Board of Supervisors (1947) 31 Cal.2d 66, 74 [187 P.2d 686]; Kappadahl v. Alcan Pacific Co. (1963) 222 Cal.App.2d 626, 634 [35 Cal.Rptr. 354].) If the judiciary were to review grants of variances superficially, administrative boards could subvert this intended decision-making structure. (See 1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) pp. 102-103.) They could "[amend] ... the zoning code in the

Copr. © Bancroft-Whitney and West Group 1998

guise of a variance" (Cow Hollow Improvement Club v. Board of Permit Appeals, supra, at p. 181), and render meaningless, applicable state and local legislation prescribing variance requirements.

Moreover, courts must meaningfully review grants of variances in order to protect the interests of those who hold rights in property nearby the parcel for which a variance is sought. (8) A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare. (See, e.g., 1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) p. 91; Bowden, *Article XXVIII - Opening the Door to Open Space Control* (1970) 1 Pacific L.J. 461, 501.) If the interest of *518 these parties in preventing unjustified variance awards for neighboring land is not sufficiently protected, the consequence will be subversion of the critical reciprocity upon which zoning regulation rests.

Abdication by the judiciary of its responsibility to examine variance board decision-making when called upon to do so could very well lead to such subversion. [FN17] Significantly, many zoning boards employ adjudicatory procedures that may be characterized as casual. (See Comment, *Judicial Control over Zoning Boards of Appeal: Suggestions for Reform* (1965) 12 U.C.L.A. L.Rev. 937, 950. Cf. Bradbeer v. England (1951) 104 Cal.App.2d 704, 710 [232 P.2d 308].) The availability of careful judicial review may help conduce these boards to insure that all parties have an opportunity fully to present their evidence and arguments. Further, although we emphasize that we have no reason to believe that such a circumstance exists in the case at bar, the membership of some zoning boards may be inadequately insulated from the interests whose advocates most frequently seek variances. (See e.g., 1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) p. 100.) Vigorous judicial review thus can serve to mitigate the effects of insufficiently independent decision-making.

FN17 See generally Comment, *Zoning: Variance Administration in Alameda County* (1962) 50 Cal.L.Rev. 101, 107 and footnote 42. See also Note, Administrative Discretion in Zoning (1969) 82 Harv.L.Rev. 668, 672 and sources cited therein.

2. *The planning commission's summary of "factual data" - its apparent "findings" - does not include facts sufficient to satisfy the variance requirements of Government Code section 65906.*

As we have mentioned, at least two sets of legislative criteria appear applicable to the variance awarded: Government Code section 65906 and Los Angeles County Zoning Ordinance No. 1494, section 522. (9) The variance can be sustained only if *all* applicable legislative requirements have been satisfied. Since we conclude that the requirements of section 65906 have not been met, the question whether the variance conforms with the criteria set forth in Los Angeles County Zoning Ordinance No. 1494, section 522 becomes immaterial. [FN18] *519

FN18 We focus on the statewide requirements because they are of more general application. If we were to decide that the criteria of section 65906 had been satisfied, we would then be called upon to determine whether the requirements set forth in the county ordinance are consistent with those in section 65906 and, if so, whether these local criteria also had been satisfied.
The local criteria need be squared with the state criteria since the section 65906 requirements prevail over any inconsistent requirements in the county ordinance. The stated purpose of title 7, chapter 4, of the Government Code, which includes section 65906, is to provide limitations - albeit minimal ones - on the adoption and administration of zoning laws, ordinances, and regulations by counties and nonchartered cities. (See fn. 6, *ante*.) Section 65802 of the code declares that "[n]o provisions of [the Government Code], other than the provisions of [chapter 4], and no provisions of any other code or statute shall restrict or limit the procedures provided in [chapter 4] by which the legislative body of any county or city enacts, amends, administers, or provides for the administration of any zoning law, ordinance, rule or regulation." The clear implication is that chapter 4 does restrict or limit these procedures. (See also Cal. Const., art. XI, § 11.)
If local ordinances were allowed to set a lesser standard for the grant of variances than those provided in section 65906, a county or city could escape the prohibition

Copr. © Bancroft-Whitney and West Group 1998

against granting use variances added to section 65906 in 1970 (see fn. 5, *ante*) merely by enacting an ordinance which would permit the grant of use variances. Clearly the Legislature did not intend that cities and counties to which the provisions of chapter 4 apply should have such unfettered discretion.

We summarize the principal factual data contained in the Los Angeles County Regional Planning Commission's report, which data the commission apparently relied on to award the variance. [FN19] The acreage upon which the original real party in interest [FN20] sought to establish a mobile home park consists of 28 acres; it is a hilly and in places steep parcel of land. At the time the variance was granted, the property contained one single-family residence. Except for a contiguous area immediately to the southeast which included an old and flood-damaged subdivision and a few commercial structures, the surrounding properties were devoted exclusively to scattered single-family residences.

FN19 We confine our analysis to the relationship between the commission's fact summary and its ultimate decision; we do not consider the testimonial evidence directly. To sustain the grant of the variance of course would require that we conclude that substantial evidence supports the findings and that the findings support the variance award. Since we decide below, however, that the commission's fact summary does not include sufficient data to satisfy the section 65906 requirements, we need not take the further step of comparing the transcript to the fact summary. Our basis for so proceeding lies in Code of Civil Procedure section 1094.5, which defines "abuse of discretion," one of several possible grounds for issuance of a writ of mandamus, to include instances in which "the order or decision [of the administrative agency] is not supported by the findings, *or* the findings are not supported by the evidence." (Italics added.)

FN20 See footnote 3, *ante*.

The proposed mobile home park would leave 30 percent of the acreage in its natural state. An additional 25 percent would be landscaped and terraced to blend in with the natural surroundings. Save in places where a wall would be incompatible with the terrain, the plan contemplated enclosure of the park with a wall; it further called for rechanneling a portion of Topanga Canyon Creek and anticipated that the developers would be required to dedicate an 80-foot-wide strip of the property for a proposed realignment of Topanga Creek Boulevard. ***520**

The development apparently would partially satisfy a growing demand for new, low cost housing in the area. Additionally, the project might serve to attract further investment to the region and could provide a much needed fire break. Several data indicate that construction on the property of single-family residences in conformance with the zoning classification would generate significantly smaller profits than would development of the mobile home park. Single-family structures apparently would necessitate costly grading, and the proposed highway realignment would require a fill 78 feet high, thereby rendering the property unattractive for conventional residential development. Moreover, the acreage is said not to be considered attractive to parties interested in single-family residences due, in the words of the report's summary of the testimony, to "the nature of the inhabitants" in the vicinity and also because of local flood problems.

These data, we conclude, do not constitute a sufficient showing to satisfy the section 65906 variance requirements. That section permits variances "*only* when, because of *special* circumstances applicable to the property, ... the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification." (Italics added.) (10) This language emphasizes *disparities* between properties, not treatment of the subject property's characteristics in the abstract. (See *Minney v. City of Azusa* (1958) 164 Cal.App.2d 12, 31 [330 P.2d 255]; cf. *In re Michener's Appeal* (1955) 382 Pa. 401 [115 A.2d 367, 371]; *Beirn v. Morris* (1954) 14 N.J. 529 [103 A.2d 361, 364]; Note, *Administrative Discretion in Zoning* (1969) 82 Harv. L.Rev. 668, 671-672.) It also contemplates that at best, only a small fraction of any one zone can qualify for a variance. (See generally 3 Anderson, American Law of Zoning (1968) § 14.69, pp. 62-65.)

The data contained in the planning commission's report focus almost exclusively on the qualities of the property for which the variance was sought. In the absence of comparative information about surrounding properties, these data lack legal significance. Thus knowledge that the property has rugged features tells us nothing about whether the

Copr. © Bancroft-Whitney and West Group 1998

original real party in interest faced difficulties different from those confronted on neighboring land. [FN21] Its assurances that it would landscape and terrace parts of the property and leave others in their natural state are all well and good, but they bear not at all on the critical issue whether a variance *521 was necessary to bring the original real party in interest into substantial parity with other parties holding property interests in the zone. (See Hamilton v. Board of Supervisors, supra, at p. 66.)

FN21 Indeed, the General Plan for Topanga Canyon suggests that the subject property is not uniquely surfaced; it states that the entire area is characterized by "mountainous terrain, steep slopes and deep canyons interspersed with limited areas of relatively flat or rolling land."

The claim that the development would probably serve various community needs may be highly desirable, but it too does not bear on the issue at hand. Likewise, without more, the data suggesting that development of the property in conformance with the general zoning classification could require substantial expenditures are not relevant to the issue whether the variance was properly granted. Even assuming for the sake of argument that if confined to the subject parcel and no more than a few others in the zone, such a burden could support a variance under section 65906, for all we know from the record, conforming development of other property in the area would entail a similar burden. Were that the case, a frontal attack on the present ordinance or a legislative proceeding to determine whether the area should be rezoned might be proper, but a variance would not. (1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) p. 95; Bowden, *Article XVIII - Opening the Door to Open Space Control* (1970) 1 Pacific L.J. 461, 506.)

Although they dispute that section 65906 requires a showing that the characteristics of the subject property are exceptional, the current real parties in interest would nevertheless have us speculate that the property is unlike neighboring parcels. They point out that the plot has rugged terrain and three stream beds [FN22] and that the Topanga Creek Boulevard realignment would bisect the property. (11) Speculation about neighboring land, however, will not support the award of a variance. The party seeking the variance must shoulder the burden of demonstrating before the zoning agency that the subject property satisfies the requirements therefor. (Tustin Heights Association v. Board of Supervisors (1959) 170 Cal.App.2d 619, 627 [339 P.2d 914].) Thus neither an administrative agency nor a reviewing court may assume without evidentiary basis that the character of neighboring property is different from that of the land for which the variance is sought. [FN23] *522

FN22 Interestingly, since the witnesses who testified in favor of the variance never mentioned the stream beds, the original real party in interest apparently did not regard the beds as disadvantageous. Rather, a witness who opposed the variance offhandedly mentioned the beds as illustrative of the scenic beauty of the area. The trial court seized upon this testimony and used it in justifying the variance award.

FN23 In fact, other parcels in the zone may well have the features that the successoral real parties in interest speculate are confined to the subject property. Rugged terrain apparently is ubiquitous in the area (see fn. 21, *ante*), and because the stream beds and highway must enter and exit the subject property somewhere, they may all traverse one or more neighboring parcels. Further, for all we know from the commission's findings, stream beds may traverse most parcels in the canyon.

(12) Moreover, the grant of a variance for nonconforming development of a 28-acre parcel in the instant case is suspect. Although we do not categorically preclude a tract of that size from eligibility for a variance, we note that in the absence of unusual circumstances, so large a parcel may not be sufficiently unrepresentative of the realty in a zone to merit special treatment. By granting variances for tracts of this size, a variance board begins radically to alter the nature of the entire zone. Such change is a proper subject for legislation, not piecemeal administrative adjudication. (See Sinclair Pipe Line Co. v. Village of Richton Park (1960) 19 Ill.2d 370 [167 N.E.2d 406]; Appeal of the Catholic Cemeteries Association (1954) 379 Pa. 516 [109 A.2d 537]; Civil City of Indianapolis v. Ostrom R. & Construction Co. (1931) 95 Ind.App. 376 [176 N.E. 246].) (13) Since there has been no affirmative showing that the subject property differs substantially and in relevant aspects from other parcels in the zone, we conclude that the variance granted amounts to the kind of "special privilege" explicitly prohibited by Government Code section 65906.

Copr. © Bancroft-Whitney and West Group 1998

We submit, in summary, that this case illumines two important legal principles. First, by requiring that administrative findings must support a variance, we emphasize the need for orderly legal process and the desirability of forcing administrative agencies to express their grounds for decision so that reviewing courts can intelligently examine the validity of administrative action. Second, by abrogating an unsupported exception to a zoning plan, we conduce orderly and planned utilization of the environment.

We reverse the judgment and remand the cause to the superior court with directions to issue a writ of mandamus requiring the Los Angeles Board of Supervisors to vacate its order awarding a variance. We also direct the superior court to grant any further relief that should prove appropriate.

Wright, C. J., McComb, J., Mosk, J., Burke, J., Sullivan, J., and Clark, J., concurred. ***523**

Cal.,1974.

Topanga Ass'n For A Scenic Community v. Los Angeles County

END OF DOCUMENT

Copr. © Bancroft-Whitney and West Group 1998

WILLIAM DESMOND et al., Plaintiffs and Appellants,
v.
COUNTY OF CONTRA COSTA, Defendant and Respondent.
No. A061677.

Court of Appeal, First District, Division 3, California.

Dec 23, 1993.

SUMMARY

In mandamus proceedings to review a decision of county supervisors denying an application for a land use permit for a residential second unit, the trial court denied plaintiffs' petition on the ground that they had failed to establish either that the board of supervisors' finding of unsuitability to the character of the surrounding neighborhood was not supported by substantial evidence in the record, or that this finding was legally irrelevant to the denial of the request for a land use permit. Neighbors had complained that because of the nature of the cul-de-sac on which plaintiffs' primary residence was located, an additional living unit on the street would create traffic, parking, safety, noise, and nuisance problems. (Superior Court of Contra Costa County, No. C92-04871, Ellen Sickles James, Judge.)

The Court of Appeal affirmed, holding that the fact that plaintiffs' proposed second unit would be the first such unit in the neighborhood did not render irrelevant, as a matter of law, the board's finding of unsuitability to the character of the surrounding neighborhood. There was ample evidence of community concern with the impact of a residential second rental unit on the general aesthetic character of the neighborhood, as well as on traffic, safety, and protection of property values. The court held that the standards imposed by the applicable county ordinances did not exceed the maximum standards set by Gov. Code, § 65852.2, for second units in residential zones. (Opinion by Merrill, J., with White P. J., and Werdegar, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Administrative Law § 131--Judicial Review and Relief--Scope and Extent of Review--Evidence--Substantial Evidence Rule.

Under current interpretations of the substantial evidence test as applied in review of administrative agency action, an appellate court must examine all relevant evidence in the entire record, considering both the*331 evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by "substantial evidence." For this purpose, substantial evidence has been defined in two ways: first, as evidence of ponderable legal significance, reasonable in nature, credible, and of solid value, and second, as relevant evidence that a reasonable mind might accept as adequate to support a conclusion. At the trial court level and on appeal, the petitioner in an administrative mandamus proceeding has the burden of proving that the agency's decision was invalid and should be set aside, because it is presumed that the agency regularly performed its official duty.

(2) Zoning and Planning § 30--Conditional Uses; Permits and Certificates-- Judicial Review--Residential Second Unit.

On review of a decision of county supervisors denying an application for a land use permit, the trial court did not err in concluding that the administrative findings of the board of supervisors were supported by substantial evidence. Plaintiffs submitted an application for a land use permit for a residential second unit. Neighbors gave ample testimony that because of the nature of the cul-de-sac on which the primary residence was located, an additional living unit on the street would create traffic, parking, safety, noise, and nuisance problems. The fact that plaintiffs' proposed second unit would be the first such unit in the neighborhood did not render irrelevant, as a matter of law, the board's finding of unsuitability to the character of the surrounding neighborhood. There was ample evidence of community concern with the impact of a residential second rental unit on the general aesthetic character of the neighborhood, as well as on traffic, safety, and protection of property values.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § § 835, 855.]

(3) Zoning and Planning § 26--Conditional Uses; Permits and Certificates-- Proceedings to Procure--

Copr. © Bancroft-Whitney and West Group 1998

Residential Second Unit.

On review of a decision of county supervisors denying an application for a land use permit, the trial court did not err in concluding that the administrative findings of the board of supervisors were supported by substantial evidence. The standards imposed by the applicable county ordinances did not exceed the maximum standards set by Gov. Code, § 65852.2, for second units in residential zones. The statute was adopted to encourage local governments to enact their own ordinances allowing and regulating so-called "granny flat" residential second units *332 in single-family and multi-family zones where they would otherwise be prohibited. The county's second unit ordinance complied with Gov. Code, § 65852.2, subd. (a), which gives local agencies discretion in the specific criteria they may adopt for approving second units. The "maximum standards" set forth in Gov. Code, § 65852.2, subd. (b), are not relevant when a local government has adopted an appropriate ordinance governing second units.

COUNSEL

William G. Segesta for Plaintiffs and Appellants.

Victor J. Westman, County Counsel, and Diana J. Silver, Deputy County Counsel, for Defendant and Respondent.

MERRILL, J.

William and Tanya Desmond appeal from a judgment denying their petition for writ of administrative mandate. That petition sought to set aside the decision of the Board of Supervisors (Board) of the County of Contra Costa (County) denying their application for a land use permit. Appellants contend that the administrative findings of the Board are not supported by substantial evidence, and that the standards imposed by the applicable County ordinances exceed the maximum standards set by Government Code section 65852.2 for second units in residential zones. We disagree and therefore affirm the judgment.

I. Factual And Procedural Background

The subject property, which is located at 8 Golden Hill Court in Walnut Creek, is zoned R-15, single-family residential district. Appellants sought and received issuance of a building permit to construct an addition to their single-family home. The addition consisted of a new two-car garage and second-level bedroom addition with a separate foundation detached from the principal structure. The new unit was attached to the existing single-family home by means of second-story decking. The building permit contained a provision that no kitchen facilities could be included in the new unit unless appellants first obtained a land use permit to allow construction of a residential second unit at that location. Appellants then submitted an application for a land use permit for a residential second unit.

Relying on alleged statements by unnamed County employees that issuance of a use permit would be "pro forma," appellants did not wait to obtain*333 the permit before commencing construction of the new unit. When a hearing was held on appellants' application for a permit to establish a residential second unit the County zoning administrator approved it. Thereafter, a group of neighbors filed an appeal to the County Planning Commission from the zoning administrator's approval of the issuance of the land use permit. County staff recommended that the planning commission uphold the decision of the zoning administrator, but following a public hearing and review of the matter, the planning commission voted unanimously to uphold the neighbors' appeal and deny the application, on the grounds that the proposed second residential unit was not architecturally compatible with the overall character of the neighborhood, and that development of the second unit would present a threat to public health, safety and welfare.

Appellants appealed the decision of the planning commission to the County Board, which held a public hearing on the matter. At the close of the hearing, the Board declared its intent to deny the appeal and the application, and directed the staff to prepare findings to support its decision. By a vote of three to two, the Board affirmed its earlier expressed intent, denied the appeal and the application, and adopted the staff findings.

In its findings, the Board stated that the property was currently designated in the County general plan as single-family residential, low density. The Board found that the proposed residential second unit was "architecturally incompatible with the overall neighborhood character and the primary residence in terms of scale, colors, materials and designs for trims, windows, roof, roof pitch and other exterior physical features" (finding No. 7); that development of the second unit would "present a threat to the public health, safety and welfare in that the second unit would result in excessive neighborhood noise and would create traffic and parking problems" (finding No. 8); that "[s]pecial conditions or unique

Copr. © Bancroft-Whitney and West Group 1998

characteristics of the subject property and its location or surroundings are not established" (finding No. 9); and that "[a] second unit is not suitable in this location, is out of character with the surrounding neighborhood and would be an intrusion into the neighborhood" (finding No. 10). In support of these findings, the Board cited the administrative record on appellants' application for a land use permit, County Ordinance Code sections 82-24.1002 and 26-2.2008, and the "on-site observations and comments" by a member of the Board at the public hearing.

Appellants filed a petition for writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5, asking the court for a writ of mandate and injunctive relief ordering the County and the Board to vacate the decision denying appellants' application and to issue a land use permit for the residential second unit. The trial court denied appellants' petition onthe *334 ground that appellants had failed to establish either that finding No. 10 was not supported by substantial evidence in the record, or that that finding was legally irrelevant to the denial of the request for a land use permit.

In its decision, the trial court stated: "Specifically, [appellants] do not point to evidence that a [residential] second unit is not out of character with the surrounding neighborhood. There is substantial evidence in the record that the second residential unit would be out of character because the surrounding streets at the moment contain only single-family dwellings.

"[Appellants'] argument that Finding No. 10 is irrelavant [*sic*] is not raised in the petition and is not supported by any authority.

"Finding No. 10 supports Finding No. 8: development of the second unit will present a threat to public health, safety, and welfare contrary to one of the requirements for a land use permit (C.C.C. Ord. Code § 82-24.1002(13)). It was within the discretion of the [Board and the County] to take the concerns of the neighbors into account and to decide that the public welfare would be served by denying the permit; that ... Finding No. 10 ... is sufficient to support the denial of [appellants'] application for a land use permit."

On this basis, the trial court denied appellant's petition for writ of mandate and entered judgment for the County. This appeal followed.

II. Standard of Review

In bringing their petition for writ of administrative mandamus, appellants argued that the County Board prejudicially abused its discretion. Under Code of Civil Procedure section 1094.5, subdivision (b), "[a]buse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." Both in the trial court and on appeal, appellants have conceded that this is not a case in which the trial court is authorized by law to exercise its independent judgment on the evidence, and thus that abuse of discretion is established only upon a determination that the findings of the administrative body were not supported by substantial evidence in the light of the whole record. (Code Civ. Proc., § 1094.5, subd. (c); *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32 [112 Cal.Rptr. 805, 520 P.2d 29] [substantial evidence standard used when no fundamental vested right involved].)

The scope of our review of the subject administrative agency action in this case is identical with that of the superior court. The same substantialevidence *335 standard applies, and the issue is whether the findings of the County Board were based on substantial evidence in light of the entire administrative record. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 149, fn. 22 [93 Cal.Rptr. 234, 481 P.2d 242]; *Zuniga v. County of San Mateo Dept. of Health Services* (1990) 218 Cal.App.3d 1521, 1530-1531 [267 Cal.Rptr. 755]; *County of San Diego v. Assessment Appeals Bd. No. 2* (1983) 148 Cal.App.3d 548, 554-555 [195 Cal.Rptr. 895].) Moreover, because the trial court did not exercise its independent judgment in reviewing the Board decision, but instead applied the substantial evidence test, we must examine the findings made by the Board itself to determine whether they were supported by substantial evidence, rather than limiting ourselves to a review of the findings made by the trial court. (*Stearns v. Fair Employment Practice Com.* (1971) 6 Cal.3d 205, 211 [98 Cal.Rptr. 467, 490 P.2d 1155]; *Bixby v. Pierno, supra*, 4 Cal.3d at pp. 143-144, fn. 10; Cal. Administrative Mandamus (Cont.Ed.Bar 1989) § § 4.162-4.163, 14.27, pp. 205-207, 463-464.)

(1) Under current interpretations of the substantial evidence test as applied in review of administrative agency action, we must examine all relevant evidence in the entire record, considering both the evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by "substantial evidence." (*Universal Camera Corp. v. Labor Bd.*

Copr. © Bancroft-Whitney and West Group 1998

(1951) 340 U.S. 474, 488-490 [95 L.Ed. 456, 467-468, 71 S.Ct. 456]; *Bixby v. Pierno, supra*, 4 Cal.3d at p. 149, fn. 22; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 635-639, fn. 22 [83 Cal.Rptr. 208, 463 P.2d 432]; *Zuniga v. County of San Mateo Dept. of Health Services, supra*, 218 Cal.App.3d at pp. 1530-1531; *County of San Diego v. Assessment Appeals Bd. No. 2, supra*, 148 Cal.App.3d at pp. 554-555.) For this purpose, "... substantial evidence has been defined in two ways: first, as evidence of ' " 'ponderable legal significance ... reasonable in nature, credible, and of solid value' " ' (*Olsevit v. Trustees of Cal. State University & Colleges* (1978) 21 Cal.3d 763, 773, fn. 9 [148 Cal.Rptr. 1, 582 P.2d 88]); and second, as ' "relevant evidence that a reasonable mind might accept as adequate to support a conclusion" ' (*Hosford v. State Personnel Bd.* (1977) 74 Cal.App.3d 302, 307 [141 Cal.Rptr. 354]).' " (*County of San Diego v. Assessment Appeals Bd. No. 2, supra*, 148 Cal.App.3d at p. 555.)

At the trial court level, the petitioner in an administrative mandamus proceeding has the burden of proving that the agency's decision was invalid and should be set aside, because it is presumed that the agency regularly performed its official duty. When the standard of review is the substantial evidence test, as it is here, it is presumed that the findings and actions of the administrative agency were supported by substantial evidence. (*336 *Caveness v. State Personnel Bd.* (1980) 113 Cal.App.3d 617, 630 [170 Cal.Rptr. 54]; *Barnes v. Personnel Department* (1978) 87 Cal.App.3d 502, 505 [151 Cal.Rptr. 94].) Thus, since the same standard of review applies now on appeal as did in the trial court, the burden is on appellant to show there is no substantial evidence whatsoever to support the findings of the Board. (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970 [191 Cal.Rptr. 415].)

III. Sufficiency of the Evidence to Support Findings

(2) Applying this standard of review to the decision of the County Board in this case, we are of the opinion that the administrative record does contain substantial evidence to support the Board's affirmance of the denial of appellant's application for a land use permit for the purpose of establishing a second residential unit.

Under the applicable County ordinances, of which we take judicial notice (Evid. Code, § § 452, subd. (b), 459; *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 24 [157 Cal.Rptr. 706, 598 P.2d 866]), the County planning agency division "shall make" certain findings before granting a land use permit for a residential second unit. (Contra Costa County [hereafter C.C.C.] Ord. Code, § 82-24.1002.) Among these findings are that "[t]he second unit is architecturally compatible with overall neighborhood character and the primary residence in terms of scale, colors, materials and design for trim, windows, roof, roof pitch and other exterior physical features"; "[t]he second unit does not result in excessive neighborhood noise, traffic, or parking problems"; and "[d]evelopment of the second unit does not present a threat to public health, safety or welfare." (C.C.C. Ord. Code, § 82-24.1002, subds. (8), (11), (13).)

In addition, the provision on granting land use permits for residential second units specifically requires that the agency must make findings in accordance with the separate ordinance dealing with variance, conditional use and special permits found at article 26-2.20 of the County Ordinance Codes. The findings that must be made prior to granting a conditional use permit include that the proposed land use "shall not adversely affect the preservation of property values"; "shall not create a nuisance and/or enforcement problem within the neighborhood"; and "shall not encourage marginal development within the neighborhood." (C.C.C. Ord. Code, § § 26-2.2008, subds. (3), (5), (6); 82- 24.1002.)

Failure to make any one of these findings must result in denial of the application for a land use permit. (C.C.C. Ord. Code, § § 26-2.2008, 82- 24.1002.) Because we are reviewing a *denial* of a requested land use permit, *337 it is not necessary to determine that *each* finding by the Board was supported by substantial evidence. As long as the Board made a finding that any one of the necessary elements enumerated in the ordinances was lacking, and this finding was itself supported by substantial evidence, the Board's denial of appellant's application must be upheld.

Finding No. 8, stating that the development of a residential second unit would present a threat to public health, safety and welfare by resulting in excessive neighborhood noise, traffic and parking problems, negates two of the necessary elements for granting a land use permit for a second unit, as enumerated in County Ordinance Code section 82-24.1002, subdivisions (11) and (13). Neighbors of the proposed second residential unit gave ample testimony that because of the nature of the cul-de-sac on which the primary residence is located, an additional living unit on the street would create traffic, parking, safety, noise and nuisance problems. Contrary to appellants' position, expert testimony on

Copr. © Bancroft-Whitney and West Group 1998

these issues is not necessary. It is appropriate and even necessary for the County to consider the interests of neighboring property owners in reaching a decision whether to grant or deny a land use entitlement, and the opinions of neighbors may constitute substantial evidence on this issue. (*Smith v. County of Los Angeles* (1989) 211 Cal.App.3d 188, 201-204 [259 Cal.Rptr. 231]; *Nelson v. City of Selma* (9th Cir. 1989) 881 F.2d 836, 840.)

Finding No. 10, stating that "[a] second unit is not suitable in this location, is out of character with the surrounding neighborhood and would be an intrusion into the neighborhood," is related to several of the enumerated requirements for issuance of a residential second unit land use permit. Provisions in the County ordinances relevant to this finding include that the second unit be "architecturally compatible with overall neighborhood character" (C.C.C. Ord. Code, § 82-24.1002, subd. (9)); that it not "adversely affect the preservation of property values" (C.C.C. Ord. Code, § 26-2.2008, subd. (3)); that it not create "a nuisance and/or enforcement problem within the neighborhood or community" (C.C.C. Ord. Code, § 26-2.2008, subd. (5)); that it not "encourage marginal development within the neighborhood" (C.C.C. Ord. Code, § 26-2.2008, subd. (6)); and, generally, that it not be detrimental to health, safety and general welfare (C.C.C. Ord. Code, § § 26-2.2008, subd. (1); 82-24.1002, subd. (13)).

These provisions in the County Ordinance Code give the County and its planning agencies the authority to consider the effect of proposed projects on the character of the surrounding neighborhood. It is well established that the concept of public welfare encompasses a broad range of factors, including aesthetic values as well as monetary and physical ones, and that a concern*338 for aesthetics and "character" is a legitimate governmental objective. (*Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, 502 [69 L.Ed.2d 800, 811-812, 101 S.Ct. 2882]; *Berman v. Parker* (1954) 348 U.S. 26, 33 [99 L.Ed. 27, 37-38, 75 S.Ct. 98]; *Guinnane v. San Francisco City Planning Com.* (1989) 209 Cal.App.3d 732, 741 [257 Cal.Rptr. 742]; *Novi v. City of Pacifica* (1985) 169 Cal.App.3d 678, 682 [215 Cal.Rptr. 439].) Other "concerns that fall well within the domain of the public interest and welfare" include parking, traffic and visual impact. (*Guinnane v. San Francisco City Planning Com., supra*, 209 Cal.App.3d at p. 743.)

Thus, although finding No. 10 does not expressly restate any particular one of the several relevant ordinance requirements, it is actually a summation of several of them. It articulates various significant elements necessarily included in the general concept of public welfare but not expressly enumerated in the County Ordinance Code. It is therefore directly related to finding No. 8, stating that the development of the proposed second residential unit would present a threat to public health, safety and welfare. This finding of unsuitability to the character of the surrounding neighborhood is sufficient by itself to support the denial of appellants' application for a land use permit. (*Guinnane v. San Francisco City Planning Com., supra*, 209 Cal.App.3d at pp. 740-743 [local agency denied permit on basis of finding that large size of house was "not in character" with surrounding neighborhood even though in technical compliance with zoning and building codes; upheld].)

Contrary to appellants' position, the fact that their proposed second unit would be the first such unit in the neighborhood does not render finding No. 10 irrelevant as a matter of law. There are many reasons why a residential second unit might be unsuitable for a particular location and "out of character" with a neighborhood, aside from the fact that it is the first such unit in that location. Such a unit might be perfectly suitable in a different neighborhood with different conditions, even though it was the first such unit in that neighborhood. The kinds of houses in this neighborhood, the street configurations (mostly cul-de-sacs), the traffic patterns, and the lot sizes, are all significant factors to be considered in making this determination. It is clear from the record that these considerations were taken into account by the Board in this case.

Moreover, the County Ordinance Code specifically *requires* a consideration of the effect of a proposed use on neighboring property values. The fact that a second unit would be the first such development in a given neighborhood may well be relevant to a determination of the effect of the unit on local property values. *339

Finding No. 10 is supported by substantial evidence in the administrative record. In the first place, the same evidence supporting finding No. 8 also supports finding No. 10. To the extent the proposed residential second unit would result in excessive neighborhood noise, traffic, or parking problems, it would clearly be "an intrusion into the neighborhood" and "not suitable to this location."

There was ample evidence of community concern with the impact of a residential second rental unit on the general aesthetic character of the neighborhood,

Copr. © Bancroft-Whitney and West Group 1998

as well as on traffic, safety, and protection of property values. These concerns were repeatedly expressed by neighbors opposing the application. In addition, one member of the Board testified to his personal observations of the proposed residential second unit and the surrounding neighborhood, and stated his opinion that it was not in character with the area. The Board properly took these opinions into account in making its determination, and they constitute substantial evidence to support the discretionary finding that the proposed second residential unit was intrusive and not suitable to the character of the surrounding neighborhood. (*Smith v. County of Los Angeles, supra,* 211 Cal.App.3d at pp. 201-204.)

Thus, at least two of the Board's findings (findings No. 8 and 10) were supported by substantial evidence in the administrative record. Each of these findings was contrary to the requirements for issuance of a land use permit; either one was sufficient to support the denial of appellants' application.

IV. Legal Relevance of the Board's Findings

(3) Much of appellants' argument on appeal concerns their position that the Board's findings were impermissible under the maximum standards for residential second units purportedly set by Government Code section 65852.2. [FN1] This contention is without merit.

FN1 Unless otherwise indicated, all further statutory references are to the Government Code.

Section 65852.2 was adopted to encourage local governments to enact their own ordinances allowing and regulating so-called "granny flat" residential second units in single-family and multi-family zones where they would otherwise be prohibited. (*Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 545-546 [7 Cal.Rptr.2d 848].) The statute sets up a three-option approach under which a local government may choose to ban all residential second units on condition of making certain findings that such units would have specific adverse impacts on public health, safety and welfare (§ 65852.2, subd. (c)); adopt its own ordinance providing for the creation of second units and establishing various criteria for approving them *340 (§ 65852.2, subd. (a)); or do neither and follow a state-prescribed procedure for approving or disapproving applications for creation of second units (§ 65852.2, subd. (b)). (*Wilson v. City of Laguna Beach, supra,* 6 Cal.App.4th at p. 553.)

Under section 65852.2, subdivision (a), any local agency may adopt an ordinance providing for the creation of second units, consistent with a list of six provisions. These provisions are phrased in permissive terms stating that local standards for second units "may include, but are not limited to" various criteria. In contrast, under section 65852.2, subdivision (b), every local agency which *fails* to adopt an ordinance governing second units in accordance with subdivisions (a) or (c) "*shall* grant a special use or a conditional use permit for the creation of a second unit if the second unit complies" with an enumerated list of nine specific requirements. (Italics added.) Unlike the provisions in subdivision (a), those contained in subdivision (b) do not use permissive or discretionary terms, but are mandatory.

At the end of this list of requirements, subdivision (b) states: "No other local ordinance, policy, or regulation shall be the basis for the denial of a building permit or a use permit under this subdivision.

"This subdivision establishes the maximum standards that local agencies shall use to evaluate proposed second units on lots zoned for residential use which contain an existing single-family dwelling. No additional standards, other than those provided in this subdivision or subdivision (a), shall be utilized or imposed, except that a local agency may require an applicant for a permit issued pursuant to this subdivision to be an owner-occupant.

"This section does not limit the authority of local agencies to adopt less restrictive requirements for the creation of second units." (§ 65852.2, subd. (b).)

Appellants concede that because the County has adopted an ordinance regulating the creation of residential second units, it is governed by section 65852.2, subdivision (a). However, they contend that the language in subdivision (b) stating that "[t]his subdivision establishes the maximum standards that local agencies shall use to evaluate proposed second units" applies equally to an ordinance drafted under subdivision (a), and thus, an ordinance enacted pursuant to subdivision (a) may not impose standards which exceed those enumerated in subdivision (b). In support of this contention, appellants argue that the intent of the statute is to encourage the creation of residential second units by barring undue local restrictions on their creation.

This argument ignores the broadly permissive

Copr. © Bancroft-Whitney and West Group 1998

language contained in section 65852.2, subdivision (a), giving local agencies discretion in thespecific *341 criteria they may adopt for approving second units. For example, subdivision (a)(1) states that "[a]reas *may* be designated within the jurisdiction of the local agency where second units *may* be permitted." (Italics added.) The necessary implication of this provision is that a local agency may forbid the creation of second units in other areas. Subdivision (a)(3) states: "Standards *may* be imposed on second units which *include, but are not limited to*, parking, height, setback, lot coverage, architectural review, and maximum size of a unit." (Italics added.) This language clearly contemplates that local agencies may impose *additional* standards on the creation of residential second units. Similarly, subdivision (a)(4) states that a local agency "*may* find that second units do not exceed the allowable density for the lot upon which the second unit is located, and that second units are a residential use that is consistent with the existing general plan and zoning designation for the lot." (Italics added.) The implication of this language is that a local agency may also decline to make such a determination, in its discretion.

In short, section 65852.2, subdivision (a), which applies to local agencies that have adopted ordinances providing for the creation of second units, contains broadly permissive language on the standards that a local government may impose on applications for such units. The "maximum standards" set forth in subdivision (b), by their own terms, apply only to *that* subdivision, and are not relevant when a local government has adopted an appropriate ordinance governing second units.

The County's second unit ordinance complies with section 65852.2, subdivision (a). There is nothing in the standards and criteria set forth in the County's ordinance that conflicts with anything in subdivision (a), or with the legislative intent of that statute. To the contrary, the provisions of the ordinance are consistent with the suggested standards set forth in subdivision (a), and are in accord with the kinds of land use regulations that have been consistently upheld in this state. (*Guinnane v. San Francisco City Planning Com., supra*, 209 Cal.App.3d at pp. 736-743.)

The judgment is affirmed.

White, P. J., and Werdegar, J., concurred.

Cal.App.1.Dist.,1993.

Desmond v. County of Contra Costa

END OF DOCUMENT

Copr. © Bancroft-Whitney and West Group 1998

Adopted: October 22, 1980
Amendments Adopted: 8/19/81
(Amendments applicable only to claims for costs incurred after June 30, 1981)
Amended: 3/17/83
Amended: 9/29/83
Amended: 12/15/83
Amended: 6/27/85
Amended: 10/20/88
Amended: 7/22/93
G:\PG\CH961.75

PARAMETERS AND GUIDELINES
Chapter 961, Statutes of 1975
Collective Bargaining

An act to repeal Article 5 (commencing with Section 13080) of Chapter 1 of Division 10 of the Education Code, and to add Chapter 10.7 (commencing with Section 3540) to Division 4 of Title 1 of the Government Code, relating to public educational employment relations, and making an appropriation. This bill, which was operative July 1, 1976, repealed the Winton Act and enacted provisions to meet and negotiate, thereby creating a collective bargaining atmosphere for public school employers.

A. Operative Date of Mandate

The provisions relating to the creation, certain duties of, and appropriations for the Public Employment Relations Board were operative on January 1, 1976. The provisions relating to the organizational rights of employees, the representational rights of employee organizations, the recognition of exclusive representatives, and related procedures were operative on April 1, 1976. The balance of the added provisions were operative on July 1, 1976.

B. Period of Claim

Only costs incurred after January 1, 1978, may be claimed. The initial claim should have included all costs incurred for that portion of the fiscal year from January 1, 1978, to June 30, 1978.

Pursuant to language included in the 1980-81 budget, claims shall no longer be accepted for this period. All subsequent fiscal year claims should be filed with the State Controller's Office for processing.

C. Mandated Cost

Public school employers have incurred costs by complying with the requirements of Section 3540 through 3549.1

established by Chapter 961, Statutes of 1975. In addition, some costs have been incurred as a result of compliance with regulations promulgated by the Public Employment Relations Board (PERB). Since these activity costs (referred to collectively as "Rodda Act" activities and costs in this document), in many respects, simply implement the original legislation, it is intended that these parameters and guidelines have embodied those regulations or actions taken by PERB prior to December 31, 1978.

D. County Superintendent of Schools Filing

If the County Superintendent of Schools files a claim on behalf of more than one school district, the costs of the individual school district must be shown separately.

E. Governing Authority

The costs for salaries and expenses of the governing authority, for example the School Superintendent and Governing Board, are not reimbursable. These are costs of general government as described by the federal guideline entitled "Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government," OASC-10.

F. Certification

The following certification must accompany all claims:

I DO HEREBY CERTIFY:

THAT Section 1090 to 1096, inclusive, of the Government Code and other applicable provisions of the law have been complied with; and

THAT I am the person authorized by the local agency to file claim for funds with the State of California.

Signature of Authorized Representative Date

Title
Telephone Number

G. Claim Components (Reimbursable Costs)

Reimbursable activities mandated by Chapter 961, Statutes of 1975 are grouped into six components, G1 through G6. The cost of activities grouped in components G1, G2, and G3 are subject to offset by the historic cost of similar Winton Act activities as described in H2.

1. Determination of appropriate bargaining units for representation and determination of the exclusive representation and determination of the exclusive representatives.

   a. Unit Determination: Explain the process for determining the composition of the certificated employee council under the Winton Act, and the process for determining appropriate bargaining units including the determination of management, supervisory and confidential employees, under Chapter 961, Statutes of 1975, if such activities were performed during the fiscal year being claimed.

   b. Determination of the Exclusive Representative: Costs may include receipt and posting of the representation and decertification notices and, if necessary, adjudication of such matters before the PERB.

   c. Show the actual increased costs including salaries and benefits for employer representatives and/or necessary costs for contracted services for the following functions:

      (1) Development of proposed lists for unit determination hearings if done during the fiscal year being claimed. Salaries and benefits must be shown as described in Item H3.

      (2) Representation of the public school employer at PERB hearings to determine bargaining units and the exclusive representative. Actual preparation time will be reimbursed. Salaries and benefits must be shown as described in Item H3.

      (3) If contracted services are used for either (a) or (b) above, contract invoices must be submitted with the claim. Contract costs must be shown as described in Item H5.

(4) Indicate the cost of substitutes for release time for employer and exclusive bargaining unit witnesses who testify at PERB hearings. The job classification of the witnesses and the date they were absent must also be submitted. Release time for employee witnesses asked to attend the PERB hearing by bargaining units will not be reimbursed.

(5) Identify the travel costs for employer representatives to any PERB hearing. Reimbursement shall reflect the rate specified by the regulations governing employees of the local public school employer.

(6) Cost of preparation for one transcript per PERB hearing will be reimbursed.

2. Elections and decertification elections of unit representatives are reimbursable in the event the Public Employment Relations Board determines that a question of representation exists and orders an election held by secret ballot.

a. Submit with your claim any Public Employment Relations Board agreements or orders which state how the election must be held.

b. If a precinct voting list was required by PERB, indicate the cost of its development. Salaries and benefits must be shown as described in Item H3.

c. The salary and benefits of a school employer representative, if required by PERB for time spent observing the counting of ballots, will be reimbursed. The representatives' salary must be shown as described in Item H3.

3. Negotiations: Reimbursable functions include -- receipt of exclusive representative's initial contract proposal, holding of public hearings, providing a reasonable number of copies of the employer's proposed contract to the public, development and presentation of the initial district contract proposal, negotiation of the contract, reproduction and distribution of the final contract agreement.

a. Show the costs of salaries and benefits for employer representatives participating in negotiations. Contracted services will be

reimbursed. Costs for maximum of five public school employer representatives per unit, per negotiation session will be reimbursed. Salaries and benefits must be shown as described on Page 7, Item H3.

b. Show the costs of salaries and benefits for employer representatives and employees participating in negotiation planning sessions. Contracted services for employer representatives will be reimbursed. Salaries and benefits must be shown as described in Item H3.

c. Indicate the cost of substitutes for release time of exclusive bargaining unit representatives during negotiations. Give the job classification of the bargaining unit representative that required a substitute and dates the substitute worked. Substitute costs for a maximum of five representatives per unit, per negotiation session will be reimbursed. The salaries of union representatives are not reimbursable.

d. Reasonable costs of reproduction for a copy of the initial contract proposal and final contract, which is applicable and distributed to each employer representative (i.e. supervisory, management, confidential) and a reasonable number of copies for public information will be reimbursed. Provide detail of costs and/or include invoices. Costs for copies of a final contract provided to collective bargaining unit members are not reimbursable.

e. If contract services are used for a. and/or b. above, contract invoices must be submitted. Contract costs must be shown as described in Item H5.

f. A list showing the dates of all negotiation sessions held during the fiscal year being claimed must be submitted.

4. <u>Impasse Proceedings</u>

a. Mediation

(1) Costs for salaries and benefits for employer representative personnel are reimbursable. Contracted services will be reimbursed. Costs for a <u>maximum of five public school employer representatives per mediation</u>

session will be reimbursed. Salaries and benefits must be shown as described in Item H3.

(2) Indicate the costs of substitutes for the release time of exclusive bargaining unit representatives during impasse proceedings. The job classification of the employee witnesses and the date they were absent shall be indicated. Costs for a maximum of five representatives per mediation session will be reimbursed.

(3) Renting of facilities will be reimbursed.

(4) Costs of the mediator will not be reimbursed.

(5) If contract services are used under 1, contract invoices must be submitted with the claim. Contract costs must be shown as described in Item H5.

b. Fact-finding publication of the findings of the fact-finding panel. (To the extent fact-finding was required under the Winton Act during the 1974-75 fiscal year, costs are not reimbursable.)

(1) All costs of the school employer panel representative shall be reimbursed. Salaries and benefits must be shown as described in Item H3.

(2) Fifty percent of the costs mutually incurred by the fact-finding panel shall be reimbursed. This may include substitutes for release time of witnesses during fact-finding proceedings, and the rental of facilities required by the panel.

(3) Special costs imposed on the public school employer for the development of unique data required by a fact-finding panel will be reimbursed. Describe the special costs and explain why this data would not have been required by a fact-finding panel under the Winton Act. Salaries and benefits must be shown as described in Item H3.

5. Contract administration and adjudication of contract disputes either by arbitration or litigation. Reimbursable functions include grievances and administration and enforcement of the contract.

   a. Salaries and benefits of employer personnel involved in adjudication of contract disputes. Contracted services will be reimbursed. Salaries and benefits must be shown as described in Item H3.

   b. Indicate substitutes necessary for release time of the representatives of an exclusive bargaining unit during adjudication of contract disputes. The job classification of the employee witnesses and the dates they were absent shall also be indicated.

   c. Reasonable costs incurred for a reasonable number of training sessions held for supervisory and management personnel on contract administration/interpretation of the negotiated contract are reimbursable. Contract interpretations at staff meetings are not reimbursable. Personal development and informational programs, i.e., classes, conferences, seminars, workshops, and time spent by employees attending such meetings are not reimbursable. Similarly, purchases of books and subscriptions for personal development and information purposes are not reimbursable. Salaries and benefits must be shown as described in Item H3.

   d. The cost of one transcript per hearing will be reimbursed.

   e. Reasonable public school employer costs associated with a contract dispute which is litigated are reimbursable, as follows:

      1. Reasonable public school employer costs associated with issues of contract disputes which are presented before PERB are reimbursable.

      2. Reasonable public school employer cost of litigation as a defendant in the court suit involving contract disputes may be reimbursable.

      3. Where the public school employer is the

plaintiff in a court suit to appeal a PERB ruling, costs are reimbursable only if the public school employer is the prevailing party (after all appeals, final judgment).

4. No reimbursement is allowed where the public school employer has filed action directly with the courts without first submitting the dispute to PERB, if required.

5. No reimbursement shall be provided for filing of amicus curiae briefs.

f. Expert witness fees will be reimbursed if the witness is called by the public school employer.

g. Reasonable reproduction costs for copies of a new contract which is required as a result of a dispute will be reimbursed.

h. If contract services are used under "a" above, copies of contract invoices must be submitted with your claim. Contract costs must be shown as described in Item H5.

i. Public school employer's portion of arbitrators' fees for adjudicating grievances, representing 50% of costs, will be reimbursed.

6. Unfair labor practice adjudication process and public notice complaints.

a. Show the actual costs for salaries and benefits of employer representatives. Services contracted by the public school employer are reimbursable. Salaries and benefits must be shown as described in Item H3.

b. Indicate cost of substitutes for release time for representatives of exclusive bargaining units during adjudication of unfair practice charges.

c. The cost of one transcript per PERB hearing will be reimbursed.

d. Reasonable reproduction costs will be reimbursed.

e. Expert witness fees will be reimbursed if the witness is called by the public school employer.

f. If contract services are used under "a" above, contract invoices must be submitted. Contract

costs must be shown as described in Item H5.

g. No reimbursement for an appeal of an unfair labor practice decision shall be allowed where the Public Employee Relations Board is the prevailing party.

h. No reimbursement for filing of amicus curiae briefs shall be allowed.

H. Supporting Data for Claims--Report Format for Submission of Claim.

1. Description of the Activity: Follow the outline of the claim components. Cost must be shown separately by component activity. Supply workload data requested as part of the description to support the level of costs claimed. The selection of appropriate statistics is the responsibility of the claimant.

2. Quantify "Increased" Costs: Public school employers will be reimbursed for the "increased costs" incurred as a result of compliance with the mandate.

a. For component activities G1, G2, and G3:

1. Determination of the "increased costs" for each of these three components requires the costs of current year Rodda Act activities to be offset [reduced] by the cost of the base-year Winton Act activities. The Winton Act base-year is generally fiscal year 1974-75.

Winton Act base-year costs are adjusted by the Implicit Price Deflator prior to offset against the current year Rodda Act costs for these three components. The Implicit Price Deflator shall be listed in the annual claiming instructions of the State Controller.

2. The cost of a claimant's current year Rodda Act activities are offset [reduced] by the cost of the base-year Winton Act activities either: by matching each component, when claimants can provide sufficient documentation to segregate each component of the Winton Act base-year activity costs; or, by combining all three components when claimants cannot satisfactorily segregate each component of Winton Act base-year costs.

b. For component activities G4, G5, and G6:

All allowable activity costs for these three Rodda Act components are "increased costs" since there were no similar activities required by the Winton Act; therefore, there is no Winton Act base-year offset to be calculated.

BASE YEAR	ADJUSTMENT	
1974-1975	1.490	1979-80 FY
"	1.560	1980-81 FY
"	1.697	1981-82 FY
"	1.777	1982-83 FY
"	1.884	1983-84 FY

3. Salary and Employees' Benefits: Show the classification of the employees involved, amount of time spent, and their hourly rate. The worksheet used to compute the hourly salary rate must be submitted with your claim. Benefits are reimbursable. Actual benefit percent must be itemized. If no itemization is submitted, 21 percent must be used for computation of claim costs. Identify the classification of employees committed to functions required under the Winton Act and those required by Chapter 961, Statutes of 1975.

4. Services and Supplies: Only expenditures which can be identified as a direct cost as a result of the mandate can be claimed.

5. Professional and Consultant Services: Separately show the name of professionals or consultants, specify the functions the consultants performed relative to the mandate, length of appointment, and the itemized costs for such services. Invoices must be submitted as supporting documentation with your claim. The maximum reimbursable fee for contracted services is $100 per hour. Annual retainer fees shall be no greater than $100 per hour. Reasonable expenses will also be paid as identified on the monthly billings of consultants. However, travel expenses for consultants and experts (including attorneys) hired by the claimant shall not be reimbursed in an amount higher than that received by State employees, as established under Title 2, Div. 2, Section 700ff, CAC.

6. Allowable Overhead Cost: Public school employer's indirect costs may only be claimed through an indirect costs rate proposal prepared in accordance with the provision on Federal Regulation OASC-10 (formerly OMB Circular A-87 and FMC 74-4). For the 1978-79 fiscal year, public school employers may use the J-86

nonrestrictive indirect cost rate approved by the State Department of Education (SDE). For the 1979-80 and subsequent fiscal years, public school employers may use the J-41A nonrestrictive indirect cost rate approved by SDE. Public school employers that do not have an approved J-41A must use the J-85 restrictive indirect cost rate for the 1978-79 fiscal year, and J-73A rate for the 1980-81 and subsequent fiscal years. The J-41A or the J-13A must be submitted with your claim.

7. Costs previously included in the J-86 indirect cost calculation which are now included in the J-41A direct support cost category are eligible for reimbursement if the method of computation is explained in the claim.

   Indirect cost rate should not be applied to costs classified as General Support in the J-41A or J-73A under EDP codes 400, 405, and 410 in column three.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Government Code Section 3547.5 as added by Chapter 1213, Statutes of 1991, and the California Department of Education Management Advisory 92-01 And filed on December 29, 1997; By the Alameda County Office of Education, Claimant.	NO. 97-TC-08 *Collective Bargaining Agreement Disclosure* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (Adopted on March 26, 1998)

STATEMENT OF DECISION

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

This Decision shall become effective on April 7, 1998.

Paula Higashi

Paula Higashi, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	NO. 97-TC-08
Government Code Section 3547.5 as added by Chapter 1213, Statutes of 1991, and the California Department of Education Management Advisory 92-01 And filed on December 29, 1997; By the Alameda County Office of Education, Claimant.	*Collective Bargaining Agreement Disclosure* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (Adopted on March 26, 1998)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) on March 26, 1998, heard this test claim during a regularly scheduled hearing. Keith Peterson appeared for the Alameda County Office of Education and Carol Berg appeared for the Education Mandated Cost Network.

At the hearing, evidence both oral and documentary was introduced, the test claim was submitted, and the vote was taken.

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

The Commission, by a vote of 7-0 approved this test claim.

Issue

> Do the provisions of Government Code section 3547.5, as added by Chapter 1213, Statutes of 1991, and the California Department of Education's Management Advisory 92-01, impose a new program or higher level of service upon school districts within the meaning of section 6, article XIII B of the California Constitution and Government Code section 175147

Prior Law

Before the test claim legislation, school districts were only required to publicly disclose all *initial* proposals for collective bargaining agreements. Government Code section 3547

provides in pertinent part: "[a]ll initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records."

Test Claim Legislation

Chapter 1213, Statutes of 1991, added section 3547.5 to the Government Code, as follows:

> "Before a public school employer enters into a written agreement with an exclusive representative covering matters within the scope of representation, the major provisions of the agreement, including, but not limited to, the costs that would be incurred by the public school employer under the agreement for the current and subsequent fiscal years, shall be disclosed at a public meeting of the public school employer in a format established for this purpose by the Superintendent of Public Instruction."

Under section 3547.5, school districts must now publicly disclose the major provisions of all collective bargaining agreements before they enter into a written agreement. The purpose of this new legislation is to ensure that the public is aware of the costs associated with the major provisions of the tentative collective bargaining agreement before it becomes binding on the school district.

California Department of Education Management Advisory 92-01[1]

Government Code section 3547.5 requires the Superintendent of Public Instruction to establish a format for the information that is to be publicly disclosed. To this end, the California Department of Education released Management Advisory 92-01 on May 15, 1992. The Advisory specifies the minimum procedures, format, and information required to be disclosed under section 3547.5.

Commission Findings

In order for a statute, which is the subject of a test claim, to impose a reimbursable state mandated program, the statutory language (1) must direct or obligate an activity or task upon local governmental entities, and (2) the required activity or task must be new or it must create an increased or higher level of service over the former required level of service. To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately

[1] California Department of Education Management Advisory 92-01 is referenced in Claimant's initial filing dated December 29, 1997.

prior to the enactment of the test claim legislation.[2] Finally, the newly required activity or increased level of service must be state mandated.[3]

The Commission found that immediately before Government Code section 3547.5 was enacted under Chapter 1231, Statutes of 1991, public school employers were under no obligation to publicly report the major provisions of a collective bargaining agreement *after* discussion with an exclusive representative of an employee group prior to entering into a written agreement.

The Commission found that under prior law school districts were only required to publicly disclose all *initial* proposals for collective bargaining agreements.

The Commission found that Government Code section 3547.5, as added by Chapter 1231, Statutes of 1991, requires school districts to publicly disclose major provisions of a collective bargaining agreement *after* negotiations, but before this agreement becomes binding.

The Commission found that the California Department of Education issued its Management Advisory 92-01, dated May 15, 1992, to establish the public disclosure format for school district compliance with the test claim statute. The Commission found that the Advisory sets forth the minimum procedures, format, and information for school districts to disclose under the new public reporting requirements. Further, the Commission found that the Advisory constitutes an "executive order" under Government Code section 17516[4] and is therefore a part of the test claim.

Conclusion

The Commission concludes that that Government Code section 3547.5, as added by Chapter 1213, Statutes of 1991, and the California Department of Education Management Advisory 92-01, impose a new program or higher level of service upon local school districts and therefore are reimbursable under section 6, article XIII B of the California Constitution and Government Code section 17514.

Further, the Commission concludes that the parameters and guidelines should allow reimbursement for compliance with the minimum procedures, format, and information specified in the California Department of Education's Management Advisory 92-01, as applicable and appropriate under the test claim statute.

---

[2] Both Keith Peterson and Carol Berg disagreed at the hearing regarding the appropriate measurement date. Carol Berg wanted this sentence stricken from the Statement of Decision, while Keith Peterson wished to lodge his formal objection to staff's use of the measurement date. However, both supported adoption of the Statement of Decision.

[3] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835.

[4] Government Code section 17516 provides in relevant part: "Executive order means any order, plan, requirement, rule, or regulation issued by any of the following: (a) The Governor. (b) Any officer or official serving at the pleasure of the Governor. (c) *Any agency, department, board, or commission of state government.*" (Emphasis added.)

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	No. CSM 97-TC-08
Government Code Section 3540 et seq., as added by Chapter 961, Statutes of 1975 et al Government Code Section 3547.5, as added by Chapter 1213, Statutes of 1991, and the California Department of Education Advisory 92-01 And filed on December 29, 1997; By the Alameda County Office of Education, Claimant.	*Consolidation of Collective Bargaining and Collective Bargaining Agreement Disclosure* ADOPTION OF AMENDED PARAMETERS AND GUIDELINES PURSUANT TO GOVERNMENT CODE SECTION 17557 AND CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTIONS 1183.12 AND 1183.2. (Adopted on August 20, 1998)

DECISION

The attached *amended* Parameters and Guidelines of the Commission on State Mandates were hereby adopted in the above-entitled matter.

This Decision shall become effective on August 25, 1998.

Paula Higashi

PAULA HIGASHI, Executive Director

P:\Mandates\1997/97-tc-08/pgorder

Adopted: October 22, 1980
Amendments Adopted: 8/19/81
(Amendments applicable only to claims for costs incurred after June 30, 1981)
Amended: 3/17/83
Amended: 9/29/83
Amended: 12/15/83
Amended: 6/27/85
Amended: 10/20/88
Amended: 7/22/93
Amended: 8/20/98
f:\mandates/1997\97tc08\pgfinal.doc
Document Date: August 21, 1998

CLAIMANT'S PROPOSED CONSOLIDATED PARAMETERS AND GUIDELINES, AS MODIFIED BY STAFF

Chapter 961, Statutes of 1975
Chapter 1213, Statutes of 1991

Collective Bargaining
and
Collective Bargaining Agreement Disclosure

An act to repeal Article 5 (commencing with Section 13080) of Chapter 1 of Division 10 of the Education Code, and to add Chapter 10.7 (commencing with Section 3540) to Division 4 of Title 1 of the Government Code, relating to public educational employment relations, and making an appropriation. This bill, which was operative July 1, 1976, repealed the Winton Act and enacted provisions to meet and negotiate, thereby creating a collective bargaining atmosphere for public school employers. Chapter 1213, Statutes of 1991 added section 3547.5 to the Government Code. Government Code section 3547.5 requires school districts to publicly disclose major provisions of a collective bargaining agreement after negotiations, but before the agreement becomes binding.

A. Operative Date of Mandate

The provisions relating to the creation, certain duties of, and appropriations for the Public Employment Relations Board were operative on January 1, 1976. The provisions relating to the organizational rights of employees, the representational rights of employee organizations, the recognition of exclusive representatives, and related procedures were operative on April 1, 1976. The balance of the added provisions were operative on July 1, 1976.

The provisions relating to Collective Bargaining Agreement Disclosure added by Chapter 1213, Statutes of 1991 were operative on January 1, 1992. The California Department of

Education issued Management Advisory 92-01 dated May 15, 1992, to establish the public disclosure format for school district compliance with the test claim statute.

B. Period of Claim

Only costs incurred after January 1, 1978 may be claimed. The initial claim should have included all costs incurred for that portion of the fiscal year from January 1, 1978, to June 30, 1978.

Pursuant to language included in the 1980-81 budget, claims shall no longer be accepted for this period. All subsequent fiscal year claims should be filed with the State Controller's Office for processing.

The test claim on Chapter 1213, Statutes of 1991 was filed with the Commission on December 29, 1997. Accordingly, the period of reimbursement for the provisions relating to disclosure begins July 1, 1996. Only disclosure costs incurred after July 1, 1996 may be claimed.

C. Mandated Cost

Public school employers have incurred costs by complying with the requirements of Section 3540 through 3549.1 established by Chapter 961, Statutes of 1975. In addition, some costs have been incurred as a result of compliance with regulations promulgated by the Public Employment Relations Board (PERB). Since these activity costs (referred to collectively as "Rodda Act" activities and costs in this document), in many respects, simply implement the original legislation, it is intended that these parameters and guidelines have embodied those regulations or actions taken by PERB prior to December 31, 1978.

D. County Superintendent of Schools Filing

If the County Superintendent of Schools files a claim on behalf of more than one school district, the costs of the individual school district must be shown separately.

E. Governing Authority

The costs for salaries and expenses of the governing authority, for example the School Superintendent and Governing Board, are not reimbursable. These are costs of general government as described by the federal guideline entitled "Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government," ASMB C-10.

F. Certification

The following certification must accompany all claims:

I DO HEREBY CERTIFY:

THAT Section 1090 to 1096, inclusive, of the Government Code and other applicable provisions of the law have been complied with; and

THAT I am the person authorized by the local agency to file claim for funds with the State of California.

_____ Signature of Authorized Representative

Date

_____ Title Telephone

Number

_____

G. Claim Components (Reimbursable Costs)

Reimbursable activities mandated by Chapter 961, Statutes of 1975 and Chapter 1213, Statutes of 1991 are grouped into seven components, G1 through G7. The cost of activities grouped in components G1, G2, and G3 are subject to offset by the historic cost of similar Winton Act activities as described in H2.

1. Determination of appropriate bargaining units for representation and determination of the exclusive representatives.

   a. Unit Determination: Explain the process for determining the composition of the certificated employee council under the Winton Act, and the process for determining appropriate bargaining units including the determination of management, supervisory and confidential employees, under Chapter 961, Statutes of 1975, if such activities were performed during the fiscal year being claimed.

   b. Determination of the Exclusive Representative: Costs may include receipt and posting of the representation and decertification notices and, if necessary, adjudication of such matters before the PERB.

c. Show the actual increased costs including salaries and benefits for employer representatives and/or necessary costs for contracted services for the following functions:

(1) Development of proposed lists for unit determination hearings if done during the fiscal year being claimed. Salaries and benefits must be shown as described in Item H3.

(2) Representation of the public school employer at PERB hearings to determine bargaining units and the exclusive representative. Actual preparation time will be reimbursed. Salaries and benefits must be shown as described in Item H3.

(3) If contracted services are used for either (a) or (b) above, contract invoices must be submitted with the claim. Contract costs must be shown as described in Item H5.

(4) Indicate the cost of substitutes for release time for employer and exclusive bargaining unit witnesses who testify at PERB hearings. The job classification of the witnesses and the date they were absent must also be submitted. Release time for employee witnesses asked to attend the PERB hearing by bargaining units will not be reimbursed.

(5) Identify the travel costs for employer representatives to any PERB hearing. Reimbursement shall reflect the rate specified by the regulations governing employees of the local public school employer.

(6) Cost of preparation for one transcript per PERB hearing will be reimbursed.

2. Elections and decertification elections of unit representatives are reimbursable in the event the Public Employment Relations Board determines that a question of representation exists and orders an election held by secret ballot.

a. Submit with your claim any Public Employment Relations Board agreements or orders which state how the election must be held.

b. If a precinct voting list was required by PERB, indicate the cost of its development. Salaries and benefits must be shown as described in Item H3.

c. The salary and benefits of a school employer representative, if required by PERB for time spent observing the counting of ballots, will be reimbursed. The representatives' salary must be shown as described in Item H3.

3. Negotiations: Reimbursable functions include -- receipt of exclusive representative's initial contract proposal, holding of public hearings, providing a reasonable number of copies of the employer's proposed contract to the public, development and presentation of the initial district contract proposal, negotiation of the contract, reproduction and distribution of the final contract agreement.

a. Show the costs of salaries and benefits for employer representatives participating in negotiations. Contracted services will be reimbursed. Costs for maximum of five public school employer representatives per unit, per negotiation session will be reimbursed. Salaries and benefits must be shown as described on Page 7, Item H3.

b. Show the costs of salaries and benefits for employer representatives and employees participating in negotiation planning sessions. Contracted services for employer representatives will be reimbursed. Salaries and benefits must be shown as described in Item H3.

c. Indicate the cost of substitutes for release time of exclusive bargaining unit representatives during negotiations. Give the job classification of the bargaining unit representative that required a substitute and dates the substitute worked. Substitute costs for a maximum of five representatives per unit, per negotiation session will be reimbursed. The salaries of union representatives are not reimbursable.

d. Reasonable costs of reproduction for a copy of the initial contract proposal and final contract, which is applicable and distributed to each employer representative (i.e. supervisory, management, confidential) and a reasonable number of copies for public information will be reimbursed. Provide detail of costs and/or include invoices. Costs for copies of a final contract provided to collective bargaining unit members are not reimbursable.

e. If contract services are used for a. and/or b. above, contract invoices must be submitted. Contract costs must be shown as described in Item H5.

f. A list showing the dates of all negotiation sessions held during the fiscal year being claimed must be submitted.

4. Impasse Proceedings

a. Mediation

(1) Costs for salaries and benefits for employer representative personnel are reimbursable. Contracted services will be reimbursed. Costs for a maximum of five public school employer representatives per mediation session will be reimbursed. Salaries and benefits must be shown as described in Item H3.

(2) Indicate the costs of substitutes for the release time of exclusive bargaining unit representatives during impasse proceedings. The job classification of the employee witnesses and the date they were absent shall be indicated. Costs for a maximum of five representatives per mediation session will be reimbursed.

(3) Renting of facilities will be reimbursed.

(4) Costs of the mediator will not be reimbursed.

(5) If contract services are used under 1, contract invoices must be submitted with the claim. Contract costs must be shown as described in Item H5.

b. Fact-finding publication of the findings of the fact-finding panel. (To the extent fact-finding was required under the Winton Act during the 1974-75 fiscal year, costs are not reimbursable.)

(1) All costs of the school employer panel representative shall be reimbursed. Salaries and benefits must be shown as described in Item H3.

(2) Fifty percent of the costs mutually incurred by the fact-finding panel shall be reimbursed. This may include substitutes for release time of witnesses during fact-finding proceedings, and the rental of facilities required by the panel.

(3) Special costs imposed on the public school employer for the development of unique data required by a fact-finding panel will be reimbursed. Describe the special costs and explain why this data would not have been required by a fact-finding panel under the Winton Act. Salaries and benefits must be shown as described in Item H3.

5. Collective Bargaining Agreement Disclosure

Disclosure of collective bargaining agreement *after* negotiation and *before* adoption by governing body, as required by Government Code section 3547.5 and California State Department of Education Management Advisory 92-01 (or subsequent replacement), attached to the amended Parameters and Guidelines. Procedures or formats which exceed those or which duplicate activities required under any other statute or executive order are not reimbursable under this item.

a. Prepare the disclosure forms and documents, as specified.

b. Distribute a copy of the disclosure forms and documents, to board members, along with a copy of the proposed agreement, as specified.

c. Make a copy of the disclosure forms and documents and of the proposed agreement available to the public, prior to the day of the public meeting, as specified.

d. Training employer's personnel on preparation of the disclosure forms and documents, as specified.

e. Supplies and materials necessary to prepare the disclosure forms and documents, as specified.

For 5. a., b., and c., list the date(s) of the public hearing(s) at which the major provisions of the agreement were disclosed in accordance with the requirements of Government Code section 3547.5 and Department of Education Advisory 92-01 (or subsequent replacement).

6. Contract administration and adjudication of contract disputes either by arbitration or litigation. Reimbursable functions include grievances and administration and enforcement of the contract.

a. Salaries and benefits of employer personnel involved in adjudication of contract disputes. Contracted services will be reimbursed. Salaries and benefits must be shown as described in Item H3.

b. Indicate substitutes necessary for release time of the representatives of an exclusive bargaining unit during adjudication of contract disputes. The job classification of the employee witnesses and the dates they were absent shall also be indicated.

c. Reasonable costs incurred for a reasonable number of training sessions held for supervisory and management personnel on contract administration/interpretation of the negotiated contract are reimbursable. Contract interpretations at staff meetings are not reimbursable. Personal development and informational programs, i.e., classes, conferences, seminars, workshops, and time spent by employees attending such meetings are not reimbursable. Similarly, purchases of books and subscriptions for personal development and information purposes are not

reimbursable. Salaries and benefits must be shown as described in Item H3.

d. The cost of one transcript per hearing will be reimbursed.

e. Reasonable public school employer costs associated with a contract dispute which is litigated are reimbursable, as follows:

1. Reasonable public school employer costs associated with issues of contract disputes which are presented before PERB are reimbursable.

2. Reasonable public school employer cost of litigation as a defendant in the court suit involving contract disputes may be reimbursable.

3. Where the public school employer is the plaintiff in a court suit to appeal a PERB ruling, costs are reimbursable only if the public school employer is the prevailing party (after all appeals, final judgment).

4. No reimbursement is allowed where the public school employer has filed action directly with the courts without first submitting the dispute to PERB, if required.

5. No reimbursement shall be provided for filing of amicus curiae briefs.

f. Expert witness fees will be reimbursed if the witness is called by the public school employer.

g. Reasonable reproduction costs for copies of a new contract which is required as a result of a dispute will be reimbursed.

h. If contract services are used under "a" above, copies of contract invoices must be submitted with your claim. Contract costs must be shown as described in Item H5.

i. Public school employer's portion of arbitrators' fees for adjudicating grievances, representing 50% of costs, will be reimbursed.

7. Unfair labor practice adjudication process and public notice complaints.

a. Show the actual costs for salaries and benefits of employer representatives. Services contracted by the public school employer are reimbursable. Salaries and benefits must be shown as described in Item H3.

b. Indicate cost of substitutes for release time for representatives of exclusive bargaining units during adjudication of unfair practice charges.

c. The cost of one transcript per PERB hearing will be reimbursed.

d. Reasonable reproduction costs will be reimbursed.

e. Expert witness fees will be reimbursed if the witness is called by the public school employer.

f. If contract services are used under "a" above, contract invoices must be submitted. Contract costs must be shown as described in Item H5.

g. No reimbursement for an appeal of an unfair labor practice decision shall be allowed where the Public Employee Relations Board is the prevailing party.

h. No reimbursement for filing of amicus curiae briefs shall be allowed.

H. Supporting Data for Claims--Report Format for Submission of Claim.

1. Description of the Activity: Follow the outline of the claim components. Cost must be shown separately by component activity. Supply workload data requested as part of the description to support the level of costs claimed. The selection of appropriate statistics is the responsibility of the claimant.

2. Quantify "Increased" Costs: Public school employers will be reimbursed for the "increased costs" incurred as a result of compliance with the mandate.

a. For component activities G1, G2, and G3:

1. Determination of the "increased costs" for each of these three components requires the costs of current year Rodda Act activities to be offset [reduced] by the cost of the base-year Winton Act activities. The Winton Act base-year is generally fiscal year 1974-75.

Winton Act base-year costs are adjusted by the Implicit Price Deflator prior to offset against the current year Rodda Act costs for these three components. The Implicit Price Deflator shall be listed in the annual claiming instructions of the State Controller.

2. The cost of a claimant's current year Rodda Act activities are offset [reduced] by the cost of the base-year Winton Act activities either: by matching each component, when claimants can provide sufficient documentation to segregate each component of the Winton Act base-year activity costs; or, by combining all three components when claimants

cannot satisfactorily segregate each component of Winton Act base-year costs.

b. For component activities G4, G6, and G7:

All allowable activity costs for these three Rodda Act components are "increased costs" since there were no similar activities required by the Winton Act; therefore, there is no Winton Act base-year offset to be calculated.

BASE YEAR	ADJUSTMENT	
1974-1975	1.490	1979-80 FY
"	1.560	1980-81 FY
"	1.697	1981-82 FY
"	1.777	1982-83 FY
"	1.884	1983-84 FY

3. Salary and Employees' Benefits: Show the classification of the employees involved, amount of time spent, and their hourly rate. The worksheet used to compute the hourly salary rate must be submitted with your claim. Benefits are reimbursable. Actual benefit percent must be itemized. If no itemization is submitted, 21 percent must be used for computation of claim costs. Identify the classification of employees committed to functions required under the Winton Act and those required by Chapter 961, Statutes of 1975.

4. Services and Supplies: Only expenditures which can be identified as a direct cost as a result of the mandate can be claimed.

5. Professional and Consultant Services: Separately show the name of professionals or consultants, specify the functions the consultants performed relative to the mandate, length of appointment, and the itemized costs for such services. Invoices must be submitted as supporting documentation with your claim. The maximum reimbursable fee for contracted services is $100 per hour. Annual retainer fees shall be no greater than $100 per hour. Reasonable expenses will also be paid as identified on the monthly billings of consultants. However, travel expenses for consultants and experts (including attorneys) hired by the claimant shall not be reimbursed in an amount higher than that received by State employees, as established under Title 2, Div. 2, Section 700ff, CAC.

6. Allowable Overhead Cost: School districts must use the Form J-380 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

County Offices of Education must use the Form J-580 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

Community College Districts must use one of the following three alternatives:

- A Federally-approved rate based on OMB Circular A-21;
- The State Controller's FAM-29C which uses the CCFS-311; or
- Seven percent (7%).

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:	Case No.: 00-TC-17/01-TC-14
Government Code Sections 3543, 3546, and 3546.3; Statutes 1980, Chapter 816; Statutes 2000, Chapter 893; Statutes 2001, Chapter 805; California Code of Regulations, Title 8, Sections 34030 and 34055 Filed on June 27, 2001, and Amended on May 15, 2002, by Clovis Unified School District, Claimant.	*Agency Fee Arrangements* 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 December 9, 2005*)

STATEMENT OF DECISION

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

PAULA HIGASHI, Executive Director Date

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:	Case No.: 00-TC-17/01-TC-14
Government Code Sections 3543, 3546, and 3546.3; Statutes 1980, Chapter 816; Statutes 2000, Chapter 893; Statutes 2001, Chapter 805; California Code of Regulations, Title 8, Sections 34030 and 34055 Filed on June 27, 2001, and Amended on May 15, 2002, by Clovis Unified School District, Claimant.	*Agency Fee Arrangements* 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 December 9, 2005*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on December 9, 2005. Mr. Keith Petersen appeared on behalf of Clovis Unified School District, Claimant. Ms. Susan Geanacou, Senior Staff Counsel, 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 to approve this test claim at the hearing by a vote of 6 to 0.

The Commission finds that Government Code section 3546, subdivisions (a) and (f), and California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose a new program or higher level of service for K-14 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 17514, for the following new activities:

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Gov. Code, § 3546, subd. (a).)

- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit. (Gov. Code, § 3546, subd. (f).)
- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed. (Cal. Code Regs., tit. 8, §§ 34030, subd. (a), and 34055, subd. (a).)

BACKGROUND

The *Agency Fee Arrangements* test claim, filed by Clovis Unified School District, addresses issues within the collective bargaining process and employer-employee relations in California's K-14 public school systems. Specifically, the test claim legislation focuses on the payment of fees by non-union member (or "fair share") employees to exclusive representative organizations. In 1975, the Legislature enacted the Educational Employment Relations Act (EERA).[1] In doing so, the Legislature sought to "promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California."[2] This policy aimed at furthering the public interest in "maintaining the continuity and quality of educational services."[3]

The EERA imposes on school districts the duty to "meet and negotiate" with an employee organization selected as the exclusive representative of an employee bargaining unit on matters within the scope of representation.[4] The scope of representation is limited to "matters relating to wages, hours of employment, and other terms and conditions of employment."[5] The EERA explicitly includes "organizational security" within the scope of representation.[6]

---

[1] Statutes 1975, chapter 961. Pursuant to Government Code section 3541.3, subdivision (g), the Public Employment Relations Board (PERB) is vested with the authority to "adopt... rules and regulations to carry out the provisions and effectuate the purposes and policies" of the EERA. (Government Code sections 3540 et seq.). Accordingly, in Code of Regulations, title 8, section 32001, subdivision (c), PERB has declared that "'[s]chool district' as used in the EERA means a school district of any kind or class, including any public community college district, within the state").

[2] Government Code section 3540.

[3] *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 11.

[4] Government Code section 3543.3.

[5] Government Code section 3543.2.

[6] Former Government Code section 3546 provided that "organizational security... shall be within the scope of representation." (Stats. 1975, ch. 961, § 2). In 2000, former Government Code section 3546 was repealed (Stats. 2000, ch. 893), but similar language was added via the same bill to Government Code section 3540.1, subdivision (i), which now provides that

Government Code section 3540.1, subdivision (i), provides two definitions for "organizational security." The first describes organizational security as:

> [a]n arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him or her, as a condition of continued employment, if he or she does join, to maintain his or her membership in good standing for the duration of the written agreement...

Thus, such an arrangement would provide that once an employee organization has been selected by an employee bargaining unit as exclusive representative, each employee has the option of either joining or not joining the employee organization.

Alternatively, the second definition describes organizational security as:

> [a]n arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the agreement...

This type of organizational security arrangement dictates that an employee in a bargaining unit for which an employee organization has been selected as exclusive representative *must* either (a) join the employee organization, or (b) pay such organization a service fee or agency fee arrangement. The EERA explicitly declares that the "employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit."[7]

Under prior law, organizational security arrangements were subject to the collective bargaining process. Statutes 2000, chapter 893 created a statutory organizational security arrangement -- removing the basic issue from the bargaining process.

Claimant's Position

Claimant, Clovis Unified School District, filed a test claim on June 27, 2001, alleging Government Code sections 3543 and 3546, as amended by Statutes 2000, chapter 893, impose reimbursable state-mandated activities on K-14 school districts for activities including establishing and implementing payroll procedures for collecting fair share service fees, and remitting the fees to the certified employee organization. Claimant alleges a new activity to: "Draft, approve and distribute an appropriate and neutral notice to existing non-member employees and new employees, which explains the additional payroll deduction for 'fair share services fees' for non-member employees of a certified employee organization."

Additionally, claimant alleges that Government Code section 3546.3 as added by Statutes 1980, chapter 816, requires school districts to "Establish and implement procedures to determine which employees claim a conscientious objection to the withholding of 'fair share services fees,'" and

---

"'Organizational security' is within the scope of representation... ."

[7] Government Code section 3544.9.

establish and implement payroll procedures to prevent automatic deductions from the wages of such conscientious objectors.

Claimant also alleges the California Code of Regulations, title 8, sections 34030 and 34055, requires K-14 school districts, within 20 days of a filed petition to rescind or reinstate the collective bargaining agreement, file with the regional office of the Public Employment Relations Board (PERB) an alphabetical list containing the names and job titles or classifications of the persons employed in the unit as of the last date of the payroll period immediately preceding the date the petition, and establish new payroll procedures, as needed.

On May 15, 2002, claimant filed a test claim amendment alleging the following reimbursable state-mandated activities from amendments by Statutes 2001, chapter 805:

- Establish procedures and thereafter implement such procedures to verify, at least annually, that payments to nonreligious, nonlabor charitable organizations have been made by employees who have claimed conscientious objections pursuant to Government Code section 3546.3.
- Adjust payroll withholdings for rebates or withholding reductions for that portion of fair share service fees that are not germane to the employee organization function as the exclusive bargaining representative when so determined pursuant to regulations adopted by PERB, pursuant to Government Code section 3546, subdivision (a).
- Take any and all necessary actions, when necessary, to recover reasonable legal fees, legal costs and settlement or judgment liabilities from the recognized employee organization, arising from any court or administrative action relating to the school district's compliance with the section pursuant to Government Code section 3546, subdivision (e);
- Provide the exclusive representative of a public school employee a list of home addresses for each employee of a bargaining unit, regardless of when the employees commenced employment, and periodically update and correct the list to reflect changes of address, additions for new employees and deletions of former employees, pursuant to Government Code section 3546, subdivision (f).

Claimant's complete, detailed allegations are found in the Amendment to the Test Claim Filing, pages five through nine, received May 15, 2002.

Claimant filed comments on the draft the Commission analysis on October 31, 2005. The substantive comments will be summarized in the analysis below.

Department of Finance's Position

Department of Finance filed comments on August 3, 2001, and July 30, 2002, addressing the allegations stated in the test claim and subsequent amendment. Regarding claimant's allegations that the test claim legislation mandates a variety of activities involving the establishment and maintenance of payroll procedures to account for deducting fair share service fees and transmitting those fees to the employee organization, Department of Finance contends that public school employers who did not negotiate and implement organizational security arrangements prior to the enactment of Statutes 2000, chapter 893 are justified in claiming mandated costs.

However, those employers who did negotiate and implement organizational security arrangements prior to the enactment of Statutes 2000, chapter 893 are not justified in making similar claims for reimbursement. Department of Finance argues that those employers who did negotiate and implement such arrangements prior to the 2000 amendments "would presumably have already established" such payroll procedures and those employers should not "be reimbursed for costs they voluntarily incurred."

Department of Finance has similar arguments regarding claimant's allegations on costs incurred in complying with PERB's regulations in the event a petition to rescind or reinstate an organizational security arrangement is filed.

Regarding claimant's allegation that it must draft notices explaining the fee deductions to employees paying fair share service fees, Department of Finance argues that no such mandate exists. Department of Finance relies on California Code of Regulations, title 8, section 32992 which provides that each employee "required to pay an agency fee shall receive written notice from the exclusive representative" regarding the fee deduction.

Likewise, responding to claimant's allegation that it must incur costs in taking the necessary actions in recovering legal fees from an exclusive representative under Government Code section 3546, subdivision (e), Department of Finance asserts that the subdivision, by its plain language, does not impose any duties on the public school employer.

Department of Finance's other comments and arguments will be addressed in the analysis below, where pertinent.[8]

---

[8] Claimant argues that the Department of Finance's comments are "incompetent" and should be stricken from the record since they do not comply with section 1183.02, subdivision (d), of the Commission's regulations. That regulation requires written responses to be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge, information, or belief. The claimant contends that the Department of Finance's response "is signed without certification" and the declaration attached to the response "simply stipulate[s] to the accuracy of the citations of law in the test claim." (Claimant's comments to draft the Commission analysis, page 1-2.)

Determining whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution is a pure question of law. (*City of Jose, supra*, 45 Cal.App.4th at p. 1817; *County of San Diego, supra*, 15 Cal.4th at p. 109). Thus, any factual allegations raised by a party, including the Department of Finance, regarding how a program is implemented is not relied upon by the Commission at the test claim phase when recommending whether an entity is entitled to reimbursement under article XIII B, section 6. The Department's response contains comments on whether the Commission should approve this test claim and is, therefore, not stricken from the administrative record.

California Community Colleges Chancellor's Office Position

The California Community Colleges Chancellor's Office ("Chancellor's Office") filed comments regarding this test claim on July 30, 2001. The Chancellor's Office begins by noting that community colleges are subject to PERB's jurisdiction. Secondly, looking to the statutes regarding organizational security, the Chancellor's Office believes that "the provisions of Government Code [sections] 3540.1 and 3546 and the related implementing regulations in the Code of Regulations impose a mandate of specific tasks for community college district the Commission."

The Chancellor's Office concludes by stating that no funds have been appropriated for costs incurred in performing these activities, and that none of the provisions of Government Code section 17556 apply to community colleges "complying with the mandate."

FINDINGS

The courts have found that article XIII B, section 6, of the California Constitution[9] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[10] "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."[11] 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.[12] 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.[13]

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

---

[9] Article XIII B, section 6, subdivision (a), provides: (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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

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

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

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

policy, but does not apply generally to all residents and entities in the state.[14] 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.[15] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[16]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[17]

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.[18] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[19]

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

Government Code Section 3543:

Government Code section 3543 was rewritten by Statutes 2000, chapter 893. Statutes 2001, chapter 805 amended one sentence, as indicated by underline below:

> (a) Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. <u>If the exclusive representative of a unit provides notification, as specified by subdivision (a)</u> of Section 3546, public school employees who are in a unit for which an exclusive representative has been selected, shall be required, as a condition of continued employment, to join the recognized employee organization or to pay the organization a fair share services fee, as required by Section 3546. If a majority

---

[14] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

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

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

[17] *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.

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

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

of the members of a bargaining unit rescind that arrangement, either of the following options shall be applicable:

(1) The recognized employee organization may petition for the reinstatement of the arrangement described in subdivision (a) of Section 3546 pursuant to the procedures in paragraph (2) of subdivision (d) of Section 3546.

(2) The employees may negotiate either of the two forms of organizational security described in subdivision (i) of Section 3540.1.

(b) Any employee may at any time present grievances to his or her employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

Before the amendment in 2000, prior law provided: "Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer." Current subdivision (b) is identical to prior law.

In order to be subject to article XIII B, section 6, of the California Constitution, the test claim legislation must impose a state-mandated activity on a local agency or school district.[20] Courts have adopted a "strict construction" interpretation of article XIII B, section 6.[21] Consistent with this narrow interpretation, the term "mandate" has been construed according to its commonly understood meaning as an "order" or "command."[22] Thus, the test claim legislation must require a local government entity to perform an activity in order to fall within the scope of article XIII B, section 6.

According to the well-settled rules of statutory construction, an examination of a statute claimed to constitute a reimbursable state mandate begins with the plain language of the statute, and "where the language is clear there is no room for interpretation."[23] Where the Legislature has not found it appropriate to include express requirements in a statute, it is inappropriate for a court

---

[20] *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 740.

[21] *City of San Jose*, *supra*, 45 Cal.App.4th 1802, 1816-17.

[22] *Long Beach Unified School Dist.*, *supra*, 225 Cal.App.3d 155, 174.

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

to write such requirements into the statute.[24] The courts have noted that "[w]e cannot... read a mandate into language which is plainly discretionary."[25]

Beginning with the plain language of section 3543, subdivision (a), there is no activity imposed on the public school *employer*. While public school *employees* "shall be required" to either join the employee organization selected by the unit as exclusive representative or to pay such organization a service fee, there is nothing in the language of section 3543, subdivision (a), imposing upon the public school employer the obligation to perform any activities.

Government Code section 3543, subdivision (a), by its plain language, fails to impose any activities on school districts. Section 3543, subdivision (b), contains the same language found in former section 3543 and therefore is not new, nor does the plain language of subdivision (b) impose any duties upon school districts. Accordingly, the Commission finds that Government Code section 3543 is not subject to article XIII B, section 6, of the California Constitution.

Government Code Section 3546.3:

Government Code section 3546.3 was added by Statutes 1980, chapter 816, as follows:

> Notwithstanding subdivision (i) of Section 3540.1, Section 3546, or any other provision of this chapter, any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to join, maintain membership in, or financially support any employee organization as a condition of employment; except that such employee may be required, in lieu of a service fee, to pay sums equal to such service fee either to a nonreligious, nonlabor organization, charitable fund exempt from taxation under Section 501(c) (3) of Title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in the organizational security arrangement, or if the arrangement fails to designate such funds, then to any such fund chosen by the employee. Either the employee organization or the public school employer may require that proof of such payments be made on an annual basis to the public school employer as a condition of continued exemption from the requirement of financial support to the recognized employee organization. If such employee who holds conscientious objections pursuant to this section requests the employee organization to use the grievance procedure or arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using such procedure.

Claimant asserts that section 3546.3 requires school districts to establish and maintain procedures for determining which employees may claim a conscientious objection, establish procedures to ensure that fair share service fee deductions are not made from the wages of those employees claiming such objections, and to establish procedures to ensure, at least annually, that those employees are making payments to charitable organizations in lieu of service fee deductions. Claimant asserts that if section 3546.3 was determined to not impose any state-

---

[24] *Whitcomb Hotel, Inc. v. California Employment Commission* (1944) 24 Cal.App.2d 753, 757.

[25] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816.

mandated activities on school districts, then it must also be interpreted that "there is no requirement for religious objectors to pay any sum of money to either their employee organization or the specified alternative approved organizations."[26]

Department of Finance, in its August 3, 2001 comments, argues that school districts that negotiated and implemented organizational security arrangements prior to the enactment of the 2000 amendments are not justified in claiming mandated costs, but that school districts that did not negotiate such arrangements are justified in claiming mandated costs. Department of Finance's position is grounded in the discretionary nature of the collective bargaining process, and that employers who negotiated organizational security arrangements prior to the enactment of the 2000 amendments should not "be reimbursed for costs they voluntarily incurred."[27]

For the reasons below, the Commission finds that Government Code section 3546.3 is not subject to article XIII B, section 6, of the California Constitution because section 3546.3 does not impose any state-mandated activities on school districts.

In order to be subject to article XIII B, section 6, of the California Constitution, the test claim legislation must impose a state-mandated activity on a local agency or school district.[28] Courts have adopted a "strict construction" interpretation of article XIII B, section 6.[29] Consistent with this narrow interpretation, the term "mandate" has been construed according to its commonly understood meaning as an "order" or "command."[30] Thus, the test claim legislation must require a local government entity to perform an activity in order to fall within the scope of article XIII B, section 6.

According to the well-settled rules of statutory construction, an examination of a statute claimed to constitute a reimbursable state mandate begins with the plain language of the statute, and "where the language is clear there is no room for interpretation."[31] Where the Legislature has not found it appropriate to include express requirements in a statute, it is inappropriate for a court to write such requirements into the statute.[32] The courts have noted that "[w]e cannot... read a mandate into language which is plainly discretionary."[33]

Just as discussed above regarding Government Code section 3543, the plain language of Government Code section 3546.3 is also discretionary. Section 3546.3 states only that an employee holding a conscientious objection to joining or financially supporting an employee organization "*may* be required" to make payments to a nonreligious, nonlabor, charitable organization in lieu of paying a fair share service fee to such organization. (Emphasis added).

---

[26] Claimant's comments to draft the Commission analysis, page 3.

[27] Department of Finance, August 3, 2001 Comments, page 3.

[28] *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 740.

[29] *City of San Jose*, *supra*, 45 Cal.App.4th 1802, 1816-17.

[30] *Long Beach Unified School Dist.*, *supra*, 225 Cal.App.3d 155, 174.

[31] *City of Merced*, *supra*, 153 Cal.App.3d 777.

[32] *Whitcomb Hotel, Inc.*, *supra*, 24 Cal.App.2d 753, 757.

[33] *City of San Jose*, *supra*, 45 Cal.App.4th 1802, 1816.

Section 3546.3 does not impose any obligation on school districts. Section 3546.3 provides that "*[e]ither* the employee organization *or* the public school employer *may* require that proof of such payments be made on an annual basis." (Emphasis added). Section 3546.3, by its plain meaning, does not require or command school districts to perform an activity. Accordingly, the Commission finds that Government Code section 3546.3 is not subject to article XIII B, section 6, of the California Constitution.

Remaining Test Claim Legislation:

In order for the remaining test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." Government Code section 3546 provides, in part, that "the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization," and that "[t]he employer of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit... ." California Code of Regulations, title 8, sections 34030 and 34055 require that a school district employer file an alphabetical list containing the names and job titles or classifications of the persons employed in the unit within 20 days after a petition is filed to rescind or reinstate an organizational security arrangement.

In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[34] The court has held that only one of these findings is necessary.[35]

Department of Finance asserts that Government Code section 3546, subdivision (a), as it relates to rebates and reductions to the fair share service fee do not constitute a program because it neither provides a service to the public nor qualifies as a function unique to governmental entities. Department of Finance claims that the United States Supreme Court's holding in *Communication Workers v. Beck* (1988) 487 U.S. 735, which addresses fair share service fees, applies to both private and public employees. The Court in *Beck* interpreted and applied the provisions of the National Labor Relations Act (NLRA). However, the NLRA by its own terms expressly excludes public employees from its coverage. Section 2, subdivision (2), of the NLRA (29 U.S.C. § 152(2)) provides, in pertinent part, that "[t]he term 'employer' ... shall not include... any State or political subdivision thereof..." Furthermore, section 2, subdivision (3), of the NLRA (29 U.S.C. § 152(3)) provides that "[t]he term 'employee' ... shall not include any individual employed... by any... person who is not an employer as herein defined."[36]

---

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

[35] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

[36] See *Carmen v. San Francisco Unified School District* (1997) 982 F.Supp. 1396, 1409 (concluding that "school districts are considered 'political subdivisions' of the State of California within the meaning of 29 U.S.C. § 152(2), and therefore are exempt from coverage under the NLRA").

The Commission finds that Government Code section 3546 and California Code of Regulations, title 8, sections 34030 and 34055, impose a program within the meaning of article XIII B, section 6 of the California Constitution under the second test, to the extent the test claim legislation requires school districts to engage in administrative activities solely applicable to public school administration. The test claim legislation imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state.

Accordingly, the Commission finds that the remaining test claim legislation constitutes a "program" and, thus, may be subject to subvention pursuant to article XIII B, section 6 of the California Constitution if the legislation also imposes a new program or higher level of service, and costs mandated by the state.

Issue 2: Does the remaining test claim legislation impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Test claim legislation imposes a new program or higher level of service within an existing program when it compels a local agency or school district to perform activities not previously required.[37] The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. Accordingly, "it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in existing programs."[38] A statute or executive order imposes a reimbursable "higher level of service" when the statute or executive order, as compared to the legal requirements in effect immediately before the enactment of the test claim legislation, increases the actual level of governmental service provided in the existing program.[39]

Government Code Section 3546:

Government Code section 3546, as enacted by Statutes 2000, chapter 893, and amended by Statutes 2001, chapter 805,[40] follows:

> (a) Notwithstanding any other provision of law, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, *the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization.* Thereafter, the employee shall, as a condition of continued employment, be required either to join the recognized employee organization or

---

[37] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 836.

[38] *County of Los Angeles, supra*, 43 Cal.3d 46, 56; *San Diego Unified School District, supra*, 33 Cal.4th 859, 874.

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

[40] Reworded subdivision (a), and added subdivisions (e) and (f).

pay the fair share service fee. The amount of the fee shall not exceed the dues that are payable by members of the employee organization, and shall cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative. Agency fee payers shall have the right, pursuant to regulations adopted by the Public Employment Relations Board, to receive a rebate or fee reduction upon request, of that portion of their fee that is not devoted to the cost of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative.

(b) The costs covered by the fee under this section may include, but shall not necessarily be limited to, the cost of lobbying activities designed to foster collective bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the employer.

(c) The arrangement described in subdivision (a) shall remain in effect unless it is rescinded pursuant to subdivision (d). The employer shall remain neutral, and shall not participate in any election conducted under this section unless required to do so by the board.

(d)(1) The arrangement described in subdivision (a) may be rescinded by a majority vote of all the employees in the negotiating unit subject to that arrangement, if a request for a vote is supported by a petition containing 30 percent of the employees in the negotiating unit, the signatures are obtained in one academic year. There shall not be more than one vote taken during the term of any collective bargaining agreement in effect on or after January 1, 2001.

(2) If the arrangement described in subdivision (a) is rescinded pursuant to paragraph (1), a majority of all employees in the negotiating unit may request that the arrangement be reinstated. That request shall be submitted to the board along with a petition containing the signatures of at least 30 percent of the employees in the negotiating unit. The vote shall be conducted at the worksite by secret ballot, and shall be conducted no sooner than one year after the rescission of the arrangement under this subdivision.

(3) If the board determines that the appropriate number of signatures have been collected, it shall conduct the vote to rescind or reinstate in a manner that it shall prescribe in accordance with this subdivision.

(4) The cost of conducting an election under this subdivision to reinstate the organizational security arrangement shall be borne by the petitioning party and the cost of conducting an election to rescind the arrangement shall be borne by the board.

(e) The recognized employee organization shall indemnify and hold the public school employer harmless against any reasonable legal fees, legal costs, and settlement or judgment liability arising from any court or administrative action

relating to the school district's compliance with this section. The recognized employee organization shall have the exclusive right to determine whether any such action or proceeding shall or shall not be compromised, resisted, defended, tried, or appealed. This indemnification and hold harmless duty shall not apply to actions related to compliance with this section brought by the exclusive representative of district employees against the public school employer.

(f) *The employer of a public school employee shall* provide the exclusive representative of a public employee with the home address of each member of a bargaining unit, regardless of when that employee commences employment, so that the exclusive representative can comply with the notification requirements set forth by the United States Supreme Court in *Chicago Teachers Union v. Hudson* (1986) 89 L.Ed. 2d 232. (Emphasis added.)

The test claim allegations regarding Government Code section 3546 will be analyzed in order of subdivision below.

Government Code Section 3546, Subdivision (a):

Claimant alleges that subdivision (a) of Government Code section 3546 constitutes a reimbursable state mandate in two respects by requiring school districts to (1) establish, implement, maintain and update payroll procedures to determine those employees from whose paychecks service fees must be deducted, and to make such deductions and transmit those fees to the employee organization; (2) "adjust payroll withholdings for rebates or withholding reductions" pursuant to the rebate or fee reduction provision of subdivision (a); and (3) provide notice to employees explaining the payroll deduction for the fair share service fees.

Department of Finance agrees that subdivision (a) requires school districts to deduct service fees from the wages of its employees, and then transmit those fees to the employee organization. However, Department of Finance also argues that those school districts that did establish organizational security arrangements prior to the enactment of the test claim legislation are not justified in claiming any mandated costs because those districts voluntarily chose to incur such costs, and so nothing new is mandated upon them by the test claim legislation. The Commission disagrees. Government Code section 17565 clearly provides that: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

Department of Finance also argues that the rebate and fee reduction provision imposes no activities on school districts. Department of Finance asserts that PERB's regulations squarely place the burden of issuing fee rebates to employees on the employee organization.

Under prior law, a school district could voluntarily enter into organizational security arrangements with an employee organization. Organizational security has been within the scope of representation since the EERA's enactment.[41] This results in a duty upon the school district to

[41] Former Government Code section 3546 (added by Stats. 1975, ch. 961, and repealed by Stats. 2000, ch. 893); Gov. Code, § 3540.1, subd. (i) (as amended by Stats. 2000, ch. 893).

meet and negotiate in good faith with the exclusive representative upon request.[42] Prior to the 2000 amendments, the EERA, while imposing a duty to bargain, did not compel the parties to reach agreement on organizational security. Thus, any agreement ultimately reached through the bargaining process was entered into voluntarily by both sides.

Government Code section 3546, subdivision (a), requires what was once voluntary. Section 3546, subdivision (a), bypasses the discretion of a school district, and instead compels the district to institute an organizational security arrangement "upon receiving notice from the exclusive representative." This new requirement that school districts shall implement organizational security arrangements requires school districts to make service fee deductions from the wages of employees, and consequently transmit those fees to the employee organization. Such fee deductions and payments to the employee organization were never required immediately preceding the enactment of the test claim legislation, and thus impose a new program or higher level of service on school districts.

In addition, under prior law, certificated and classified employees could pay the service fees directly to the certificated or recognized employee organization in lieu of having the school district deduct the service fees from the employee's salary or wage order.[43] Claimant argues that Government Code section 3546, subdivision (a), expressly states that its terms apply "notwithstanding any other provision of law." Thus, claimant argues that the employee's right to pay the service fee directly to the employee organization is "nullified." Claimant contends the school districts are now required to make the service fee deductions from the wages of all employees that work in a unit for which an exclusive representative has been selected and transmit those fees to the employee organization.[44]

The Commission agrees with claimant. Government Code section 3546, subdivision (a), states the following:

> *Notwithstanding any other provision of law*, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Emphasis added.)

The phrase "notwithstanding any other provision of law" has expressly been interpreted by the courts as "an express legislative intent to have the specific statute control despite the existence of other law which might otherwise govern."[45] Thus, any other provision of law that is contrary or inconsistent with the statute "is subordinated to the latter provision" containing the "notwithstanding" language.[46] In this case, the sections in the Education Code allowing the

---

[42] Government Code section 3543.3.

[43] Education Code sections 45061, 45168, 87834, and 88167.

[44] Claimant's response to draft the Commission analysis, page 4.

[45] *People v. Tillman* (1999) 73 Cal.App.4th 771, 784-785.

[46] *Id.* at page 786.

employee to directly pay the service fee to the employee organization is inconsistent with the test claim statute that requires, without exception, the employer to deduct the service fee from the wages of the employee that works in a unit for which an exclusive representative has been selected. Accordingly, the Commission finds that Government Code section 3456, subdivision (a), imposes a new program or higher level of service by requiring school districts to make service fee deductions from the wages of all certificated and classified employees that work in a unit for which an exclusive representative has been selected, and transmit those fees to the employee organization.

However, in order to be subject to the subvention requirement of article XIII B, section 6, of the California Constitution, the test claim legislation must also impose upon a local agency or school district "costs mandated by the state." Government Code section 17514 defines "costs mandated by the state" to mean "any increased costs which a local agency or school district is required to incur..."

Government Code section 17556 lists several exceptions which preclude the Commission from finding costs mandated by the state. Specifically, "The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: ... (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

Pursuant to Education Code sections 45061 and 87834, K-14 school districts retain the authority to levy the charges necessary to cover any costs incurred in making service fee deductions from the wages of certificated employees choosing not to join the employee organization. Education Code section 45061 applies to elementary and secondary districts, while Education Code section 87834 is for community colleges. Education Code section 45061 follows:

> The governing board of each school district when drawing an order for the salary or wage payment due to a certificated employee of the district shall, with or without charge, reduce the order for the payment of service fees to the certified or recognized organization as required by an organizational security arrangement between the exclusive representative and a public school employer as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code. However, the organizational security arrangement shall provide that any employee may pay service fees directly to the certified or recognized employee organization in lieu of having such service fees deducted from the salary or wage order.
>
> If the employees of a district do not authorize the board to make a deduction to pay their pro rata share of the costs of making deductions for the payment of service fees to the certified or recognized organization, the board shall deduct from the amount transmitted to the organization on whose account the payments were deducted the actual costs, if any, of making the deduction. No charge shall exceed the actual cost to the district of the deduction. These actual costs shall be determined by the board and shall include startup and ongoing costs.

Education Code section 87834 is nearly identical, the only difference being that section 87834 substitutes the words "community college district" for the words "school district" in the first sentence of section 45061. As is evident from the plain language of sections 45061 and 87834,

school districts may deduct service fees from the wages of certificated employees "*with or without charge.*" (Emphasis added).

The language of Government Code section 17556, subdivision (d), is clear and unambiguous. In *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, the court found that "the plain language of the statute precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." In making such a determination, the court explicitly rejected the argument that the term "authority" should be construed as meaning "a practical ability in light of surrounding economic circumstances."[47] Accordingly, the focus is not whether a local agency or school district *chooses* to exercise an authority to levy service charges or fees, but rather whether such authority exists at all. Section 17556, subdivision (d), explicitly declares that if the local agency or school district "has the authority" to assess fees, then the commission shall be precluded from finding "costs mandated by the state." Here, school districts do possess such authority.

According to the Education Code sections, "No charge shall exceed the actual cost to the district of the deduction," but the costs for which the governing board is authorized to assess charges "shall be determined by the board and shall include startup and ongoing costs." Thus, the school district may assess charges for costs it must incur in establishing, maintaining, and adjusting its service fee deduction procedures, in addition to transmitting those fees to the employee organization.

Education Code sections 45061 and 87834 provide school districts with "the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program," within the meaning of Government Code section 17556, subdivision (d). Accordingly, the Commission finds that Government Code section 3546, subdivision (a), does not constitute a reimbursable state mandate because the test claim legislation does not impose "costs mandated by the state" as to activities regarding certificated employees.

This same fee authority does not apply for classified employees. Subdivision (b) of both Education Code sections 45168 and 88167 (for K-12 districts and community college districts, respectively), provide:

> The governing board of each [ ] district, when drawing an order for the salary or wage payment due to a classified employee of the district may, *without charge*, reduce the order ... for the payment of service fees to the certified or recognized organization as required in an organizational security arrangement between the exclusive representative and a [ ] district employer as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code. [Emphasis added.]

Thus, the Commission finds that Government Code section 3546, subdivision (a) imposes a new program or higher level of service upon school districts within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for the following new activity:

---

[47] *Ibid.*

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization.

This activity does not apply for certificated employees; fee authority is available pursuant to Education Code sections 45061 and 87834.

Claimant further alleges that Government Code section 3546, subdivision (a), requires school districts to make payroll adjustments for service fee deductions to account for fee reductions or rebates to which the fee-paying employees may become entitled. Claimant alleges that this activity is mandated since school districts are required to report accurate payroll information to their employees and the state and federal governments.[48]

Government Code section 3546, subdivision (a), recognizes the right of employees paying fair share service fees "to receive a rebate or fee reduction upon request, of that portion of their fee" determined to be beyond the permissible scope of the employee organization's role as exclusive bargaining representative. To implement these provisions, PERB regulations require the exclusive representative to provide annual notice to nonmembers that are required to pay the fair share service fee of the amount of the service fee deduction and the calculation used to arrive at the amount of the fee.[49] If the employee disagrees with the amount of the service fee deduction, the employee may file an agency fee objection and the exclusive representative is required to administer an agency fee appeal procedure.[50] The Commission finds that the requirement imposed by Government Code section 3546, subdivision (a), on school districts to deduct the correct amount from the wages of the employee after receiving notice from the exclusive representative of the amount, applies when the agency fee objection is resolved and it is determined that the employee is entitled to a reduction of future agency fee deductions.

But there is no mandate in the statutes or regulations plead by the claimant requiring the school district to make payroll adjustments for rebates. Rather, any rebates are paid by the exclusive representative. Under PERB regulations, once an agency fee objection is filed, the exclusive representative is required to hold any disputed agency fees in an escrow account for the duration of the dispute.[51] Escrowed agency fees that are being challenged shall not be released until after there is a mutual agreement between the agency fee objector and the exclusive representative, or an impartial decisionmaker has made a decision.[52] Interest at the prevailing rate shall be paid by the exclusive representative on all rebated fees.[53]

---

[48] Claimant's response to draft the Commission analysis, page 5.

[49] California Code of Regulations, title 8, section 32992, subdivision (a).

[50] California Code of Regulations, title 8, section 32994.

[51] California Code of Regulations, title 8, section 32995, subdivision (a).

[52] California Code of Regulations, title 8, section 32995, subdivision (b).

[53] California Code of Regulations, title 8, section 32995, subdivision (c).

Finally, claimant requests reimbursement to "draft, approve, and distribute an appropriate and neutral notice to existing nonmember employees and new employees which explains the additional payroll deduction for 'fair share service fees' for nonmember employees of an employee organization." Claimant argues that these activities are "implicit in the legislation" and are necessary since the employer is responsible for changes to employee payroll amounts. Claimant asserts this activity is required since there is no statutory requirement for the exclusive representative to provide such notices to employees about these payroll adjustments.[54] Neither Government Code section 3546, nor the PERB regulations, require school districts to provide notice to its employees regarding the service fee deduction. If this test claim is approved, however, the Commission can consider claimant's request at the parameters and guidelines stage and determine whether the requested activities are a reasonable method of complying with the mandate to deduct the fair share service fee in an amount authorized by Government Code section 3546.[55]

Government Code Section 3546, Subdivisions (b) through (e):

Government Code section 3546, subdivision (b), describes the permissible costs towards which an employee organization may apply the fair share service fees. Nothing in the language of subdivision (b), imposes any activities upon school districts.

Subdivision (c) provides that the "employer shall remain neutral, and shall not participate in any election conducted under this section unless required to do so by the board." Claimant alleges that subdivision (c) requires the public school employer to supply "administrative support" as required by PERB.[56] However, PERB has not enacted any rules or regulations requiring a school district's participation in an organizational security election.[57] Therefore, subdivision (c) does not impose any required activities on school districts.

Government Code section 3546, subdivision (d), contains four subparts. Subdivisions (d)(1) and (d)(2) describe the process by which employees in a bargaining unit may either rescind or reinstate, respectively, an organizational security arrangement. Such a process includes the submission of a petition to PERB and a consequent election among the employees if the petition meets PERB's requirements as promulgated by its regulations. Claimant alleges that subdivisions (d)(1) and (d)(2) require school districts to adjust payroll procedures when the organizational security arrangement is rescinded or reinstated to comply with the requirement to deduct fair share service fees in the appropriate amount from the employee salaries. Government Code section 3546, subdivisions (d)(1) and (d)(2), however, do not impose any state-mandated

---

[54] Claimant's response to draft the Commission analysis, pages 5 and 6.

[55] California Code of Regulations, title 2, section 1183.1, subdivision (a)(4).

[56] First Amendment to the Test Claim, page 6; claimant's response to draft the Commission analysis, page 6.

[57] See California Code of Regulations, title 8, division 3, chapter 2, subchapter 2 for PERB's regulations governing organizational security arrangements under the EERA.

activities on school districts and, therefore, reimbursement is not required to comply with these subdivisions.[58]

Subdivision (d)(3) provides that PERB shall conduct a vote to either rescind or reinstate an organizational security arrangement if the required number of employee signatures on a petition have been collected. Claimant alleges that subdivision (d)(3) requires school districts to "supply any required administrative support as may be required by PERB."[59] Claimant asserts that "it can be reasonably anticipated that if, for example, the Board determines that the appropriate number of signatures have not been collected, there may be some inquiry as to the content of the list of employees the school district is required to provide to PERB pursuant to Title 8, CCR, Sections 34030 and 34055."[60] Government Code section 3546, subdivision (d)(3), however, does not require anything of school districts, thus any mandated activities related to this subdivision would only arise from an executive order. No such executive order is included in this test claim, therefore no findings can be made that school districts have reimbursable state-mandated costs to supply administrative support to PERB.

Subdivision (d)(4) states that the costs of conducting an election to rescind an organizational security arrangement "shall be borne by the board," while the costs in an election to rescind "shall be borne by the petitioning party." The Commission finds that nothing in the plain language of section 3546, subdivision (d)(4), requires school districts to perform any activities.

Finally, Government Code section 3546, subdivision (e), requires that the "recognized employee organization shall indemnify and hold the public school employer harmless against any reasonable legal fees, legal costs, and settlement or judgment liability arising from any court or administrative action relating to the school district's compliance with this section."

Claimant argues that subdivision (e) requires school districts to take any and all necessary actions... to recover reasonable legal fees... from the recognized employee organization."[61] Claimant also contends that "the right to indemnification stems from this subdivision and the cause of civil action which may result in the indemnification of the school district arises from this code section, thus making it s a source of costs mandated by the state."[62] Department of Finance rebuts this argument by asserting that the plain language of subdivision (e) does not impose any activities on school districts.

---

[58] The requirement for school districts to deduct the fair share service fees from employee wages in the appropriate amount is mandated by Government Code section 3546, subdivision (a), and not subdivision (d). Thus, the requested activity to adjust payroll procedures to the reflect the amount required to be deducted from an employee's salary because of a rescission or reinstatement of the organizational security arrangement may be considered by the Commission as a reasonable method of complying with Government Code section 3546, subdivision (a), at the parameters and guidelines stage. (Cal. Code Regs., tit. 2, § 1183.1, subd. (a)(4).)

[59] First Amendment to the Test Claim, page 6.

[60] Claimant's response to draft the Commission analysis, page 6.

[61] First Amendment to the Test Claim, page 8.

[62] Claimant's response to draft the Commission analysis, page 7.

The Commission finds that the plain language of subdivision (e) does not impose any duties on school districts. Rather, subdivision (e) imposes a requirement on the *employee organization* to indemnify and hold harmless a school district for any legal expenses incurred in complying with implementing an organizational security arrangement. If a school district asserts its legal right to indemnification, that action is a decision of the school district and not a mandate by the state.

Accordingly, the Commission finds that Government Code section 3546, subdivisions (b), (c), (d), and (e) do not mandate a program, or impose a new program or higher level of service upon school districts within the meaning of article XIII B, section 6, of the California Constitution.

Government Code Section 3546, Subdivision (f):

Statutes 2001, chapter 805 added subdivision (f) to Government Code section 3546 "so that the exclusive representative can comply with the notification requirements set forth by the United States Supreme Court in *Chicago Teachers Union v. Hudson* (1986) 89 L.Ed. 2d 232."

Claimant asserts that Government Code section 3546, subdivision (f) imposes a state-mandated activity on school districts for providing a list of employee home addresses to the exclusive representative. Department of Finance, on the other hand, claims that the activity "consists of producing a report which should readily be available through the school district's payroll system,"[63] and that any costs incurred by the claimant in providing such a list are *de minimis*, and should therefore not be reimbursable because claimant's costs would be unlikely to reach the threshold for a claim.

Government Code section 3546, subdivision (f) requires school districts to file a list of employee home addresses with an employee organization selected by an employee bargaining unit to act as exclusive representative. Prior to the enactment of
Statutes 2001, chapter 805, no statutory or regulatory requirement obligated a school district to provide a list of home addresses to the exclusive representative. The requirements imposed upon school districts by Government Code section 3546, subdivision (f), impose a new program or higher level of service within the meaning of article XIII B, section 6, of the California Constitution for the following new activity:

- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit.

Government Code section 3546, subdivision (f), also imposes "costs mandated by the state" upon school districts as defined in Government Code section 17514. Government Code section 17556, states, in pertinent part:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: ...
>
> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.

---

[63] Department of Finance, July 30, 2002 Comments, page 3.

(c) [t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.

However, the Commission finds that Government Code section 17556, subdivisions (b) and (c) do not apply in this case.

In *Chicago Teachers Union v. Hudson, supra*, 475 U.S. 292, 305-07, the United States Supreme Court held that employee organizations must: (1) establish procedures prior to making agency fee deductions which will ensure that the funds from such fees are not used to finance ideological activities beyond the scope of collective bargaining; (2) provide agency fee payers with the methods used for calculating the amount of the agency fee; and (3) establish an appeals process to ensure that agency fee objections are addressed in a timely and fair manner by an impartial decision maker.

In order to facilitate the exclusive representative's responsibility to provide notice to nonmember employees regarding the service fee deductions and the methods used to calculate the amount of such fees, Government Code section 3546, subdivision (f) imposes upon school districts the obligation to provide a list of employee home addresses to the exclusive representative. Although subdivision (f) aims at imposing certain notification requirements upon the employee organization in order to comply with federal case law, the requirement that school districts provide the employee organization with a list of employee home addresses goes beyond mere compliance with federal case law.

In *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 817, the court found that Penal Code section 987.9, which requires counties to provide ancillary investigative services when providing defense services to indigent criminal defendants, constituted a federal mandate. The court determined that the right to counsel under the Sixth Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution include "the right to reasonably necessary ancillary services."[64] Accordingly, Penal Code section 987.9 "merely codified these constitutional guarantees," and thus section 987.9 simply required local compliance with the federal mandate.[65]

In *San Diego Unified School District, supra*, 33 Cal.4th 859, 889, the California Supreme Court adopted the reasoning that procedural protections that are merely incidental to the codification of a federal right, and which add only a *de minimis* financial impact, constitute an implementation of federal law not reimbursable under article XIII B, section 6, of the California Constitution.

Here, however, while the notification requirements imposed on the employee organization are mandated by the United States Supreme Court's holding in *Hudson*, nothing in the *Hudson* decision imposes any required activities on school districts. Thus, because Government Code section 3546, subdivision (f) imposes a new required activity on school districts beyond compliance with federal case law, Government Code section 17556, subdivisions (b) and (c) do not apply. Nor are any other provisions of Government Code section 17556 applicable here;

---

[64] *County of Los Angeles, supra*, 32 Cal.App.4th 805, 815.

[65] *Ibid.*

therefore, the Commission finds that Government Code section 3546, subdivision (f) imposes costs mandated by the state pursuant to Government Code section 17514.

California Code of Regulations, Title 8, Sections 34030 and 34055:

PERB has enacted regulations implementing the procedures for filing petitions to either rescind or reinstate an organizational security arrangement. Title 8, section 34030, was added to the California Code of Regulations in 1980, and subsection (b) was added, operative January 1, 2001:

> (a) Within 20 days following the filing of the petition to rescind an organizational security arrangement, the employer shall file with the regional office an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed, unless otherwise directed by the Board.
>
> (b) If after initial determination the proof of support is insufficient, the Board may allow up to 10 days to perfect the proof of support.
>
> (c) Upon completion of the review of the proof of support, the Board shall inform the parties in writing of the determination as to sufficiency or lack thereof regarding the proof of support.

Title 8, section 34055, was added to the California Code of Regulations, operative January 1, 2001, and is nearly identical in language to section 34030, except that it provides that the employer shall file the required list "Within 20 days following the filing of the petition *to reinstate* an organizational security provision ..."

Claimant alleges that section 34030, subdivision (a), and section 34055, subdivision (a), impose state-mandated activities on school districts to file a list of employee names and job titles with PERB. Department of Finance, on the other hand, contends that only those districts that did not negotiate and implement organizational security arrangements prior to the 2000 amendments are justified in claiming mandated costs. Department of Finance alleges that districts that did negotiate organizational security arrangements prior to the 2000 amendments should not be reimbursed for voluntarily assumed costs.

California Code of Regulations, title 8, section 34030, subdivision (a), was enacted by PERB in 1980. Prior to the enactment of Statutes 2000, chapter 893, any organizational security arrangement entered into between a school district and employee organization was the product of a voluntary agreement resulting from the collective bargaining process. Statutes 2000, chapter 893, however, required the parties to implement an organizational security arrangement.

Under prior law, a school district retained discretion on entering into an organizational security arrangement with an employee organization. Thus, the provisions of section 34030, subdivision (a), requiring school districts to file a list of names and job titles to PERB upon the submission of an employee petition to rescind an organizational security arrangement would not have been state-mandated or required. This conclusion flows from the fact that the decision to participate in the underlying program was within the school district's discretion, and thus any

downstream requirements imposed within such a program were also voluntary.[66] Accordingly, if the district did enter into an organizational security arrangement, compliance with PERB's filing requirements in section 34030, subdivision (a), did not constitute a mandate by the state until January 1, 2001, the operative date of Statutes 2000, chapter 893.

Government Code section 3546, subdivision (d)(1), as added by Statutes 2000, chapter 893, recognizes the right of public school employees in a unit for which an employee organization has been selected as exclusive representative to rescind an organizational security arrangement. Subdivision (d)(1), states that the organizational security arrangement required by subdivision (a) of section 3546 "may be rescinded by a majority vote of all the employees in the negotiating unit subject to that arrangement, if a request for a vote is supported by a petition containing 30 percent of the employees in the negotiating unit." If the organizational security arrangement is rescinded pursuant to such a vote, subdivision (d)(2) allows that "a majority of all employees in the negotiating unit may request that the arrangement be reinstated."[67]

Sections 34030 and 34055 implement the provisions of Government Code section 3546, subdivision (d). California Code of Regulations, title 8, sections 34030 and 34055 require that within 20 days of the submission of a petition to either rescind or reinstate an organizational security arrangement, the public school "employer shall file with the regional [PERB] office an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition." The Commission finds that California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution for the following new activity:

- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed.

None of the provisions of Government Code section 17556 are applicable; therefore, the Commission finds that California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a) impose costs mandated by the state pursuant to Government Code section 17514.

---

[66] *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742. The California Supreme Court addressed the issue whether legislation imposing certain notice and agenda requirements on school site councils administering various school-related educational programs constituted a reimbursable state mandate. The Court concluded that mandatory "downstream" requirements flowing from a local government entity's voluntary decision to participate in an underlying program do not constitute reimbursable state mandates.

[67] Government Code section 3546, subdivision (d)(2).

CONCLUSION

The Commission concludes that Government Code section 3546, subdivisions (a) and (f), and California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose new programs or higher levels of service for K-14 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 17514, for the following specific new activities:

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Gov. Code, § 3546, subd. (a).)[68]
- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit. (Gov. Code, § 3546, subd. (f).)[69]
- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed. (Cal. Code Regs., tit. 8, §§ 34030, subd. (a), and 34055, subd. (a).)[70]

The Commission concludes that Government Code sections 3543, 3546, subdivisions (b) through (e), and 3546.3, as added or amended by Statutes 1980, chapter 816, Statutes 2000, chapter 893, and Statutes 2001, chapter 805 are not reimbursable state-mandated programs within the meaning of article XIII B, section 6, and Government Code section 17514.

---

[68] As added by Statutes 2000, chapter 893, operative January 1, 2001.

[69] As amended by Statutes 2001, chapter 805, operative January 1, 2002.

[70] As amended and operative on January 1, 2001.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

Claim of: San Diego Unified School District, Claimant	No. CSM-4437 Education Code Sections 47605 and 47607 Chapter 781, Statutes of 1992 Charter Schools

DECISION

The attached Proposed Statement of Decision of the Commission on State Mandates is hereby adopted by the Commission on State Mandates as its decision in the above-entitled matter.

This Decision shall become effective on July 21, 1994.

IT IS SO ORDERED July 21, 1994.

Mary Ann Aguayo

Mary Ann Aguayo, Acting Executive Director
Commission on State Mandates

C:\SOD\FACESHET.9

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

Claim of: San Diego Unified School District, Claimant	No. CSM-4437 Education Code Sections 47605 and 47607 Chapter 781, Statutes of 1992 Charter Schools

PROPOSED STATEMENT OF DECISION

This claim was heard by the Commission on State Mandates (Commission) on May 26, 1994, in Sacramento, California, during a regularly scheduled hearing.

Mr. Keith Petersen appeared on behalf of the San Diego Unified School District, Ms. Carol Miller appeared on behalf of the Education Mandated Cost Network, and Mr. James Apps appeared on behalf of the Department of Finance. Evidence both oral and documentary having been introduced, the matter submitted, and vote taken, the Commission finds:

ISSUE

Do the provisions of Education Code sections 47605 and 47607 of Chapter 781, Statutes of 1992 (Chapter 781/92), require school districts to implement a new program or provide a higher level of service in an existing program, within the meaning of section 6, article XIIIB of the California Constitution and Government Code section 17514?

BACKGROUND AND FINDINGS OF FACT

The test claim was filed with the Commission on December 1, 1993, by the San Diego Unified School District.

The elements for filing a test claim, as specified in section 1183 of Title 2 of the California Code of Regulations, were satisfied.

Chapter 781/92 added Education Code section 47605 as follows:

> "(a) A petition for the establishment of a charter school within any school district may be circulated by any one or more persons seeking to establish the charter school. After the petition has been signed by not less than 10 percent of the teachers currently employed by the school district, or by not less that 50 percent of the teachers currently employed at one school of the district, it may be submitted to the governing board of the school district for review.
>
> "(b) No later than 30 days after receiving a petition, in accordance with subdivision (a), the governing board of the school district shall hold a public hearing on the provisions of the charter, at which time the board shall consider the level of employee and parental support for the petition. Following review of the petition and the public hearing, the governing board shall either grant or deny the charter within 60 days of receipt of the petition, provided, however, that the date may be extended by an additional 30 days if both parties agree to the extension. A school district governing board may grant a charter for the operation of a school under this part if it determines that the petition contains the number of signatures required by subdivision (a), a statement of each of the conditions described in subdivision (d), and descriptions of all of the following:
>
> "(1) A description of the educational program of the school, designed, among other things, to identify those whom the school is attempting to educate, what it means to be an 'educated person' in the 21st century, and how learning best occurs. The goals identified in that program shall include the objective of enabling pupils to become self-motivated, competent, and lifelong learners.

//

"(2) The measurable pupil outcomes identified for use by the charter school. 'Pupil outcomes,' for purposes of this part, means the extent to which all pupils of the school demonstrate that they have attained the skills, knowledge, and attitudes specified as goals in the school's educational program.

"(3) The method by which pupil progress in meeting those pupil outcomes is to be measured.

"(4) The governance structure of the school, including, but not limited to, the process to be followed by the school to ensure parental involvement.

"(5) The qualifications to be met by individuals to be employed by the school.

"(6) The procedures that the school will follow to ensure the health and safety of pupils and staff. These procedures shall include the requirement that each employee of the school furnish the school with a criminal record summary as described in Section 44237.

"(7) The means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted.

"(8) Admission requirements, if applicable.

"(9) The manner in which an annual audit of the financial and programmatic operations of the school is to be conducted.

"(10) The procedures by which pupils can be suspended or expelled.

"(11) The manner by which staff members of the charter schools will be covered by the State Teachers' Retirement System, the Public Employees' Retirement System, or federal social security.

"(12) The public school attendance alternatives for pupils residing within the school district who choose not to attend charter schools.

"(13) A description of the rights of any employee of the school district upon leaving the employment of the school district to work in a charter school, and of any rights of return to the school district after employment at a charter school.

//

//

"(c) Charter schools shall meet the statewide performance standards and conduct the pupil assessments required pursuant to Section 60602.5.

"(d) In addition to any other requirement imposed under this part, a charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations, shall not charge tuition, and shall not discriminate against any pupil on the basis of ethnicity, national origin, gender, or disability. Admission to a charter school shall not be determined according to the place of residence of the pupil, or of his or her parent or guardian, within this state, except that any existing public school converting partially or entirely to a charter school under this part shall adopt and maintain a policy giving admission preference to pupils who reside within the former attendance area of that public school.

"(e) No governing board of a school district shall require any employee of the school district to be employed in a charter school.

"(f) No governing board of a school district shall require any pupil enrolled in the school district to attend a charter school.

"(g) The governing board may require that the petitioner or petitioners provide information regarding the proposed operation and potential effects of the school, including, but not limited to, the facilities to be utilized by the school, the manner in which administrative services of the school are to be provided, and potential civil liability effects upon the school and upon the school district.

"(h) In reviewing petitions for the establishment of charter schools within the school district, the school district governing board shall give preference to petitions that demonstrate the capability to provide comprehensive learning experiences to pupils identified by the petitioner or petitioners as academically low achieving pursuant to the standards established by the State Department of Education under Section 54032.

"(i) Upon the approval of the petition by the governing board of the school district, the petitioner or petitioners shall provide written notice of that approval, including a copy of the petition, to the State Board of Education.

"(j) (1) If the governing board of the school district denies a charter, the county superintendent of schools, at the request of the petitioner or petitioners, shall select and convene a review panel to review the action of

the governing board. The review panel shall consist of three governing board members from other school districts in the county and three teachers from other school districts in the county unless only one school district is located in the county, in which case the panel members shall be selected from school districts in adjoining counties.

"(2) If the review panel determines that the governing board failed to appropriately consider the charter request, or acted in an arbitrary manner in denying the request, the review panel shall request the governing board to reconsider the charter request. In the case of a tie vote of the panel, the county superintendent of schools shall vote to break the tie.

"(3) If, upon reconsideration, the governing board denies a charter, the county board of education, at the request of the petitioner or petitioners, shall hold a public hearing in the manner described in subdivision (b) and, accordingly, may grant a charter. A charter school for which a charter is granted by a county board of education pursuant to this paragraph shall qualify fully as a charter school for all funding and other purposes of the part."

The Commission observed that Education Code section 47605 does not contain a requirement for school districts or county boards of education to plan and prepare procedures for implementation of the Charter Schools Act of 1992 prior to the receipt by the school district or county board of education of a charter school petition.

The Commission found that the State Board of Education and the California Department of Education have distributed advisory bulletins to school districts and county boards of education, and that these bulletins provide a framework to school districts which will enable them to respond to a charter petition in a timely manner.

The Commission observed that Education Code section 47605 does not contain a requirement for school districts or county boards of

education to disseminate information regarding charter school programs to staff, students, parents, and the community.

The Commission noted that Education Code Section 47615 requires the State Board of Education to distribute information announcing the availability of the charter school process to each school district, county office of education, and public postsecondary educational institution, and, through press releases, to each major newspaper in the state.

The Commission noted that, in many cases, questions will be directed to the school district or county board of education as the local point of contact with the charter school petition process.

Further, the Commission found that responding to direct inquiries from the public for information regarding charter schools, although limited in scope, is an implicit requirement.

The Commission observed that Education Code section 47605, subdivision (b), established requirements for school districts to conduct a public hearing within thirty days of receipt of a petition to determine community support for the petition.

The Commission observed that Education Code section 47605, subdivision (b), established requirements for school districts to grant or deny the petition within sixty days of receipt, subject to a thirty-day extension upon agreement of the parties.

//

The Commission observed that Education Code section 47605, subdivision (j), established requirements for school districts to respond to the request of the review panel selected and convened by the county superintendent of schools, pursuant to an appeal of any petition denied by the district.

The Commission found that, while section 47605 phrases this as a request, it is clear that a school district cannot simply ignore such a request from the review panel.

The Commission further found, since the school district must respond, this request for reconsideration is an integral part of the appeals process established by Education Code section 47605, subdivision (j).

The Commission recognized that Education Code section 47605 established requirements for county boards of education to hear a petition following a denial on reconsideration by the governing board of a school district, to conduct a public hearing within thirty days of receipt of a petition to determine community support for the petition, when the petition has been denied by the school district, and to grant or deny the petition within sixty days of receipt, subject to a thirty-day extension upon agreement of the parties, when the petition has been denied by the school district.

The Commission found that the activities required in Education Code section 47605 were not required under prior law.

//

Chapter 781/92 added Education Code section 47607 as follows:

> "(a) A charter may be granted pursuant to Sections 47605 and 47606 for a period not to exceed five years. A charter granted by a school district governing board or county board of education may be granted one or more subsequent renewals by that entity. Each renewal shall be for a period not to exceed five years. A material revision of the provisions of a charter petition may be made only with the approval of the authority that granted the charter.
>
> "(b) A charter may be revoked by the authority that granted the charter under this chapter if the authority finds that the charter school did any of the following:
>
> "(1) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter petition.
>
> "(2) Failed to meet or pursue any of the pupil outcomes identified in the charter petition.
>
> "(3) Failed to meet generally accepted accounting standards of fiscal management.
>
> "(4) Violated any provision of law.

The Commission observed that Education Code section 47607 established requirements for school districts or county boards of education to monitor the charter school performance to determine if it has achieved its goals and objectives.

The Commission noted that Education Code section 47607 authorizes the authority that granted the charter (i.e., school districts or county boards of education) to determine if the charter school is or is not in compliance with Education Code section 47607, subdivision (b).

The Commission recognized that Education Code section 47607, subdivision (b), lists four grounds on which the charter granting

1 authority may revoke the charter. The authority that granted the
2 charter cannot know if any of these grounds applies without in some
3 way monitoring what is going on at the charter school.
4
5 Further, the Commission noted that Education Code section 47610
6 requires that a charter school comply with all of the provisions
7 set forth in its charter petition.
8
9 Therefore, the Commission found that monitoring by the granting
10 authority is implicit in Education Code section 47607, which
11 permits revocation of the charter for specified actions or
12 omissions on the part of the charter school.
13
14 The Commission observed that Education Code section 47607
15 established requirements for school districts or county boards of
16 education to decide upon requests for revision or extension of
17 approved charters.
18
19 The Commission found that school districts or county boards of
20 education will engage in renewal activities only if they have
21 previously granted a charter in response to a petition for the
22 establishment of a charter school.
23
24 The Commission further noted that, while there is no express
25 statutory requirement that a petition be granted if specified
26 criteria are met, governing boards of school districts or county
27 boards of education lack unfettered discretion to deny charter
28 school petitions which meet or exceed all of the criteria set forth

in Education Code section 47605 for such a petition, without leaving themselves open to charges of acting in an arbitrary manner in denying the request.

The Commission observed that, while Education Code section 47607, subdivision (a), does not lay out an explicit renewal process, it requires by its language that the renewal process, as well as the material revision process, take place. It is clear that the granting authority is not required to automatically grant renewal or material revision, and that the charter school must request that its charter be renewed or materially revised. Even so, the granting authority has no choice but to entertain requests for renewal or material revision of a charter.

The Commission found that, since granting authorities cannot refuse to receive a petition for the establishment of a charter school, and lack unfettered discretion to deny charter school petitions, they also cannot refuse to receive a request for renewal or material revision of the charter.

The Commission found that the activities required in Education Code section 47607 were not required under prior law.

APPLICABLE LAW RELEVANT TO THE DETERMINATION OF A REIMBURSABLE STATE MANDATED PROGRAM

Government Code section 17500 and following, and section 6, article XIIIB of the California Constitution and related case law.

CONCLUSION

The Commission determines that it has the authority to decide this claim under the provisions of Government Code sections 17500 and 17551, subdivision (a).

The Commission concludes that the provisions of Education Code section 47605, of Chapter 781/92, do not impose a new program or higher level of service in an existing program within the meaning of section 6 of article XIIIB of the California Constitution and Government Code section 17514 by requiring school districts or county boards of education to plan and prepare procedures for implementation of the Charter Schools Act of 1992 or to disseminate information regarding charter schools to staff, students, parents, and the community.

The Commission concludes that the provisions of Education Code section 47605, of Chapter 781/92, do impose a new program or higher level of service in an existing program within the meaning of section 6 of article XIIIB of the California Constitution and Government Code section 17514 by requiring school districts to respond to requests from the public for information on the charter school program; conduct a public hearing within thirty days of receipt of a petition to determine community support for the petition; grant or deny the petition within sixty days of receipt, subject to a thirty-day extension upon agreement of the parties; provide persons to take part in a review panel to review the decision of the governing board of the school district and, if

necessary, request the governing board of the school district to reconsider the charter request; and, respond to any request of the review panel selected and convened by the county superintendent of schools pursuant to an appeal of any petition denied by the school district.

The Commission concludes that the provisions of Education Code section 47605, of Chapter 781/92, do impose a new program or higher level of service in an existing program within the meaning of section 6 of article XIIIB of the California Constitution and Government Code section 17514 by requiring county boards of education to select and convene a review panel to review the decision of the governing board of the school district and, if necessary, request the governing board of the school district to reconsider the charter request; hear a petition following a denial on reconsideration by the governing board of a school district; conduct a public hearing within thirty days of receipt of a petition to determine community support for the petition; and, grant or deny the petition within sixty days of receipt, subject to a thirty-day extension upon agreement of the parties.

The Commission concludes that the provisions of Education Code section 47607, of Chapter 781/92, do impose a new program or higher level of service in an existing program within the meaning of section 6 of article XIIIB of the California Constitution and Government Code section 17514 by requiring school districts to monitor the performance of charter schools for which they have granted charters to determine if they have achieved their goals and

1 objectives and to evaluate and decide upon requests for revision or
2 extension of approved charters.
3
4 The Commission concludes that the provisions of Education Code
5 section 47607, of Chapter 781/92, do impose a new program or higher
6 level of service in an existing program within the meaning of
7 section 6 of article XIIIB of the California Constitution and
8 Government Code section 17514 by requiring county boards of
9 education to monitor the performance of charter schools for which
10 they have granted charters to determine if they have achieved their
11 goals and objectives and to evaluate and decide upon requests for
12 revision or extension of approved charters.
13
14 Accordingly, costs incurred related to the aforementioned
15 reimbursable state mandated programs contained in Education Code
16 sections 47605 and 47607, are costs mandated by the state and are
17 subject to reimbursement within the meaning of section 6,
18 article XIIIB of the California Constitution. Therefore, the
19 claimant is directed to submit parameters and guidelines, pursuant
20 to Government Code section 17557 and Title 2, California Code of
21 Regulations, section 1183.1, to the Commission for its
22 consideration.
23
24 The foregoing conclusions pertaining to the requirements contained
25 in Education Code sections 47605 and 47607, are subject to the
26 following conditions:
27 The determination of a reimbursable state mandated
28 program does not mean that all increased costs claimed will be reimbursed. 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.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment and business address is 1414 K Street, Suite 315, Sacramento, California 95814.

On July 25, 1994, I served the attached Defendant/Respondent Commission on State Mandates Respondent's Brief by placing a true copy thereof in an envelope addressed to each of the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully prepaid.

(See attached mailing list)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 25, 1994, at Sacramento, California.

Eva Goodyear

EVA GOODYEAR

H:\SERVMAIL.6

M A I L I N G L I S T

CSM-4437
Claim of San Diego City Schools
Ch. 781, Statutes of 1992
Charter Schools

Mr. Jim Apps (A-15)
Department of Finance
915 L Street, Sixth Floor
Sacramento, CA 95814

Mr. Robert Agee (E-8)
Department of Education
721 Capitol Mall
Sacramento, CA 95814

Ms. Carol Miller
Education Mandated Cost Network
1127 11th Street, Suite 401
Sacramento, CA 95814

Mr. Keith Petersen
San Diego Unified School District
Finance Division
4100 Normal Street, Room 3202
San Diego, CA 92103-2682

Mr. Joseph Stein, President
State Board of Eduation (E-8)
721 Capitol Mall, Room 532
Sacramento, CA 95814

Attn: Greg Geeting

Parameters and Guidelines

Education Code § 47605
Education Code § 47607
Chapter 781, Statutes of 1992
Charter Schools

I. Summary of the Source of the Mandate

Chapter 781, Statutes of 1992, effective January 1, 1993, added Part 26.8 to the Education Code, commencing with Section 47600 to establish a process for individuals to petition local school district governing boards to establish charter schools which would be exempt from state laws governing school district programs, except for those encompassed in the charter. Various requirements of the Charter Schools Act of 1992 establish specific responsibilities for school district and county office of education governing boards:

Section 47605, subdivision (b), requires the governing board of a school district hold a public hearing to consider the level of employee and parental support for a petition within thirty days of receiving a petition. Within sixty days of receiving a petition, subject to one thirty-day continuance by agreement of the parties, the governing board of a school district shall either grant or deny the petition according to thirteen conditions specified in subdivision (b) and the conditions stated in subdivision (h), generally referred to as the "elements of a school charter."

Section 47605, subdivision (g), authorizes the governing board of a school district to request additional information from petitioners.

Section 47605, subdivision (j) (1), requires the governing body of a county office of education to select and convene a review panel at the request of any petitioner whose charter petition was denied by the school district governing board.

Section 47605, subdivision (j) (2), requires the review panel to make a determination regarding the actions of the school district governing board and either agree with the decision or resubmit the charter petition to the school district governing board for reconsideration.

Section 47605, subdivision (j) (3), requires the school district governing board to rehear the charter petition upon remand from the county office of education review committee. If the school district governing board once again denies the petition, the county office of education governing board must hold a public hearing in the manner specified in subdivision (b) and either grant the charter or not.

Section 47607, subdivision (a), authorizes the charter granting authority to revise and renew charters. Subdivision (b) authorizes the charter granting authority to revoke charters for specified reasons.

II. Commission on State Mandates' Decision

The Commission on State Mandates, in the Statement of Decision adopted at the July 21, 1994 hearing found that Education Code sections 47605 and 47607 as added by Chapter 781, Statutes of 1992 impose a new program or higher level of service within the meaning section 6, Article XIII B of the California Constitution for school districts and county offices of education.

The Commission determined that the following provisions of Education Code sections 47605 and 47607 establish costs mandated by the state pursuant to Government Code section 17514, by requiring the governing boards of school districts which have received a charter school petition to:

(1) Respond to requests for information from the public regarding the Charter Schools Act.

(2) Conduct a public hearing to consider the level of community support for the petition within thirty days of receiving a petition.

(3) Review and evaluate the petition for its compliance with the conditions stated in the Charter Schools Act.

(4) Grant or deny the petition within sixty days of receiving the petition, subject to one thirty-day continuance by agreement of the parties.

(5) It the petition is denied by the school district and appealed by the petitioners to the county office of education, respond to the inquiry of the panel convened by the county superintendent to review the action of the school district governing board.

(6) Reconsider the charter petition if so requested by the county office review panel.

(7) Monitor the charter school performance to determine if it has achieved its goals and objectives, and upon cause, hear and decide upon a revocation of the charter.

(8) Evaluate and decide upon requests for revision or renewal of charters approved by the district.

The Commission determined that the following provisions of Education Code Sections 47605 and 47607 establish costs mandated by the state pursuant to Government Code section 17514, by requiring the superintendent or governing board of county offices of education to:

(9) At the request of petitioners whose petition has been denied by the school district, select and convene a review panel of three governing board members and three teachers from other school districts to determine if the school board governing

board acted properly in denying the petition, and if necessary, request the school district governing board to reconsider the charter petition.

(10) At the request of petitioners whose petition has been denied again upon reconsideration by the school district, conduct a public hearing within thirty days of receiving a petition to consider the level of community support for a county office of education charter school.

(11) Review and evaluate the petition for its compliance with the conditions stated in the Charter Schools Act.

(12) Grant or deny the petition within sixty days of receiving the petition, subject to one thirty-day continuance by agreement of the parties.

(13) Monitor the charter school performance to determine if it has achieved its goals and objectives, and upon cause, hear and decide upon a revocation of the charter.

(14) Evaluate and decide upon requests for revision or renewal of charters approved by the county.

The Commission determined that the following provisions of Education Code Sections 47605 and 47607 establish costs mandated by the state pursuant to Government Code section 17514, by requiring other school districts to:

(15) Provide district personnel to participate in the review panel convened by the county superintendent of schools.

The Commission determined that Education Code sections 47605 and 47607 did not establish costs mandated by the state pursuant to Government Code section 17514, for governing boards of school districts and county offices of education to:

(16) Plan and prepare procedures for implementation of the Charter Schools Act.

(17) Disseminate information regarding charter schools to staff, students, parents, and the community.

III. Eligible Claimants

Any "school district", as defined in Government Code section 17519, except for community colleges, which incurs increased costs as a result of this mandate is eligible to claim reimbursement.

IV. Period of Reimbursement

Section 17557 of the Government Code states that a test claim must be submitted on or before December 31 following a given fiscal year to establish eligibility for that fiscal year. The test claim for this mandate was received by the Commission on December 1, 1993, therefore all mandated costs incurred on or after the operative date of January 1, 1993, for implementation of Education Code sections 47605 and 47607 as added by Chapter 781, Statutes 1992 are reimbursable.

Actual costs for one fiscal year should be included in each claim. Estimated costs for the subsequent year may be included on the same claim, if applicable. Pursuant to Section 17561 (d) (3) of the Government Code, all claims for reimbursement of initial years costs shall be submitted within 120 days of notification by the State Controller of the enactment of the claims bill.

If the total costs for a given fiscal year do not exceed $200, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

V. Reimbursable Costs

A. Scope of the Mandate

1. For school districts which have received an original charter school petition and county offices of education which have received a petition subsequent to its denial upon reconsideration by the school district, to: respond to requests for information from the public; conduct a public hearing to consider the level of community support for the petition; review and evaluate the petition for its compliance with the conditions stated in the Charter Schools Act; grant or deny the petition within sixty days of receiving the petition, subject to one thirty-day continuance by agreement of the parties; monitor the charter school performance to determine if it has achieved its goals and objectives; upon cause, hear and decide upon a revocation of the charter; and evaluate and decide upon requests for revision or renewal of charters.

2. For county offices of education which have received an appeal of a charter school denied by a school district to: select and convene a review panel of three governing board members and three teachers from other school districts to determine if the school board governing board acted properly in denying the petition, and if necessary, request the school district governing board to reconsider the charter petition.

3. For school districts which have denied an original charter school petition, to: respond to the inquiry of the panel review convened by the county superintendent and reconsider the charter petition if so requested.

4. For other school districts to provide personnel to take part in the review panel convened by the county superintendent of schools.

B. Reimbursable Activities

For each eligible school district and county office of education, the direct and indirect costs of labor, supplies and services incurred for the following mandate components are reimbursable:

1. Responding to information requests

   Providing information, upon request, to the community regarding the Charter Schools Act of 1992 and governing board's charter policy and procedures.

2. Evaluating Petitions

   Administrative review and evaluation of qualified charter petitions for compliance with criteria for the granting of charters.

3. Public hearings

   Administrative preparation for the conducting of public hearings needed to reach a determination for adoption, reconsideration, renewal, revision, revocation, or appeal of a petition.

4. Monitoring the charter

   Subsequent administrative review, analysis, and reporting on the charter school's performance for purposes of charter reconsideration, renewal, revision, evaluation, or revocation by the governing body.

5. Petition appeals

   Staffing and convening the county office review panel, conducting the analysis of the school district decision process, responding to the review panel inquiries and requests, and reporting to the involved parties.

VI. Claim Preparation

Each claim for reimbursement pursuant to this mandate must be timely filed and set forth a listing of each item for which reimbursement is claimed under this mandate.

A. Reporting by Components

Claimed costs must be allocated according to the five components of reimbursable activity described in Section V. B.

B. Supporting Documentation

Claimed costs should be supported by the following information:

1. Employee Salaries and Benefits

   Identify the employee(s) and their job classification, describe the mandated functions performed, and specify the actual number of hours devoted to each function, the productive hourly rate, and the related benefits. The average number of hours devoted to each function may be claimed if supported by a documented time study.

2. Materials and Supplies

Only the expenditures that can be identified as a direct cost of the mandate can be claimed. List cost of materials which have been consumed or expended specifically for the purpose of this mandate.

3. Contract Services

Give the name(s) of the contractors(s) who performed the service(s). Describe the activities performed by each named contractor, and give the number of actual hours spent on the activities. Show the inclusive dates when services were performed and itemize all costs for those services.

4. Allowable Overhead Costs

a. School districts must use the J-380 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

b. County offices of education must use the J-580 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the Sate Department of Education.

VII. Supporting Data

For reporting purposes, all costs claimed must be traceable to source documents and/or worksheets that show evidence of the validity of such costs. Pursuant to Government Code section 17558.5, these documents must be kept on file by the agency submitting the claim for a period of no less than four years after the end of the calendar year in which the reimbursement claim is filed, and made available on the request of the State Controller.

VIII. Offsetting Savings and Other Reimbursements

Any offsetting savings the claimant experiences as a direct result of this statute must be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, e.g., service fees collected, federal funds, other state funds, etc., shall be identified and deducted from this claim. The Commission has not identified any specific offsetting savings from state or federal sources applicable to this mandate.

IX. State Controller's Office Required Certification

An authorized representative of the claimant will be required to provide a certification of claim, as specified in the State Controller's claiming instructions, for those costs mandated by the state contained herein.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	No. 99-TC-03
Education Code Sections 47602, 47604, 47605, 47605.5, 47607, 47613 (formerly 47613.7), 47613.5, and 47614; Statutes 1998, Chapters 34 and 673; California Code of Regulations, Title 5, Sections 15410-15428; California Department of Education Memorandum dated April 28, 1999, Filed on June 29, 1999, By Los Angeles County Office of Education and San Diego Unified School District, Claimants.	*Charter Schools II* 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 November 21, 2002)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on October 24, 2002. Art Palkowitz and Brian Bennett appeared on behalf of claimant San Diego Unified School District. Gayle Windom appeared on behalf of claimant Los Angeles County Office of Education. Dan Troy, Heather Carlson and Susan Geanacou appeared on behalf of the Department of Finance (DOF). At the hearing testimony was given, the test claim was submitted, and the vote was taken.

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 approved the staff analysis for the test claim presented by a 5-0 vote.

BACKGROUND

On August 24, 1999, claimants, Los Angeles County Office of Education and San Diego Unified School District, submitted a test claim alleging a reimbursable state mandate for county offices of education and school districts to provide supervisory oversight and reporting services to charter schools, and various other activities related to the establishment and fiscal management of charter schools.[1] The claim arises from enactments or amendments to Education Code sections 47602, 47604, 47605, 47605.5, 47607, 47613 (formerly 47613.7), 47613.5, and 47614 by Statutes 1998, chapters 34 and 673, and the adoption of California Code of Regulations, title 5, sections 15410 through 15428. Claimants also assert that California Department of Education

[1] The reimbursement period for this test claim begins no earlier than July 1, 1998. (Gov. Code, § 17557, subd. (e).)

(CDE) memorandum dated April 28, 1999 constitutes an executive order resulting in a reimbursable state mandate.

On May 26, 1994, the Commission heard and decided a related test claim, *Charter Schools*, CSM-4437.[2] The Commission found that Statutes 1992, chapter 781, by enacting Education Code sections 47605 and 47607, imposed a reimbursable state mandated program for school districts for new activities related to initial charter school petitions, and for monitoring and evaluating the performance of charter schools pertaining to the revision or renewal of approved charters. The claimants indicate intent to request a parameters and guidelines amendment to incorporate any new activities from the *Charter Schools II* claim into the existing *Charter Schools* parameters and guidelines.

Claimants' Position

Claimants allege reimbursable costs mandated by the state for test claim legislation requiring the following activities of school districts:

> (1) provide notice and an opportunity to cure to charter schools prior to any proposed revocation of the charter, (2) allow charter schools to use certain facilities free of charge, (3) respond to, prepare for, and participate in court proceedings challenging a decision to deny a charter, (4) evaluate petitions for renewals of charter school petitions originally granted by the State Board of Education and prepare for and conduct hearings related to proposed renewals of those charter petitions, (5) calculate, process, and advance payments of property taxes to charter schools, and (6) provide administrative services to charter schools without full reimbursement.

Claimants allege similar activities are newly required of county offices of education, and also that county offices of education are now required to evaluate certain charter school petitions and conduct some of the same activities found to be reimbursable for school districts in the original *Charter Schools* test claim.

Claimants conclude that none of the Government Code section 17556 exceptions to finding costs mandated by the state apply to this test claim. Claimants specifically assert that there are no other federal or state constitutional provisions, statutes or executive orders impacted, and that Statutes 1998, chapters 34 and 643 appropriated no funds for the reimbursable activities alleged.

State Agency Position

DOF's July 28, 2000 response to the test claim allegations states agreement in part with claimants on some of the identified new activities, however it argues that:

- Some of the claimed activities are discretionary or permissive;
- Some of the claimed activities are not new;
- Fee authority is given for the district to charge the charter school for expenses of supervisory oversight; or
- Other offsetting savings are established as part of the test claim legislation.

[2] *Charter Schools*, CSM-4437, Statement of Decision adopted on July 21, 1994; Parameters and Guidelines adopted October 18, 1994.

DOF agrees with claimants that Education Code sections 47605, subdivision (k), 47605.5, and 47607 include new activities or higher levels of service.

COMMISSION FINDINGS

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.[3] 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. 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.[4] 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. Finally, the newly required activity or increased level of service must impose costs mandated by the state.[5]

Test Claim Executive Orders: California Code of Regulations:

As part of the test claim filings, claimants allege, "The State Board of Education adopted title 5, California Code of Regulations section 15410 et seq. as emergency regulations to implement Education Code section 47613.5." Claimants' test claim Exhibit C is identified as including "Title 5 California Code of Regulations §§ 15410-15428," however, the exhibit is a printout from the California Department of Education's (CDE's) website and does not provide any indication of an operative date. The regulations are not in the current version of *Barclays Official California Code of Regulations*, and there are no historical notes indicating that any regulations were ever filed or operative for those section numbers.[6]

As noted below, Education Code section 47613.5 was repealed by Statutes 1999, chapter 78, effective July 7, 1999. Claimants' exhibit from the CDE website may be of proposed regulations that were never published or operative prior to the repeal of the implementing Education Code section. Without evidence presented of the operative dates of the claimed regulations, the Commission finds that the claimed regulations are not properly included in this test claim. Any further references to "test claim legislation" do not include California Code of Regulations, title 5, sections 15410 through 15428.

---

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

[4] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[5] Government Code section 17514.

[6] *Barclays Official California Code of Regulations* is certified by the Office of Administrative Law as the official regulation publication of the State of California for purposes of judicial notice. (Gov. Code, § 11344.6 and Cal. Code Regs., tit. 1, § 190.)

Issue 1: **Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?**[7]

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[8] The court has held that only one of these findings is necessary.[9]

The Commission finds that the test claim legislation constitutes a program within the meaning of article XIII B, section 6 of the California Constitution under both tests. First, it constitutes a program that carries out the governmental function of providing a service to the public, to the extent the test claim legislation requires school districts and county offices of education to engage in supervisory, funding and reporting activities related to charter schools. The courts have held that education is a peculiarly governmental function administered by local agencies as a service to the public.[10]

The test claim legislation also satisfies the second test that triggers article XIII B, section 6, to the extent that the test claim legislation requires school districts and county offices of education to engage in charter school supervisory, funding and reporting activities solely applicable to public school administration. The test claim legislation imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state. Accordingly, the Commission finds that supervisory, funding and reporting activities related to charter schools constitute a "program" and, thus, are subject to article XIII B, section 6 of the California Constitution.

Issue 2: **Does the test claim legislation impose a new program or higher level of service within an existing program upon school districts within the meaning of article XIII B, section 6 of the California Constitution by requiring new or additional activities related to charter school supervision and reporting?**

The claimants contend that the test claim legislation imposes a new program or higher level of service upon school districts by requiring specific new activities related to charter school supervision and reporting. Under prior law, school districts were required to engage in activities

---

[7] Article XIII B, section 6 of the California Constitution 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."

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

[9] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

[10] *Long Beach Unified School Dist., supra*, 225 Cal.App.3d at 172 states "although numerous private schools exist, education in our society is considered to be a peculiarly governmental function ... administered by local agencies to provide service to the public."

related to initial charter school petitions, and for monitoring and evaluating the performance of charter schools pertaining to the revision or renewal of approved charters.[11] The test claim legislation makes changes to some of the requirements as compared to prior law. The analysis for finding a new program or higher level of service must examine whether the test claim legislation requires a school district to engage in activities, and whether such activities constitute a new program or higher level of service when compared to prior law.

Test Claim Statutes:

Education Code section 47602.

This Education Code section, as added by Statutes 1992, chapter 781, and amended by Statutes 1993, chapter 589, Statutes 1996, chapter 849, Statutes 1998, chapter 34, and Statutes 1998, chapter 673 provides:

> (a)(1) In the 1998-99 school year, the maximum total number of charter schools authorized to operate in this state shall be 250. In the 1999-2000 school year, and in each successive school year thereafter, an additional 100 charter schools are authorized to operate in this state each successive school year. For the purposes of implementing this section, the State Board of Education shall assign a number to each charter petition that it grants pursuant to subdivision (j) of Section 47605 and to each charter notice it receives pursuant to subdivision (i) and paragraph (5) of subdivision (j) of Section 47605, based on the chronological order in which the notice is received. The limits contained in this paragraph may not be waived pursuant to Section 33050 or any other provision of law.
>
> (2) By July 1, 2003, the Legislative Analyst shall, pursuant to the criteria in Section 47616.5, report to the Legislature on the effectiveness of the charter school approach authorized under this part and recommend whether to expand or reduce the annual rate of growth of charter schools authorized pursuant to this section.
>
> (b) No charter shall be granted under this part that authorizes the conversion of any private school to a charter school. No charter school shall receive any public funds for a pupil if the pupil also attends a private school that charges the pupil's family for tuition. The State Board of Education shall adopt regulations to implement this section.

Claimants identify that Education Code section 47602, subdivision (a), as amended by Statutes 1998, chapter 673, "increases the number of charter schools that are authorized to operate in the state." The statutory language is directed to the State Board of Education and the state Legislative Analyst's Office, and claimants do not specifically identify any new reimbursable activities or duties imposed upon local educational agencies by this amended Education Code section. Therefore, the Commission finds that Education Code section 47602 does not impose a new program or higher level of service upon school districts or county offices of education.

[11] Statutes 1992, chapter 781, enacting Education Code sections 47605 and 47607. See previously approved test claim *Charter Schools*, CSM-4437.

Education Code section 47604.

This Education Code section, as added by Statutes 1998, chapter 34, provides:

> (a) Charter schools may elect to operate as, or be operated by, a nonprofit public benefit corporation, formed and organized pursuant to the Nonprofit Public Benefit Corporation Law (Part 2 (commencing with Section 5110) of Division 2 of Title 1) of the Corporations Code).
>
> (b) The governing board of a school district that grants a charter for the establishment of a charter school formed and organized pursuant to this section shall be entitled to a single representative on the board of directors of the nonprofit public benefit corporation.
>
> (c) It is the intent of the Legislature that an authority that grants a charter to a charter school to be operated by, or as, a nonprofit public benefit corporation shall not be liable for the debts or obligations of the charter school.

Claimants allege that, despite the language of subdivision (c), the school district or county office of education granting a charter,

> may be liable for the acts or obligations of the charter school due to the granting authority's statutory oversight responsibilities or because the nonprofit corporation laws may shield the charter school, but not the granting authority, from liability. County offices of education and school districts must determine the impact of section 47604 on self-provided or purchased insurance. Further, county offices of education and school districts may incur additional costs for such insurance as the result of the election of a charter school to operate as or by a nonprofit public benefit corporation.

Claimants have not offered legal support for this contention. Alternatively, DOF, in its response of July 28, 2000, argues:

> Districts have a choice as to whether or not to buy more liability insurance. Further, the law makes the districts and county offices better off than before by specifying in statute that they should have no liability. Indeed, the district's need for such coverage would seem to decrease, as they are now responsible for fewer students. The Department of Education's legal opinion, [test claim Attachment 1, dated June 12, 1997], similarly concludes the chartering agency has no liability for charter school activities.

The CDE's June 12, 1997 legal opinion, *Charter School Liability and Accountability*, provides extensive statutory and case law analysis on public sector imputed and vicarious liability law, and concludes, "Given the purpose of the enabling legislation, we believe the better view is that chartering entities are completely immune from liability incurred by charter schools under existing law." Following this opinion, the Legislature enacted Education Code section 47604, subdivision (c), to confirm that chartering entities, including school districts and county offices of education, are not to be liable for the debts or obligations of a charter school, when operated as, or by, a non-profit.

In claimant San Diego Unified School District's September 30, 2002 comments on the draft staff analysis, the claimant expresses agreement "with staff's recommendation regarding the purchase

of insurance for charter schools established as nonprofit public benefit corporation[s]." Claimant then goes on to argue that:

> However, charter schools not operating as a nonprofit corporation have been the sponsoring entity's responsibility for acts or obligations.
>
> DOF contends under Education Code section 47604 "districts have a choice as to whether or not to buy more liability insurance." Given that school districts *shall* purchase insurance in accordance with Education Code section 35208 (a)[12] there is no reasonable alternative for the sponsoring district of a charter but to purchase insurance for charter schools that are not a nonprofit public benefit corporation.
>
> Education Code section 47604 for the first time determined the responsibility of sponsoring districts with charter schools not operating as nonprofit corporations. Therefore, in accordance with Education Code section 35208 (a) purchasing insurance for the charter school is mandatory as it would be for other school sites.

It is unclear about how this new argument connects with the test claim legislation. First, Education Code section 35208, subdivision (a), which requires school districts to carry liability insurance, was not pled as part of the test claim allegations. Second, even if the section was properly pled and before the Commission now, it does not fall within the jurisdiction of the Commission under article XIII B, section 6, subdivision (c) of the California Constitution, because Education Code section 35208 was enacted prior to 1975.[13] Claimant raises a new argument for reimbursement of a chartering entity's costs of purchasing liability insurance to cover a charter school not run as a non-profit. The Commission finds no connection from the test claim legislation pled, namely Education Code section 47604, to this newly asserted expense. Education Code section 47604, as cited in its entirety above, simply allows a charter school to operate as a non-profit. It has nothing to do with purchasing liability insurance, or for determining "the responsibility of sponsoring districts with charter schools *not operating* as nonprofit corporations." [Emphasis added.]

The Commission finds that Education Code section 47604 does not require any new activities on the part of school districts or county offices of education. As discussed in *Long Beach*, "mandates" is to be understood "in the ordinary sense of 'orders' or 'commands.'"[14] The state, by permitting charter schools to operate as a nonprofit public benefit corporation, in no way is ordering school districts to purchase additional insurance, therefore the statute does not impose a new program or higher level of service upon school districts or county offices of education for the alleged costs and activities.

---

[12] Claimant's footnote contains complete text of the cited code section.

[13] Former Education Code of 1959, section 1017 was renumbered by Statutes 1976, chapter 1010 as section 35208.

[14] *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d at 174.

Education Code section 47605.

This Education Code section, as added by Statutes 1992, chapter 781, and amended by Statutes 1993, chapter 589, Statutes 1996, chapter 786, Statutes 1998, chapters 34 and 673,[15] provides the standards and instructions for filing and reviewing a petition to establish a charter school. This code section, as added by Statutes 1992, chapter 781, was the subject of the prior test claim, *Charter Schools*, and was found to impose a reimbursable state mandate for school districts for new activities related to processing initial charter school petitions. Claimants allege new reimbursable state mandates are imposed by amended subdivision (j) and new subdivision (k). Each subdivision will be analyzed individually below. Amended subdivision (j)(1) provides:

> (j)(1) If the governing board of a school district denies a petition, the petitioner may elect to submit the petition for the establishment of a charter school to either the county board of education or directly to the State Board of Education. The county board of education or the State Board of Education, as the case may be, shall review the petition pursuant to subdivision (b). If the petitioner elects to submit a petition for establishment of a charter school to the county board of education and the county board of education denies the petition, the petitioner may file a petition for establishment of a charter school with the State Board of Education.

Claimants allege "subdivision (j) now allows a charter petitioner to submit a charter petition directly with the county board of education ... whenever a school district denies a charter petition." By replacing subdivision (j), the Legislature eliminated the previously approved mandate activities for county superintendents to convene a review panel to evaluate a denied charter petition and substituted a new review procedure.

Claimants indicate intent to request a parameters and guidelines amendment to incorporate any new activities into the existing *Charter Schools* parameters and guidelines. The reimbursable activities of former subdivision (j), as added by Statutes 1992, chapter 781, should be eliminated from the *Charter Schools* parameters and guidelines, effective January 1, 1999, and replaced with the new requirements of subdivision (j)(1). The Commission finds that Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673, imposes a new program or higher level of service upon county offices of education for the following activity:

- After the governing board of a school district denies a charter school petition and the charter school petitioner submits the petition to the county board of education, the county board of education shall review the petition pursuant to Education Code section 47605, subdivision (b).

Claimants also allege that Statutes 1998, chapter 673 further amended

> subdivision (j) to allow a charter petitioner to file a judicial action challenging a school district's denial of the petition if the county board of education or the State Board of Education fails to act on a direct petition within 120 days. Thus, school districts must respond to, prepare for, and participate in a judicial proceeding,

[15] This statute has been further amended by Statutes 1999, chapter 828, Statutes 2000, chapter 580, and Statutes 2001, chapter 344, none of which are included or amended into the present test claim allegations. Nor did claimants include the amendments made by Statutes 1993, chapter 589, or Statutes 1996, chapter 786 in the test claim allegations.

rather than a county board of education review, if the charter petitioner challenges a decision by a school district to deny a charter petition.

Claimants refer to subdivision (j)(3):

> If either the county board of education or the State Board of Education fails to act on a petition within 120 days of receipt, the decision of the governing board of the school district to deny a petition shall, thereafter, be subject to judicial review.

DOF argues, "No new mandate is established as charters always had a right to file a judicial action. The Education Code is permissive; as long as an action is not prohibited, it is permitted." In addition, the Commission notes that response to judicial review is not imposed by state action, but by the action of a member of the public filing a lawsuit. Subdivision (j)(3) merely sets a time period after which the charter petitioner can demonstrate to a court that they have exhausted all statutory administrative remedies. Therefore, the Commission finds that Education Code section 47605, subdivision (j)(3), as amended by Statutes 1998, chapter 673, does not impose a new program or higher level of service upon school districts.

Finally, claimants allege a reimbursable state mandate is imposed by Education Code section 47605, subdivision (k)(3), in pertinent part:

> A charter school that has been granted its charter by the State Board of Education and elects to seek renewal of its charter shall, prior to expiration of the charter, submit its petition for renewal to the governing board of the school district that initially denied the charter.

DOF's response "concur[s] that the law imposes new duties on the agency that previously denied a charter." The Commission agrees, and finds that Education Code section 47605, subdivision (k)(3), as added by Statutes 1998, chapter 673, imposes a new program or higher level of service upon school districts for the following activity:

- Review charter school petitions for renewal, when submitted directly to the governing board of the school district that initially denied the charter, prior to expiration of the charter granted by the State Board of Education.

Education Code section 47605.5.

This Education Code section, as added by Statutes 1998, chapter 34, provides:

> A petition may be submitted directly to a county board of education in the same manner as set forth in Section 47605 for charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services. Any denial of a petition shall be subject to the same process for any other county board of education denial of a charter school petition pursuant to this part.

Claimants allege that this code section imposes "new requirements for responding to information requests, evaluating charter school petitions, conducting public hearings, monitoring charter school performance, and responding to appeals of decisions with respect to charter school petitions made directly to the county board of education."

Prior law of Education Code section 47605, as added by Statutes 1992, chapter 781, only permitted proponents of a charter school to apply to a county office of education for review when

the governing board of a school district denied a petition. New Education Code section 47605.5 sets up a requirement for county boards of education to review submitted charter school petitions under the criteria of section 47605, if the proposed charter school is designed to "serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services." This requires county boards of education to incur expenses for activities previously found reimbursable to school districts under the *Charter Schools* parameters and guidelines. The Commission finds that Education Code section 47605.5, as added by Statutes 1998, chapter 34, imposes a new program or higher level of service upon county offices of education for the following new activity:

- Review charter school petitions submitted directly to the county board of education, in the same manner as set forth in Education Code section 47605, for charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services.

Education Code section 47607.

This Education Code section, as added by Statutes 1992, chapter 781, and amended by Statutes 1998, chapter 34, provides,

> (a)(1) A charter may be granted pursuant to Sections 47605, 47605.5, and 47606 for a period not to exceed five years. A charter granted by a school district governing board, a county board of education or the State Board of Education, may be granted one or more subsequent renewals by that entity. Each renewal shall be for a period of five years. A material revision of the provisions of a charter petition may be made only with the approval of the authority that granted the charter. The authority that granted the charter may inspect or observe any part of the charter school at any time.
>
> (2) Renewals and material revisions of charters shall be governed by the standards and criteria in Section 47605.
>
> (b) A charter may be revoked by the authority that granted the charter under this chapter if the authority finds that the charter school did any of the following:
>
> (1) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter.
>
> (2) Failed to meet or pursue any of the pupil outcomes identified in the charter.
>
> (3) Failed to meet generally accepted accounting principles, or engaged in fiscal mismanagement.
>
> (4) Violated any provision of law.
>
> (c) Prior to revocation, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils.

This statute was included in the original *Charter Schools* test claim filed on the enactment of Statutes 1992, chapter 781. The primary amendment by Statutes 1998, chapter 34 was the addition of subdivision (c).

Claimants allege that Education Code section 47607, as amended, requires the school district or county office of education granting a charter school petition to "provide notice to that charter school prior to any proposed charter revocation ... and also requires the charter granting authority to give the charter school a reasonable opportunity to cure" violations that do not pose a threat to health and safety. DOF agrees "that the cost of preparing a written notification is new." Claimants acknowledge that other activities required by Education Code section 47607 are already reimbursable through the original *Charter Schools* claims process.

Under the provisions of Education Code section 47605, subdivision (b), school districts, and county offices of education required to review charter school petitions, "*shall* grant a charter for the operation of a school under this part if it is satisfied that the charter is consistent with sound educational practice." Under the statute, local educational agencies must cite facts and make specific written findings in order to reject a charter application; the rejection cannot be arbitrary. Thus, acceptance and approval of a complete charter petition is not a discretionary act on the part of school districts and county offices of education.

Once a charter school petition is approved the chartering agency maintains some oversight responsibilities. For example, Education Code section 47613 states, "a chartering agency may charge for the actual costs of supervisorial oversight of a charter school." If in the course of that oversight, the school district or county office of education determines that the standards or criteria of the approved charter are not being met, the chartering agency has a duty to revoke the charter by following the mandatory procedure described in Education Code section 47607, subdivision (c). Therefore, the Commission finds that Education Code section 47607, as amended by Statutes 1998, chapter 34, imposes a new program or higher level of service upon school districts and county offices of education for the following new activity:

- Prior to revocation of a charter, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils.

Education Code section 47613 (formerly 47613.7).

When the test claim was filed, the test claim statute was Education Code section 47613.7, as added by Statutes 1998, chapter 34. The section was renumbered Education Code section 47613 by Statutes 1999, chapter 78, effective July 7, 1999. No amendments were made to the statutory language.

> (a) Except as set forth in subdivision (b), a chartering agency may charge for the actual costs of supervisorial oversight of a charter school not to exceed 1 percent of the revenue of the charter school.
>
> (b) A chartering agency may charge for the actual costs of supervisorial oversight of a charter school not to exceed 3 percent of the revenue of the charter school if the charter school is able to obtain substantially rent free facilities from the chartering agency.

(c) A local agency that is given the responsibility for supervisorial oversight of a charter school, pursuant to paragraph (1) of subdivision (k) of Section 47605, may charge for the costs of supervisorial oversight, and administrative costs necessary to secure charter school funding, not to exceed 3 percent of the revenue of the charter school. A charter school that is charged for costs under this subdivision shall not be charged pursuant to subdivision (a) or (b).

(d) This section shall not prevent the charter school from separately purchasing administrative or other services from the chartering agency or any other source.

(e) For the purposes of this section, a chartering agency means a school district, county department of education, or the State Board of Education, that granted the charter to the charter school.

Claimants allege that although the code section allows school districts to charge a charter school for the actual costs of supervisorial oversight, the maximum charge of one percent (or three percent if the school district provides substantially rent-free facilities to the charter school) of charter school revenue, is insufficient to pay for the oversight costs.

DOF argues "that if the Legislature had intended that chartering agencies' requirements should be more costly, they would not have imposed a limit on the reimbursements. On the contrary, we believe this limitation was in keeping with the intent of the Charter law that oversight be just that and was intended to discourage micromanagement."

The Commission notes that this statute alone does not impose a new program or higher level of service, but instead establishes a fee system for which the chartering agency can impose a maximum charge of one or three percent of the charter school revenue for the actual costs of supervisorial oversight. Supervisorial oversight is a reimbursable activity in the original *Charter Schools* Parameters and Guidelines, as follows:

4. Monitoring the charter

Subsequent administrative review, analysis, and reporting on the charter school's performance for purposes of charter reconsideration, renewal, revision, evaluation, or revocation by the governing body.

In comments on the draft staff analysis, claimant San Diego Unified School District states that they are "unable to locate in the Parameters and Guidelines or in the Claiming Instructions the term 'Supervisorial oversight.'" The Commission agrees that this is not the exact language utilized, however, claimant has not cited any other definition of "supervisorial oversight" in the Education Code indicating that the term should not be read as comparable to the "Monitoring the charter" activity allowed for in *Charter Schools* Parameters and Guidelines.

Claimant argues that "the supervisorial oversight activities are a new program or higher level of service that is required to be performed by the sponsoring entity and must be a reimbursable [sic] for any amounts exceeding 1% or 3%." Again, supervisorial oversight is not a *new activity* required by the law claimed in the present test claim allegations. Claimant cannot make a successful claim for subvention for the costs of supervisorial oversight without first pleading and establishing that a new law or executive order imposed a new program or higher level of service upon school districts or county offices of education. The laws relating to supervisorial oversight as *an activity* were pled in the original *Charter Schools* test claim based upon the enactment of Statutes 1992, chapter 781, and have already been found by the Commission to impose certain

reimbursable costs mandated by the state. The Commission finds that Education Code section 47613 does not require any new activities, but rather establishes a fee authority to be used by a school district or county office of education to offset any costs of charter school supervisorial oversight.[16]

The Commission finds that Education Code section 47613, as added by Statutes 1998, chapter 34, renumbered by Statutes 1999, chapter 78, does not impose a new program or higher level of service upon school districts or county offices of education.

Education Code section 47613.5.

Education Code section 47613.5, as added by Statutes 1998, chapter 34, effective January 1, 1999, and repealed by Statutes 1999, chapter 78, effective July 7, 1999, follows, in pertinent part:

> (a) Notwithstanding Sections 47612 and 47613, commencing with the 1999-2000 school year and only upon adoption of regulations pursuant to subdivision (b), charter school operational funding shall be equal to the total funding that would be available to a similar school district serving a similar pupil population, provided that a charter school shall not be funded as a necessary small school or a necessary small high school, nor receive revenue limit funding that exceeds the statewide average for a school district of a similar type.
>
> (b) The State Department of Education shall propose, and the State Board of Education may adopt, regulations to implement subdivision (a) and, to the extent possible and consistent with federal law, provide for simple and, at the option of the charter school, local or direct allocation of funding to charter schools.

Claimants allege that "Education Code section 47613.5 required the State Department of Education to propose, and the State Board of Education to adopt, regulations that provide for these alternative methods of funding." The statutory language is directed exclusively to the CDE and the State Board of Education and does not impose any activities or duties upon school districts.

In addition, as discussed above, it appears that the proposed regulations were never published or operative prior to the repeal of this implementing Education Code section, effective July 9, 1999. Any potential activities for local educational agencies would have resulted from the implementation of the regulations originally required by this statute, not from the statute alone. Therefore, the Commission finds that Education Code section 47613.5 did not impose a new program or higher level of service upon school districts or county offices of education.

Education Code section 47614.

This Education Code section was added by Statutes 1998, chapter 34, operative January 1, 1999.

> A school district in which a charter school operates shall permit a charter school to use, at no charge, facilities not currently being used by the school district for instructional or administrative purposes, or that have not been historically used for

[16] Government Code section 17514 defines "costs mandated by the state" as increased costs a district is "required to incur," therefore any costs that are recoverable through sources other than district tax revenues are not reimbursable costs mandated by the state.

rental purposes provided the charter school shall be responsible for reasonable maintenance of those facilities.

Education Code section 47614 was replaced by language from Initiative Measure, Proposition 39, section 6, effective November 8, 2000, as follows in part:

> The intent of the people in amending Section 47614 is that public school facilities should be shared fairly among all public school pupils, including those in charter schools.
>
> Each school district shall make available, to each charter school operating in the school district, facilities sufficient for the charter school to accommodate all of the charter school's in-district students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending other public schools of the district. Facilities provided shall be contiguous, furnished, and equipped, and shall remain the property of the school district. The school district shall make reasonable efforts to provide the charter school with facilities near to where the charter school wishes to locate, and shall not move the charter school unnecessarily.

The statutory language of Education Code section 47614, as added by Statutes 1998, chapter 34 was replaced by vote of the people upon the approval of Proposition 39, and thus is no longer subject to article XIII B, section 6 of the California Constitution, which only requires subvention when "the Legislature or any state agency mandates a new program or higher level of service." Therefore, the Commission finds that any potential reimbursement period for Education Code section 47614 begins on January 1, 1999, and concludes on November 8, 2000.

Claimants allege that Education Code section 47614 imposes a reimbursable state mandate, including "the fair rental value of the facility as determined by the school district governing board plus other direct and indirect costs associated with the charter school's use of the facility."

DOF's July 28, 2000 response to the test claim allegations concludes:

> The law specifically states that the district must provide facilities only if they are excess facilities or are not already being rented. As such, there is no loss of rent to the district, as the "fair rental value" of an unrented property is zero. However, there could be minor, one-time administrative costs in establishing a free use agreement with the charter. Additionally, even if there were a revenue loss, it would not appear to constitute a reimbursable new program nor higher level of service within the meaning of the mandate law. Finally, the law also provides offsetting savings, because the law requires that any facilities provided for use by the charter be maintained by the charter, thus relieving the chartering agency from the costs of maintenance on the surplus facility.

The Commission also disagrees with the claim for state subvention for any lost rental value of a facility utilized by a charter school under this section as it contradicts the court's holding in *County of Sonoma v. Commission on State Mandates*. In *County of Sonoma*, the court concluded that lost revenue is not reimbursable under article XIII B, section 6 of the California Constitution.[17]

---

[17] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1285.

In *County of Sonoma*, the counties contended that reduced allocation of tax revenues was a reimbursable cost under article XIII B, section 6. The court disagreed. After analyzing Supreme Court cases on mandates, reviewing Government Code section 17500 et seq. and other Constitutional provisions differentiating "costs" from "lost revenue," the court came to the following conclusions:

> [I]t is the expenditure of tax revenues of local governments that is the appropriate focus of section 6 (*County of Fresno v. State of California* [citation omitted]) [stating that section 6 was "designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues."][18]
>
> No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes.[19]
>
> The obvious view of the Legislature is that reimbursement is intended to replace actual costs incurred, not as compensation for revenue that was never received.[20]
>
> The presence of these references to reimbursement for lost revenue in article XIII supports a conclusion that by using the word "cost" in section 6 the voters meant the common meaning of cost as an expenditure or expense actually incurred.[21]

And finally, the court held that "we cannot extend the provisions of section 6 to include concepts such as lost revenue."[22] Accordingly, the Commission finds that the claim for the lost fair rental value is not subject to article XIII B, section 6, because lost revenue, such as rental income, does not constitute a cost.

As for associated "direct and indirect costs" of providing property to charter schools, Statutes 1998, chapter 34 only required that school districts provide property if it was not being currently used for instructional or administrative purposes, *and*, if it had not been historically rented. In other words, the statute only required school districts to provide truly vacant, unutilized property. There was no state requirement to evict current tenants, establish a lease agreement, or prepare property for a charter school in any way. In return for use of the unutilized property, charter schools "shall be responsible for reasonable maintenance of those facilities," thus, providing a potential benefit to school districts, not a cost.

However, any potential offsetting savings does not preclude finding that a new program or higher level of service was imposed upon school districts for the administrative expenses resulting directly from the statutory requirement to permit charter schools to utilize unused district facilities, such as "one-time administrative costs in establishing a free use agreement with the charter," as proposed by DOF.

---

[18] *Id.* at 1283.

[19] *Id.* at 1284.

[20] *Ibid.*

[21] *Id.* at 1285.

[22] *Ibid.*

Thus, the Commission finds that Education Code section 47614, as added by Statutes 1998, chapter 34, imposes a new program or higher level of service upon school districts from January 1, 1999 to November 8, 2000, for the following new activity:

- Permitting a charter school to use, at no charge, facilities not currently being used by the school district for instructional or administrative purposes, or that have not been historically used for rental purposes provided the charter school shall be responsible for reasonable maintenance of those facilities. (Reimbursement for this activity is limited to administrative expenses resulting directly from the requirement to permit charter schools to utilize unused district facilities. Rental value of the facility is specifically excluded as a reimbursable expense.)

Test Claim Executive Orders: California Department of Education Memorandum:

Implementation of New Charter School Funding Model, dated April 28, 1999.

Claimants allege the memorandum is an executive order imposing a reimbursable state mandated program for the processing of payments of property tax from school districts to charter schools. The April 28, 1999 document is a letter "intended to help charter schools make" decisions on the new funding model options described in Education Code section 47613.5. The memorandum discusses the plan for implementation of Education Code section 47613.5, however the code section was repealed on July 7, 1999, and thus the memorandum was no longer of use.

Under Government Code section 17516, an "executive order" may include "any order, plan, requirement, rule, or regulation issued by . . . any agency, department, board, or commission of state government." For the period of time the memorandum applied, it was informational regarding the new charter school funding model; however, the Commission finds that the memorandum did not meet the definition of an executive order for school districts and county offices of education, as it did not issue any directives or require any activities on the part of such local educational agencies. The Commission finds that the CDE memorandum dated April 28,1999, did not impose a new program or higher level of service upon school districts or county offices of education.

Issue 3: Does the test claim legislation found to contain a new program or higher level of service also impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Reimbursement under article XIII B, section 6 is required only if any new program or higher-level of service is also found to impose "costs mandated by the state." Government Code section 17514 defines "costs mandated by the state" as any *increased* cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service.

DOF makes an argument against subvention for the part of the test claim legislation, based upon the exception of Government Code section 17556, subdivision (e): that there are no costs mandated by the state if the statute or executive order provides *offsetting savings* to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

DOF contends that Statutes 1998, chapter 673, in amending Education Code section 47605, subdivision (j), the Legislature eliminated a mandate that county offices of education "convene a

review panel to determine if a district acted properly in denying a petition. However, it also: a) adds a requirement that county offices review petitions directly submitted to them; and b) allows charter schools to file judicial action against a district in the case of a denial if the entity fails to act on a petition within 120 days."

DOF argues, "There would seem to be considerable offsetting savings resulting from the elimination of the earlier mandate. We believe these alternative activities to be comparable and therefore no reimbursable mandate exists."

DOF's analysis does not comport with the complete description of offsetting savings in the exception to reimbursement described in Government Code section 17556, subdivision (e). Because the prior requirements in Education Code section 47605 were found to constitute a reimbursable state mandated program as part of the original *Charter Schools* test claim, the elimination of part of the mandate and the substitution of other requirements does not provide *offsetting savings which result in no net costs* to the school district. Following the program evolution in a timeline: first, there is no program prior to the development of charter schools legislation; next, there is a new program in Statutes 1992, chapter 781, resulting in a reimbursable state mandate; finally, part of the new program activities are eliminated and substituted with alternative activities by Statutes 1998, chapter 673. But, under DOF's argument, because the newest program is comparable, suddenly "no reimbursable mandate exists." This does not follow – if the previous program activities were reimbursable, the substituted activities must be as well, unless another exception to subvention exists.

In addition, the test claim legislation does not include additional revenue that was specifically intended to fund the entire cost of the state mandate. Accordingly, the Commission finds that Government Code section 17556, subdivision (e), does not apply to deny a finding of costs mandated by the state for the activities identified as imposing a reimbursable state mandated program.

The Commission finds none of the other exceptions to finding a reimbursable state mandate under Government Code section 17556 apply here. Accordingly, the Commission finds that the activities identified in the conclusion, below, qualify for reimbursement because the activities impose costs mandated by the state within the meaning of Government Code section 17514.

CONCLUSION

The Commission concludes that Education Code sections 47605, subdivision (j)(1) and (k)(3), 47605.5, 47607, and 47614 contain new programs or higher levels of service for school districts and/or county offices of education 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 17514, for the following specific new activities:

<u>School Districts:</u>

- Review charter school petitions for renewal, when submitted directly to the governing board of the school district that initially denied the charter, prior to expiration of the charter granted by the State Board of Education. (Ed. Code, § 47605, subd.(k)(3).)[23]

[23] As amended by Statutes 1998, chapter 673, operative January 1, 1999.

- Prior to revocation of a charter, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607.)[24]

- Permitting a charter school to use, at no charge, facilities not currently being used by the school district for instructional or administrative purposes, or that have not been historically used for rental purposes, provided the charter school shall be responsible for reasonable maintenance of those facilities. (Reimbursement for this activity is limited to administrative expenses resulting directly from the requirement to permit charter schools to utilize unused district facilities. Rental value of the facility is specifically excluded as a reimbursable expense.) (Ed. Code, § 47614.)[25]

County Offices of Education:

- Review charter school petitions submitted directly to the county board of education, pursuant to Education Code section 47605, subdivision (b), when the governing board of a school district denies a charter school petition and the charter school petitioner submits the petition to the county board of education. (Ed. Code, § 47605, subd. (j)(1).)[26]

- Review charter school petitions submitted directly to the county board of education, in the same manner as set forth in Education Code section 47605, for charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services. (Ed. Code, § 47605.5.)[27]

- Prior to revocation of a charter, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607.)[28]

The Commission finds that Education Code section 47613[29] establishes a fee authority that must be used by a school district or county office of education to offset any claimed reimbursement

---

[24] As amended by Statutes 1998, chapter 34, operative January 1, 1999.

[25] As added by Statutes 1998, chapter 34, operative January 1, 1999. Mandate eliminated by voter approval of Proposition 39, which replaced Education Code section 47614, operative November 8, 2000.

[26] As amended by Statutes 1998, chapter 673, operative January 1, 1999. This mandate replaces the previously approved mandate in *Charter Schools* for a review process for denied charter petitions. (Ed. Code, § 47605, subd. (j), as added by Stats. 1992, ch. 781; replaced by Stats. 1998, ch. 673.)

[27] As added by Statutes 1998, chapter 34, operative January 1, 1999.

[28] As amended by Statutes 1998, chapter 34, operative January 1, 1999.

[29] As added by Statutes 1998, chapter 34, operative January 1, 1999, and renumbered by Statutes 1999, chapter 78.

for the costs of charter school supervisorial oversight under the *Charter Schools* parameters and guidelines.

The Commission finds that Education Code sections 47602, 47604, 47613, 47613.5, 47614 and CDE Memorandum dated April 28, 1999, do not require any additional mandatory activities of school districts or county offices of education, and therefore do not impose a new program or higher level of service.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

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

November 22, 2002, I served the:

Adopted Statement of Decision
Charter Schools II, 99-TC-03
Los Angeles County Office of Education and
San Diego Unified School District, Claimants
Statutes 1998, Chapter 34, et al.

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

Mr. Arthur M. Palkowitz
San Diego Unified School District
4100 Normal Street, Room 3159
San Diego, CA 92103-2682

Ms. Marlene Dunn
Los Angeles County Office of Education
9300 Imperial Highway
Downey, CA 90242

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 November 22, 2002, at Sacramento, California.

Victoria Soriano
VICTORIA SORIANO

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Section 47605, Subdivision (b), and former Subdivisions (j)(1), (j)(2), and (j)(3); Education Code Section 47607, Subdivisions (a) and (b); Statutes 1992, Chapter 781; Filed on December 1, 1993; By San Diego Unified School District; and Education Code Sections 47602, 47604, 47605, 47605.5, 47607, 47613 (formerly 47613.7), 47613.5, and 47614; Statutes 1998, Chapters 34 and 673; California Code of Regulations, Title 5, Sections 15410-15428; California Department of Education Memorandum dated April 28, 1999; Filed on June 29, 1999; By Los Angeles County Office of Education and San Diego Unified School District, Claimants.	No. CSM 4437 *Charter Schools* and No. 99-TC-03 *Charter Schools II* ADOPTION OF PARAMETERS AND GUIDELINES PURSUANT TO GOVERNMENT CODE SECTION 17557 AND CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1183.12 *(Adopted on December 2, 2003)*

CONSOLIDATED PARAMETERS AND GUIDELINES

On December 2, 2003, the Commission on State Mandates adopted the attached Consolidated Parameters and Guidelines.

PAULA HIGASHI, Executive Director Date

CONSOLIDATION OF PARAMETERS AND GUIDELINES

Education Code Section 47605, Subdivision (b), and
former Subdivisions (j)(1), (j)(2), and (j)(3)
Education Code Section 47607, Subdivisions (a) and (b)

Statutes 1992, Chapter 781

Charter Schools (CSM 4437)

and

Education Code Sections 47605, Subdivisions (j)(1) and (k)(3),
47605.5, 47607, and 47614

Statutes 1998, Chapters 34 and 673

Charter Schools II (99-TC-03)

I. SUMMARY OF THE MANDATE

Charter Schools

On July 21, 1994, the Commission on State Mandates (Commission) adopted its Statement of Decision finding that Education Code sections 47605 and 47607, as added by Statutes 1992, chapter 781, require new activities related to initial charter school petitions and for monitoring and evaluating the performance of charter schools pertaining to the revision or renewal of approved charters, which constitute a new program or higher level of service for school districts and/or county offices of education 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 17514. Specifically, the Commission approved the *Charter Schools* test claim for the increased costs of performing the following activities:

School Districts

- Respond to requests from the public for information on the charter school program. (Ed. Code, § 47605.)
- Conduct a public hearing within thirty days of receipt of a petition to determine community support for the petition. (Ed. Code, § 47605, subd. (b).)
- Grant or deny the petition within sixty days of receipt, subject to a thirty-day extension upon agreement of the parties. (Ed. Code, § 47605, subd. (b).)
- Provide persons to take part in a review panel to review the decision of the governing board of the school district and, if necessary, request the governing board of the school district to reconsider the charter request. (Former Ed. Code, § 47605, subd. (j).)[1]

[1] Effective January 1, 1999, this activity was replaced with the new requirements of Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673.

- Respond to any request of the review panel selected and convened by the county superintendent of schools pursuant to an appeal of any petition denied by the school district. (Former Ed. Code, § 47605, subd. (j).)[2]
- Monitor the performance of charter schools for which they have granted charters to determine if they have achieved their goals and objectives. (Ed. Code, § 47607.)
- Evaluate and decide upon requests for revision or extension of approved charters. (Ed. Code, § 47607.)

County Boards of Education

- Select and convene a review panel to review the decision of the governing board of the school district and, if necessary, request the governing board of the school district to reconsider the charter request. (Former Ed. Code, § 47605, subds. (j)(1) and (j)(2).)[3]
- Hear a petition following a denial on reconsideration by the governing board of a school district. (Former Ed. Code, § 47605, subd. (j)(3).)[4]
- Conduct a public hearing within thirty days of receipt of a petition to determine community support for the petition. (Former Ed. Code, § 47605, subd. (j)(3).)[5]
- Grant or deny the petition within sixty days of receipt, subject to a thirty-day extension upon agreement of the parties. (Former Ed. Code, § 47605, subd. (j)(3).)[6]
- Monitor the performance of charter schools for which they have granted charters to determine if they have achieved their goals and objectives. (Ed. Code, § 47607.)
- Evaluate and decide upon requests for revision or extension of approved charters. (Ed. Code, § 47607.)

The Commission determined that the following provisions of Education Code sections 47605 and 47607 did not impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, for school districts and county boards of education to:

- Plan and prepare procedures for implementation of the Charter Schools Act of 1992.

---

[2] Effective January 1, 1999, this activity was replaced with the new requirements of Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673.

[3] Effective January 1, 1999, this activity was replaced with the new requirements of Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673.

[4] Effective January 1, 1999, this activity was replaced with the new requirements of Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673.

[5] Effective January 1, 1999, this activity was replaced with the new requirements of Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673.

[6] Effective January 1, 1999, this activity was replaced with the new requirements of Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673.

- Disseminate information regarding charter schools to staff, students, parents, and the community.

Charter Schools II

On November 21, 2002, the Commission adopted its Statement of Decision finding that Education Code sections 47605, subdivisions (j)(1) and (k)(3), 47605.5, 47607, and 47614 require new activities, as specified below, which constitute new programs or higher levels of service for school districts and/or county offices of education 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 17514:

School Districts

- Review charter school petitions for renewal, when submitted directly to the governing board of the school district that initially denied the charter, prior to expiration of the charter granted by the State Board of Education. (Ed. Code, § 47605, subd. (k)(3).)
- Prior to revocation of a charter, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607, subd. (c).)
- Permit a charter school to use, at no charge, facilities not currently being used by the school district for instructional or administrative purposes, or that have not been historically used for rental purposes, provided the charter school shall be responsible for reasonable maintenance of those facilities. (Reimbursement for this activity is limited to administrative expenses resulting directly from the requirement to permit charter schools to utilize unused district facilities. Rental value of the facility is specifically excluded as a reimbursable expense.) (Ed. Code, § 47614.)

County Offices of Education

- Review charter school petitions submitted directly to the county board of education, pursuant to Education Code section 47605, subdivision (b), when the governing board of a school district denies a charter school petition and the charter school petitioner submits the petition to the county board of education. (Ed. Code, § 47605, subd. (j)(1).)
- Review charter school petitions submitted directly to the county board of education, in the same manner as set forth in Education Code section 47605, for charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services. (Ed. Code, § 47605.5.)
- Prior to revocation of a charter, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607, subd. (c).)

The Commission also found that Education Code section 47613 establishes a fee authority that must be used by a school district or county office of education to offset any claimed reimbursement for the costs of charter school supervisorial oversight under the *Charter Schools* Parameters and Guidelines.

In addition, the Commission found that Education Code sections 47602, 47604, 47613, 47613.5, 47614 and California Department of Education Memorandum dated April 28, 1999, do not require any additional mandatory activities of school districts or county offices of education, and therefore, do not impose a new program or higher level of service.

II. ELIGIBLE CLAIMANTS

Any "school district," as defined in Government Code section 17519, except for community colleges, which incurs increased costs as a result of this mandate, is eligible to claim reimbursement. Charter schools are not eligible claimants.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557 states that a test claim must be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. Although the *Charter Schools II* test claim was filed on August 24, 1999, which establishes a reimbursement period beginning July 1, 1998, the test claim legislation was not operative until January 1, 1999. Therefore, this consolidated set of parameters and guidelines is operative for costs incurred from January 1, 1999, and beyond.

Education Code section 47614, as added by Statutes 1998, chapter 34, was replaced by voter approval of Proposition 39, which was operative November 8, 2000. Therefore, costs incurred for compliance with Education Code section 47614 is only reimbursable for the period January 1, 1999, through November 7, 2000.

Costs for *Charter Schools* (CSM 4437) that have been claimed for fiscal years 1998-1999, 1999-2000, 2000-2001, 2001-2002, and 2002-2003 as of the effective date of these parameters and guidelines pursuant to the State Controller's claiming instructions for Program 140 may not be claimed and are not reimbursable under these parameters and guidelines.

Actual costs for one fiscal year should be included in each claim. Estimated costs for the subsequent year may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1), all claims for reimbursement of initial years' costs shall be submitted within 120 days of the issuance of the State Controller's claiming instructions.

If total costs for a given year do not exceed $1,000, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

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

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are reimbursable:

Charter Schools[7]

A. School Districts

1. Responding to information requests

   Provide information, upon request, to the community regarding the Charter Schools Act of 1992 and governing board's charter policy and procedures. (Ed. Code, § 47605.)[8]

2. Evaluating petitions

   Review and evaluate qualified charter petitions for compliance with criteria for the granting of charters. (Ed. Code, § 47605.)[9]

3. Public hearings

   Prepare for public hearings, to be done within thirty days of receiving the petition, to consider the level of community support for a charter school petition, and grant or deny the charter school petition within sixty days of receiving the petition, subject to one thirty-day continuance by agreement of the parties, pursuant to Education Code section 47605. (Ed. Code, § 47605.)[10]

---

[7] Effective January 1, 1999, many activities from the original *Charter Schools* Parameters and Guidelines were amended by Statutes 1998, chapters 34 and 673, and are reflected in the *Charter Schools II* activities.)

[8] As added by Statutes 1992, chapter 781.

[9] As added by Statutes 1992, chapter 781.

[10] As added by Statutes 1992, chapter 781.

B. School Districts and County Offices of Education[11]

1. Monitoring: Renewal, Material Revision, and Revocation of the Charter[12]

   a. Review, analyze, and report on the charter school's performance for purposes of charter reconsideration, renewal, revision, evaluation, or revocation by the governing body. (Ed. Code, § 47607, subds. (a) and (b).)[13]

   b. Evaluate and decide upon material revisions, renewals, or revocations of charters. (Ed. Code, § 47607, subds. (a) and (b).)[14]

Charter Schools II

A. School Districts

1. Review charter school petitions for renewal that are submitted directly to the governing board of the school district that initially denied the charter.[15] Pursuant to Education Code section 47605, subdivision (k)(3), the petition must be submitted prior to expiration of the charter granted by the State Board of Education. (Ed. Code, § 47605, subd. (k)(3).)[16]

2. Notify the charter public school of any violation of Education Code section 47607, subdivision (b), prior to revocation of a charter. Pursuant to Education Code section 47607, subdivision (c), the school shall be given a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607, subd. (c).)[17]

B. County Offices of Education

1. Review charter school petitions submitted directly to the county board of education, pursuant to Education Code section 47605, subdivision (b):

   a. When the governing board of a school district denies a charter school petition and the charter school petitioner submits the petition to the county board of education. (Ed. Code, § 47605, subd. (j)(1).)[18]

---

[11] See section VII. Offsetting Savings and Reimbursements.

[12] The fee authority established by Education Code section 47613 must be used by a school district or county office of education to offset any claimed reimbursement for the cost of these activities.

[13] As added by Statutes 1992, chapter 781.

[14] As added by Statutes 1992, chapter 781.

[15] Each renewal is for a period of five years.

[16] As amended by Statutes 1998, chapter 673.

[17] As amended by Statutes 1998, chapter 34.

[18] As amended by Statutes 1998, chapter 673. As amended by Statutes 1998, chapter 673. This replaces the previously approved activity in the original *Charter Schools* Parameters and Guidelines related to "Petition Appeals." (Ed. Code, § 47605, subd. (j), as added by Stats. 1992, ch. 781; replaced by Stats. 1998, ch. 673.)

b. For charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services. (Ed. Code, § 47605.5.)[19]

2. Notify the charter public school of any violation of Education Code section 47607, subdivision (b), prior to revocation of a charter. Pursuant to Education Code section 47607, subdivision (c), the school shall be given a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607, subd. (c).)[20]

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. Direct costs that are eligible for reimbursement are:

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the dates when services were performed and itemize all costs for those services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for

[19] As added by Statutes 1998, chapter 34.

[20] As amended by Statutes 1998, chapter 34.

purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs include: (a) the indirect costs originating in each department or agency of the governmental unit carrying out state mandated programs, and (b) the costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

School districts must use the J-380 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

County offices of education must use the J-580 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[21] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING SAVINGS AND REIMBURSEMENTS

Any offsetting savings the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, including but

[21] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

Education Code section 47613 establishes a fee authority that must be used by a school district or county office of education to offset any claimed reimbursement for the costs of charter school supervisorial oversight under the *Charter Schools* Parameters and Guidelines. This refers to activity B. 1. under *Charter Schools* in section IV. of these parameters and guidelines.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the statute or executive order creating the mandate and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (a), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.

Original List Date: 12/2/1999
Last Updated: 2/9/2006
List Print Date: 04/06/2006
Claim Number: 99-TC-05
Issue: Charter School Collective Bargaining

Mailing Information: Draft Staff Analysis

Mailing List

Related

99-TC-14 Charter Schools III

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.)

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842
Tel: (916) 727-1350
Fax: (916) 727-1734

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117
Tel: (858) 514-8605
Fax: (858) 514-8645

Mr. Steve Smith
Steve Smith Enterprises, Inc.
4633 Whitney Avenue, Suite A
Sacramento, CA 95821
Tel: (916) 483-4231
Fax: (916) 483-1403

Mr. Jay Stewart
Western Placer Unified School District
1400 First Street
Lincoln, CA 95648
Claimant
Tel: (916) 645-6350
Fax: (916) 645-6356

Mr. Gerald Shelton
California Department of Education (E-08)
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814
Tel: (916) 445-0541
Fax: (916) 327-8306

Ms. Jeannie Oropeza
Department of Finance (A-15)
Education Systems Unit
915 L Street, 7th Floor
Tel: (916) 445-0328
Fax: (916) 323-9530

Sacramento, CA 95814

Ms. Sandy Reynolds
Reynolds Consulting Group, Inc.
P.O. Box 894059
Temecula, CA 92589

Tel: (951) 303-3034
Fax: (951) 303-6607

Ms. Beth Hunter
Centration, Inc.
8570 Utica Avenue, Suite 100
Rancho Cucamonga, CA 91730

Tel: (866) 481-2621
Fax: (866) 481-2682

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 324-4888

Mr. Fil Guzman
School Support Services, LLC
PMB 206
105 E Dorset, Suite B
Dixon, CA 95620

Tel: (707) 480-2458
Fax: (707) 469-9555

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Tel: (916) 454-7310
Fax: (916) 454-7312

Mr. David E. Scribner
Scribner Consulting Group, Inc.
3840 Rosin Court, Suite 190
Sacramento, CA 95834

Claimant Representative
Tel: (916) 922-2636
Fax: (916) 922-2719

Ms. Ginny Brummels
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 324-0256
Fax: (916) 323-6527

Mr. David Cichella
California School Management Group
1111 E Street
Tracy, CA 95376

Tel: (209) 834-0556
Fax: (209) 834-0087

Mr. Eric Premack
Charter Schools Development Center
7750 College Town Drive, Suite 100
Sacramento, CA 95826

Tel: (916) 278-4737
Fax:

Mr. Robert Thompson
Public Employment Relations Board (D-12)
General Counsel
1031 18th Street
Sacramento, CA 95814-4174

Tel: (916) 322-3198

Fax: (916) 327-7955

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

Claim of: San Diego Unified School District, Claimant	No. CSM-4437 Education Code Sections 47605 and 47607 Chapter 781, Statutes of 1992 Charter Schools

DECISION

The attached Proposed Statement of Decision of the Commission on State Mandates is hereby adopted by the Commission on State Mandates as its decision in the above-entitled matter.

This Decision shall become effective on July 21, 1994.

IT IS SO ORDERED July 21, 1994.

Mary Ann Aguayo

Mary Ann Aguayo, Acting Executive Director
Commission on State Mandates

G:\SOD\FACESHET.9

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

Claim of: San Diego Unified School District, Claimant	No. CSM-4437 Education Code Sections 47605 and 47607 Chapter 781, Statutes of 1992 Charter Schools

PROPOSED STATEMENT OF DECISION

This claim was heard by the Commission on State Mandates (Commission) on May 26, 1994, in Sacramento, California, during a regularly scheduled hearing.

Mr. Keith Petersen appeared on behalf of the San Diego Unified School District, Ms. Carol Miller appeared on behalf of the Education Mandated Cost Network, and Mr. James Apps appeared on behalf of the Department of Finance. Evidence both oral and documentary having been introduced, the matter submitted, and vote taken, the Commission finds:

ISSUE

Do the provisions of Education Code sections 47605 and 47607 of Chapter 781, Statutes of 1992 (Chapter 781/92), require school districts to implement a new program or provide a higher level of service in an existing program, within the meaning of section 6, article XIIIB of the California Constitution and Government Code section 17514?

BACKGROUND AND FINDINGS OF FACT

The test claim was filed with the Commission on December 1, 1993, by the San Diego Unified School District.

The elements for filing a test claim, as specified in section 1183 of Title 2 of the California Code of Regulations, were satisfied.

Chapter 781/92 added Education Code section 47605 as follows:

> "(a) A petition for the establishment of a charter school within any school district may be circulated by any one or more persons seeking to establish the charter school. After the petition has been signed by not less than 10 percent of the teachers currently employed by the school district, or by not less that 50 percent of the teachers currently employed at one school of the district, it may be submitted to the governing board of the school district for review.
>
> "(b) No later than 30 days after receiving a petition, in accordance with subdivision (a), the governing board of the school district shall hold a public hearing on the provisions of the charter, at which time the board shall consider the level of employee and parental support for the petition. Following review of the petition and the public hearing, the governing board shall either grant or deny the charter within 60 days of receipt of the petition, provided, however, that the date may be extended by an additional 30 days if both parties agree to the extension. A school district governing board may grant a charter for the operation of a school under this part if it determines that the petition contains the number of signatures required by subdivision (a), a statement of each of the conditions described in subdivision (d), and descriptions of all of the following:
>
> "(1) A description of the educational program of the school, designed, among other things, to identify those whom the school is attempting to educate, what it means to be an 'educated person' in the 21st century, and how learning best occurs. The goals identified in that program shall include the objective of enabling pupils to become self-motivated, competent, and lifelong learners.

//

"(2) The measurable pupil outcomes identified for use by the charter school. 'Pupil outcomes,' for purposes of this part, means the extent to which all pupils of the school demonstrate that they have attained the skills, knowledge, and attitudes specified as goals in the school's educational program.

"(3) The method by which pupil progress in meeting those pupil outcomes is to be measured.

"(4) The governance structure of the school, including, but not limited to, the process to be followed by the school to ensure parental involvement.

"(5) The qualifications to be met by individuals to be employed by the school.

"(6) The procedures that the school will follow to ensure the health and safety of pupils and staff. These procedures shall include the requirement that each employee of the school furnish the school with a criminal record summary as described in Section 44237.

"(7) The means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted.

"(8) Admission requirements, if applicable.

"(9) The manner in which an annual audit of the financial and programmatic operations of the school is to be conducted.

"(10) The procedures by which pupils can be suspended or expelled.

"(11) The manner by which staff members of the charter schools will be covered by the State Teachers' Retirement System, the Public Employees' Retirement System, or federal social security.

"(12) The public school attendance alternatives for pupils residing within the school district who choose not to attend charter schools.

"(13) A description of the rights of any employee of the school district upon leaving the employment of the school district to work in a charter school, and of any rights of return to the school district after employment at a charter school.

//

//

"(c) Charter schools shall meet the statewide performance standards and conduct the pupil assessments required pursuant to Section 60602.5.

"(d) In addition to any other requirement imposed under this part, a charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations, shall not charge tuition, and shall not discriminate against any pupil on the basis of ethnicity, national origin, gender, or disability. Admission to a charter school shall not be determined according to the place of residence of the pupil, or of his or her parent or guardian, within this state, except that any existing public school converting partially or entirely to a charter school under this part shall adopt and maintain a policy giving admission preference to pupils who reside within the former attendance area of that public school.

"(e) No governing board of a school district shall require any employee of the school district to be employed in a charter school.

"(f) No governing board of a school district shall require any pupil enrolled in the school district to attend a charter school.

"(g) The governing board may require that the petitioner or petitioners provide information regarding the proposed operation and potential effects of the school, including, but not limited to, the facilities to be utilized by the school, the manner in which administrative services of the school are to be provided, and potential civil liability effects upon the school and upon the school district.

"(h) In reviewing petitions for the establishment of charter schools within the school district, the school district governing board shall give preference to petitions that demonstrate the capability to provide comprehensive learning experiences to pupils identified by the petitioner or petitioners as academically low achieving pursuant to the standards established by the State Department of Education under Section 54032.

"(i) Upon the approval of the petition by the governing board of the school district, the petitioner or petitioners shall provide written notice of that approval, including a copy of the petition, to the State Board of Education.

"(j) (1) If the governing board of the school district denies a charter, the county superintendent of schools, at the request of the petitioner or petitioners, shall select and convene a review panel to review the action of

the governing board. The review panel shall consist of three governing board members from other school districts in the county and three teachers from other school districts in the county unless only one school district is located in the county, in which case the panel members shall be selected from school districts in adjoining counties.

"(2) If the review panel determines that the governing board failed to appropriately consider the charter request, or acted in an arbitrary manner in denying the request, the review panel shall request the governing board to reconsider the charter request. In the case of a tie vote of the panel, the county superintendent of schools shall vote to break the tie.

"(3) If, upon reconsideration, the governing board denies a charter, the county board of education, at the request of the petitioner or petitioners, shall hold a public hearing in the manner described in subdivision (b) and, accordingly, may grant a charter. A charter school for which a charter is granted by a county board of education pursuant to this paragraph shall qualify fully as a charter school for all funding and other purposes of the part."

The Commission observed that Education Code section 47605 does not contain a requirement for school districts or county boards of education to plan and prepare procedures for implementation of the Charter Schools Act of 1992 prior to the receipt by the school district or county board of education of a charter school petition.

The Commission found that the State Board of Education and the California Department of Education have distributed advisory bulletins to school districts and county boards of education, and that these bulletins provide a framework to school districts which will enable them to respond to a charter petition in a timely manner.

The Commission observed that Education Code section 47605 does not contain a requirement for school districts or county boards of

education to disseminate information regarding charter school programs to staff, students, parents, and the community.

The Commission noted that Education Code Section 47615 requires the State Board of Education to distribute information announcing the availability of the charter school process to each school district, county office of education, and public postsecondary educational institution, and, through press releases, to each major newspaper in the state.

The Commission noted that, in many cases, questions will be directed to the school district or county board of education as the local point of contact with the charter school petition process.

Further, the Commission found that responding to direct inquiries from the public for information regarding charter schools, although limited in scope, is an implicit requirement.

The Commission observed that Education Code section 47605, subdivision (b), established requirements for school districts to conduct a public hearing within thirty days of receipt of a petition to determine community support for the petition.

The Commission observed that Education Code section 47605, subdivision (b), established requirements for school districts to grant or deny the petition within sixty days of receipt, subject to a thirty-day extension upon agreement of the parties.

//

The Commission observed that Education Code section 47605, subdivision (j), established requirements for school districts to respond to the request of the review panel selected and convened by the county superintendent of schools, pursuant to an appeal of any petition denied by the district.

The Commission found that, while section 47605 phrases this as a request, it is clear that a school district cannot simply ignore such a request from the review panel.

The Commission further found, since the school district must respond, this request for reconsideration is an integral part of the appeals process established by Education Code section 47605, subdivision (j).

The Commission recognized that Education Code section 47605 established requirements for county boards of education to hear a petition following a denial on reconsideration by the governing board of a school district, to conduct a public hearing within thirty days of receipt of a petition to determine community support for the petition, when the petition has been denied by the school district, and to grant or deny the petition within sixty days of receipt, subject to a thirty-day extension upon agreement of the parties, when the petition has been denied by the school district.

The Commission found that the activities required in Education Code section 47605 were not required under prior law.

//

Chapter 781/92 added Education Code section 47607 as follows:

> "(a) A charter may be granted pursuant to Sections 47605 and 47606 for a period not to exceed five years. A charter granted by a school district governing board or county board of education may be granted one or more subsequent renewals by that entity. Each renewal shall be for a period not to exceed five years. A material revision of the provisions of a charter petition may be made only with the approval of the authority that granted the charter.
>
> "(b) A charter may be revoked by the authority that granted the charter under this chapter if the authority finds that the charter school did any of the following:
>
> "(1) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter petition.
>
> "(2) Failed to meet or pursue any of the pupil outcomes identified in the charter petition.
>
> "(3) Failed to meet generally accepted accounting standards of fiscal management.
>
> "(4) Violated any provision of law.

The Commission observed that Education Code section 47607 established requirements for school districts or county boards of education to monitor the charter school performance to determine if it has achieved its goals and objectives.

The Commission noted that Education Code section 47607 authorizes the authority that granted the charter (i.e., school districts or county boards of education) to determine if the charter school is or is not in compliance with Education Code section 47607, subdivision (b).

The Commission recognized that Education Code section 47607, subdivision (b), lists four grounds on which the charter granting

1 authority may revoke the charter. The authority that granted the
2 charter cannot know if any of these grounds applies without in some
3 way monitoring what is going on at the charter school.
4
5 Further, the Commission noted that Education Code section 47610
6 requires that a charter school comply with all of the provisions
7 set forth in its charter petition.
8
9 Therefore, the Commission found that monitoring by the granting
10 authority is implicit in Education Code section 47607, which
11 permits revocation of the charter for specified actions or
12 omissions on the part of the charter school.
13
14 The Commission observed that Education Code section 47607
15 established requirements for school districts or county boards of
16 education to decide upon requests for revision or extension of
17 approved charters.
18
19 The Commission found that school districts or county boards of
20 education will engage in renewal activities only if they have
21 previously granted a charter in response to a petition for the
22 establishment of a charter school.
23
24 The Commission further noted that, while there is no express
25 statutory requirement that a petition be granted if specified
26 criteria are met, governing boards of school districts or county
27 boards of education lack unfettered discretion to deny charter
28 school petitions which meet or exceed all of the criteria set forth

in Education Code section 47605 for such a petition, without leaving themselves open to charges of acting in an arbitrary manner in denying the request.

The Commission observed that, while Education Code section 47607, subdivision (a), does not lay out an explicit renewal process, it requires by its language that the renewal process, as well as the material revision process, take place. It is clear that the granting authority is not required to automatically grant renewal or material revision, and that the charter school must request that its charter be renewed or materially revised. Even so, the granting authority has no choice but to entertain requests for renewal or material revision of a charter.

The Commission found that, since granting authorities cannot refuse to receive a petition for the establishment of a charter school, and lack unfettered discretion to deny charter school petitions, they also cannot refuse to receive a request for renewal or material revision of the charter.

The Commission found that the activities required in Education Code section 47607 were not required under prior law.

APPLICABLE LAW RELEVANT TO THE DETERMINATION OF A REIMBURSABLE STATE MANDATED PROGRAM

Government Code section 17500 and following, and section 6, article XIIIB of the California Constitution and related case law.

CONCLUSION

The Commission determines that it has the authority to decide this claim under the provisions of Government Code sections 17500 and 17551, subdivision (a).

The Commission concludes that the provisions of Education Code section 47605, of Chapter 781/92, do not impose a new program or higher level of service in an existing program within the meaning of section 6 of article XIIIB of the California Constitution and Government Code section 17514 by requiring school districts or county boards of education to plan and prepare procedures for implementation of the Charter Schools Act of 1992 or to disseminate information regarding charter schools to staff, students, parents, and the community.

The Commission concludes that the provisions of Education Code section 47605, of Chapter 781/92, do impose a new program or higher level of service in an existing program within the meaning of section 6 of article XIIIB of the California Constitution and Government Code section 17514 by requiring school districts to respond to requests from the public for information on the charter school program; conduct a public hearing within thirty days of receipt of a petition to determine community support for the petition; grant or deny the petition within sixty days of receipt, subject to a thirty-day extension upon agreement of the parties; provide persons to take part in a review panel to review the decision of the governing board of the school district and, if

1 necessary, request the governing board of the school district to
2 reconsider the charter request; and, respond to any request of the
3 review panel selected and convened by the county superintendent of
4 schools pursuant to an appeal of any petition denied by the school
5 district.
6
7 The Commission concludes that the provisions of Education Code
8 section 47605, of Chapter 781/92, do impose a new program or higher
9 level of service in an existing program within the meaning of
10 section 6 of article XIIIB of the California Constitution and
11 Government Code section 17514 by requiring county boards of
12 education to select and convene a review panel to review the
13 decision of the governing board of the school district and, if
14 necessary, request the governing board of the school district to
15 reconsider the charter request; hear a petition following a denial
16 on reconsideration by the governing board of a school district;
17 conduct a public hearing within thirty days of receipt of a
18 petition to determine community support for the petition; and,
19 grant or deny the petition within sixty days of receipt, subject to
20 a thirty-day extension upon agreement of the parties.
21
22 The Commission concludes that the provisions of Education Code
23 section 47607, of Chapter 781/92, do impose a new program or higher
24 level of service in an existing program within the meaning of
25 section 6 of article XIIIB of the California Constitution and
26 Government Code section 17514 by requiring school districts to
27 monitor the performance of charter schools for which they have
28 granted charters to determine if they have achieved their goals and

objectives and to evaluate and decide upon requests for revision or extension of approved charters.

The Commission concludes that the provisions of Education Code section 47607, of Chapter 781/92, do impose a new program or higher level of service in an existing program within the meaning of section 6 of article XIIIB of the California Constitution and Government Code section 17514 by requiring county boards of education to monitor the performance of charter schools for which they have granted charters to determine if they have achieved their goals and objectives and to evaluate and decide upon requests for revision or extension of approved charters.

Accordingly, costs incurred related to the aforementioned reimbursable state mandated programs contained in Education Code sections 47605 and 47607, are costs mandated by the state and are subject to reimbursement within the meaning of section 6, article XIIIB of the California Constitution. Therefore, the claimant is directed to submit parameters and guidelines, pursuant to Government Code section 17557 and Title 2, California Code of Regulations, section 1183.1, to the Commission for its consideration.

The foregoing conclusions pertaining to the requirements contained in Education Code sections 47605 and 47607, are subject to the following conditions:

> The determination of a reimbursable state mandated program does not mean that all increased costs claimed will be reimbursed. 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.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment and business address is 1414 K Street, Suite 315, Sacramento, California 95814.

On July 25, 1994, I served the attached Defendant/Respondent Commission on State Mandates Respondent's Brief by placing a true copy thereof in an envelope addressed to each of the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully prepaid.

(See attached mailing list)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 25, 1994, at Sacramento, California.

Eva Goodyear

EVA GOODYEAR

H:\SERVMAIL.6

M A I L I N G L I S T

CSM-4437
Claim of San Diego City Schools
Ch. 781, Statutes of 1992
Charter Schools

Mr. Jim Apps (A-15)
Department of Finance
915 L Street, Sixth Floor
Sacramento, CA 95814

Mr. Robert Agee (E-8)
Department of Education
721 Capitol Mall
Sacramento, CA 95814

Ms. Carol Miller
Education Mandated Cost Network
1127 11th Street, Suite 401
Sacramento, CA 95814

Mr. Keith Petersen
San Diego Unified School District
Finance Division
4100 Normal Street, Room 3202
San Diego, CA 92103-2682

Mr. Joseph Stein, President
State Board of Eduation (E-8)
721 Capitol Mall, Room 532
Sacramento, CA 95814

Attn: Greg Geeting

Adopted: October 18, 1994
g:\sfz\charter\pgprop.wpd

Parameters and Guidelines

Education Code § 47605
Education Code § 47607
Chapter 781, Statutes of 1992
Charter Schools

I. Summary of the Source of the Mandate

Chapter 781, Statutes of 1992, effective January 1, 1993, added Part 26.8 to the Education Code, commencing with Section 47600 to establish a process for individuals to petition local school district governing boards to establish charter schools which would be exempt from state laws governing school district programs, except for those encompassed in the charter. Various requirements of the Charter Schools Act of 1992 establish specific responsibilities for school district and county office of education governing boards:

Section 47605, subdivision (b), requires the governing board of a school district hold a public hearing to consider the level of employee and parental support for a petition within thirty days of receiving a petition. Within sixty days of receiving a petition, subject to one thirty-day continuance by agreement of the parties, the governing board of a school district shall either grant or deny the petition according to thirteen conditions specified in subdivision (b) and the conditions stated in subdivision (h), generally referred to as the "elements of a school charter."

Section 47605, subdivision (g), authorizes the governing board of a school district to request additional information from petitioners.

Section 47605, subdivision (j) (1), requires the governing body of a county office of education to select and convene a review panel at the request of any petitioner whose charter petition was denied by the school district governing board.

Section 47605, subdivision (j) (2), requires the review panel to make a determination regarding the actions of the school district governing board and either agree with the decision or resubmit the charter petition to the school district governing board for reconsideration.

Section 47605, subdivision (j) (3), requires the school district governing board to rehear the charter petition upon remand from the county office of education review committee. If the school district governing board once again denies the petition, the county office of education governing board must hold a public hearing in the manner specified in subdivision (b) and either grant the charter or not.

Section 47607, subdivision (a), authorizes the charter granting authority to revise and renew charters. Subdivision (b) authorizes the charter granting authority to revoke charters for specified reasons.

II. Commission on State Mandates' Decision

The Commission on State Mandates, in the Statement of Decision adopted at the July 21, 1994 hearing found that Education Code sections 47605 and 47607 as added by Chapter 781, Statutes of 1992 impose a new program or higher level of service within the meaning section 6, Article XIII B of the California Constitution for school districts and county offices of education.

The Commission determined that the following provisions of Education Code sections 47605 and 47607 establish costs mandated by the state pursuant to Government Code section 17514, by requiring the governing boards of school districts which have received a charter school petition to:

(1) Respond to requests for information from the public regarding the Charter Schools Act.

(2) Conduct a public hearing to consider the level of community support for the petition within thirty days of receiving a petition.

(3) Review and evaluate the petition for its compliance with the conditions stated in the Charter Schools Act.

(4) Grant or deny the petition within sixty days of receiving the petition, subject to one thirty-day continuance by agreement of the parties.

(5) It the petition is denied by the school district and appealed by the petitioners to the county office of education, respond to the inquiry of the panel convened by the county superintendent to review the action of the school district governing board.

(6) Reconsider the charter petition if so requested by the county office review panel.

(7) Monitor the charter school performance to determine if it has achieved its goals and objectives, and upon cause, hear and decide upon a revocation of the charter.

(8) Evaluate and decide upon requests for revision or renewal of charters approved by the district.

The Commission determined that the following provisions of Education Code Sections 47605 and 47607 establish costs mandated by the state pursuant to Government Code section 17514, by requiring the superintendent or governing board of county offices of education to:

(9) At the request of petitioners whose petition has been denied by the school district, select and convene a review panel of three governing board members and three teachers from other school districts to determine if the school board governing

board acted properly in denying the petition, and if necessary, request the school district governing board to reconsider the charter petition.

(10) At the request of petitioners whose petition has been denied again upon reconsideration by the school district, conduct a public hearing within thirty days of receiving a petition to consider the level of community support for a county office of education charter school.

(11) Review and evaluate the petition for its compliance with the conditions stated in the Charter Schools Act.

(12) Grant or deny the petition within sixty days of receiving the petition, subject to one thirty-day continuance by agreement of the parties.

(13) Monitor the charter school performance to determine if it has achieved its goals and objectives, and upon cause, hear and decide upon a revocation of the charter.

(14) Evaluate and decide upon requests for revision or renewal of charters approved by the county.

The Commission determined that the following provisions of Education Code Sections 47605 and 47607 establish costs mandated by the state pursuant to Government Code section 17514, by requiring other school districts to:

(15) Provide district personnel to participate in the review panel convened by the county superintendent of schools.

The Commission determined that Education Code sections 47605 and 47607 did not establish costs mandated by the state pursuant to Government Code section 17514, for governing boards of school districts and county offices of education to:

(16) Plan and prepare procedures for implementation of the Charter Schools Act.

(17) Disseminate information regarding charter schools to staff, students, parents, and the community.

III. Eligible Claimants

Any "school district", as defined in Government Code section 17519, except for community colleges, which incurs increased costs as a result of this mandate is eligible to claim reimbursement.

IV. Period of Reimbursement

Section 17557 of the Government Code states that a test claim must be submitted on or before December 31 following a given fiscal year to establish eligibility for that fiscal year. The test claim for this mandate was received by the Commission on December 1, 1993, therefore all mandated costs incurred on or after the operative date of January 1, 1993, for implementation of Education Code sections 47605 and 47607 as added by Chapter 781, Statutes 1992 are reimbursable.

Actual costs for one fiscal year should be included in each claim. Estimated costs for the subsequent year may be included on the same claim, if applicable. Pursuant to Section 17561 (d) (3) of the Government Code, all claims for reimbursement of initial years costs shall be submitted within 120 days of notification by the State Controller of the enactment of the claims bill.

If the total costs for a given fiscal year do not exceed $200, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

V. Reimbursable Costs

A. Scope of the Mandate

1. For school districts which have received an original charter school petition and county offices of education which have received a petition subsequent to its denial upon reconsideration by the school district, to: respond to requests for information from the public; conduct a public hearing to consider the level of community support for the petition; review and evaluate the petition for its compliance with the conditions stated in the Charter Schools Act; grant or deny the petition within sixty days of receiving the petition, subject to one thirty-day continuance by agreement of the parties; monitor the charter school performance to determine if it has achieved its goals and objectives; upon cause, hear and decide upon a revocation of the charter; and evaluate and decide upon requests for revision or renewal of charters.

2. For county offices of education which have received an appeal of a charter school denied by a school district to: select and convene a review panel of three governing board members and three teachers from other school districts to determine if the school board governing board acted properly in denying the petition, and if necessary, request the school district governing board to reconsider the charter petition.

3. For school districts which have denied an original charter school petition, to: respond to the inquiry of the panel review convened by the county superintendent and reconsider the charter petition if so requested.

4. For other school districts to provide personnel to take part in the review panel convened by the county superintendent of schools.

B. Reimbursable Activities

For each eligible school district and county office of education, the direct and indirect costs of labor, supplies and services incurred for the following mandate components are reimbursable:

1. Responding to information requests

   Providing information, upon request, to the community regarding the Charter Schools Act of 1992 and governing board's charter policy and procedures.

2. Evaluating Petitions

   Administrative review and evaluation of qualified charter petitions for compliance with criteria for the granting of charters.

3. Public hearings

   Administrative preparation for the conducting of public hearings needed to reach a determination for adoption, reconsideration, renewal, revision, revocation, or appeal of a petition.

4. Monitoring the charter

   Subsequent administrative review, analysis, and reporting on the charter school's performance for purposes of charter reconsideration, renewal, revision, evaluation, or revocation by the governing body.

5. Petition appeals

   Staffing and convening the county office review panel, conducting the analysis of the school district decision process, responding to the review panel inquiries and requests, and reporting to the involved parties.

VI. Claim Preparation

Each claim for reimbursement pursuant to this mandate must be timely filed and set forth a listing of each item for which reimbursement is claimed under this mandate.

A. Reporting by Components

Claimed costs must be allocated according to the five components of reimbursable activity described in Section V. B.

B. Supporting Documentation

Claimed costs should be supported by the following information:

1. Employee Salaries and Benefits

   Identify the employee(s) and their job classification, describe the mandated functions performed, and specify the actual number of hours devoted to each function, the productive hourly rate, and the related benefits. The average number of hours devoted to each function may be claimed if supported by a documented time study.

2. Materials and Supplies

Only the expenditures that can be identified as a direct cost of the mandate can be claimed. List cost of materials which have been consumed or expended specifically for the purpose of this mandate.

3. Contract Services

Give the name(s) of the contractors(s) who performed the service(s). Describe the activities performed by each named contractor, and give the number of actual hours spent on the activities. Show the inclusive dates when services were performed and itemize all costs for those services.

4. Allowable Overhead Costs

a. School districts must use the J-380 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

b. County offices of education must use the J-580 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the Sate Department of Education.

VII. Supporting Data

For reporting purposes, all costs claimed must be traceable to source documents and/or worksheets that show evidence of the validity of such costs. Pursuant to Government Code section 17558.5, these documents must be kept on file by the agency submitting the claim for a period of no less than four years after the end of the calendar year in which the reimbursement claim is filed, and made available on the request of the State Controller.

VIII. Offsetting Savings and Other Reimbursements

Any offsetting savings the claimant experiences as a direct result of this statute must be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, e.g., service fees collected, federal funds, other state funds, etc., shall be identified and deducted from this claim. The Commission has not identified any specific offsetting savings from state or federal sources applicable to this mandate.

IX. State Controller's Office Required Certification

An authorized representative of the claimant will be required to provide a certification of claim, as specified in the State Controller's claiming instructions, for those costs mandated by the state contained herein.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	No. 99-TC-03
Education Code Sections 47602, 47604, 47605, 47605.5, 47607, 47613 (formerly 47613.7), 47613.5, and 47614; Statutes 1998, Chapters 34 and 673; California Code of Regulations, Title 5, Sections 15410-15428; California Department of Education Memorandum dated April 28, 1999,	*Charter Schools II*
Filed on June 29, 1999,	STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7
By Los Angeles County Office of Education and San Diego Unified School District, Claimants.	*(Adopted on November 21, 2002)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on October 24, 2002. Art Palkowitz and Brian Bennett appeared on behalf of claimant San Diego Unified School District. Gayle Windom appeared on behalf of claimant Los Angeles County Office of Education. Dan Troy, Heather Carlson and Susan Geanacou appeared on behalf of the Department of Finance (DOF). At the hearing testimony was given, the test claim was submitted, and the vote was taken.

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 approved the staff analysis for the test claim presented by a 5-0 vote.

BACKGROUND

On August 24, 1999, claimants, Los Angeles County Office of Education and San Diego Unified School District, submitted a test claim alleging a reimbursable state mandate for county offices of education and school districts to provide supervisory oversight and reporting services to charter schools, and various other activities related to the establishment and fiscal management of charter schools.[1] The claim arises from enactments or amendments to Education Code sections 47602, 47604, 47605, 47605.5, 47607, 47613 (formerly 47613.7), 47613.5, and 47614 by Statutes 1998, chapters 34 and 673, and the adoption of California Code of Regulations, title 5, sections 15410 through 15428. Claimants also assert that California Department of Education

[1] The reimbursement period for this test claim begins no earlier than July 1, 1998. (Gov. Code, § 17557, subd. (c).)

(CDE) memorandum dated April 28, 1999 constitutes an executive order resulting in a reimbursable state mandate.

On May 26, 1994, the Commission heard and decided a related test claim, *Charter Schools*, CSM-4437.[2] The Commission found that Statutes 1992, chapter 781, by enacting Education Code sections 47605 and 47607, imposed a reimbursable state mandated program for school districts for new activities related to initial charter school petitions, and for monitoring and evaluating the performance of charter schools pertaining to the revision or renewal of approved charters. The claimants indicate intent to request a parameters and guidelines amendment to incorporate any new activities from the *Charter Schools II* claim into the existing *Charter Schools* parameters and guidelines.

Claimants' Position

Claimants allege reimbursable costs mandated by the state for test claim legislation requiring the following activities of school districts:

> (1) provide notice and an opportunity to cure to charter schools prior to any proposed revocation of the charter, (2) allow charter schools to use certain facilities free of charge, (3) respond to, prepare for, and participate in court proceedings challenging a decision to deny a charter, (4) evaluate petitions for renewals of charter school petitions originally granted by the State Board of Education and prepare for and conduct hearings related to proposed renewals of those charter petitions, (5) calculate, process, and advance payments of property taxes to charter schools, and (6) provide administrative services to charter schools without full reimbursement.

Claimants allege similar activities are newly required of county offices of education, and also that county offices of education are now required to evaluate certain charter school petitions and conduct some of the same activities found to be reimbursable for school districts in the original *Charter Schools* test claim.

Claimants conclude that none of the Government Code section 17556 exceptions to finding costs mandated by the state apply to this test claim. Claimants specifically assert that there are no other federal or state constitutional provisions, statutes or executive orders impacted, and that Statutes 1998, chapters 34 and 643 appropriated no funds for the reimbursable activities alleged.

State Agency Position

DOF's July 28, 2000 response to the test claim allegations states agreement in part with claimants on some of the identified new activities, however it argues that:

- Some of the claimed activities are discretionary or permissive;
- Some of the claimed activities are not new;
- Fee authority is given for the district to charge the charter school for expenses of supervisory oversight; or
- Other offsetting savings are established as part of the test claim legislation.

[2] *Charter Schools*, CSM-4437, Statement of Decision adopted on July 21, 1994; Parameters and Guidelines adopted October 18, 1994.

DOF agrees with claimants that Education Code sections 47605, subdivision (k), 47605.5, and 47607 include new activities or higher levels of service.

COMMISSION FINDINGS

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.[3] 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. 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.[4] 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. Finally, the newly required activity or increased level of service must impose costs mandated by the state.[5]

Test Claim Executive Orders: California Code of Regulations:

As part of the test claim filings, claimants allege, "The State Board of Education adopted title 5, California Code of Regulations section 15410 et seq. as emergency regulations to implement Education Code section 47613.5." Claimants' test claim Exhibit C is identified as including "Title 5 California Code of Regulations §§ 15410-15428," however, the exhibit is a printout from the California Department of Education's (CDE's) website and does not provide any indication of an operative date. The regulations are not in the current version of *Barclays Official California Code of Regulations*, and there are no historical notes indicating that any regulations were ever filed or operative for those section numbers.[6]

As noted below, Education Code section 47613.5 was repealed by Statutes 1999, chapter 78, effective July 7, 1999. Claimants' exhibit from the CDE website may be of proposed regulations that were never published or operative prior to the repeal of the implementing Education Code section. Without evidence presented of the operative dates of the claimed regulations, the Commission finds that the claimed regulations are not properly included in this test claim. Any further references to "test claim legislation" do not include California Code of Regulations, title 5, sections 15410 through 15428.

---

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

[4] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[5] Government Code section 17514.

[6] *Barclays Official California Code of Regulations* is certified by the Office of Administrative Law as the official regulation publication of the State of California for purposes of judicial notice. (Gov. Code, § 11344.6 and Cal. Code Regs., tit. 1, § 190.)

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?[7]

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[8] The court has held that only one of these findings is necessary.[9]

The Commission finds that the test claim legislation constitutes a program within the meaning of article XIII B, section 6 of the California Constitution under both tests. First, it constitutes a program that carries out the governmental function of providing a service to the public, to the extent the test claim legislation requires school districts and county offices of education to engage in supervisory, funding and reporting activities related to charter schools. The courts have held that education is a peculiarly governmental function administered by local agencies as a service to the public.[10]

The test claim legislation also satisfies the second test that triggers article XIII B, section 6, to the extent that the test claim legislation requires school districts and county offices of education to engage in charter school supervisory, funding and reporting activities solely applicable to public school administration. The test claim legislation imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state. Accordingly, the Commission finds that supervisory, funding and reporting activities related to charter schools constitute a "program" and, thus, are subject to article XIII B, section 6 of the California Constitution.

Issue 2: Does the test claim legislation impose a new program or higher level of service within an existing program upon school districts within the meaning of article XIII B, section 6 of the California Constitution by requiring new or additional activities related to charter school supervision and reporting?

The claimants contend that the test claim legislation imposes a new program or higher level of service upon school districts by requiring specific new activities related to charter school supervision and reporting. Under prior law, school districts were required to engage in activities

---

[7] Article XIII B, section 6 of the California Constitution 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."

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

[9] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

[10] *Long Beach Unified School Dist., supra*, 225 Cal.App.3d at 172 states "although numerous private schools exist, education in our society is considered to be a peculiarly governmental function ... administered by local agencies to provide service to the public."

related to initial charter school petitions, and for monitoring and evaluating the performance of charter schools pertaining to the revision or renewal of approved charters.[11] The test claim legislation makes changes to some of the requirements as compared to prior law. The analysis for finding a new program or higher level of service must examine whether the test claim legislation requires a school district to engage in activities, and whether such activities constitute a new program or higher level of service when compared to prior law.

Test Claim Statutes:

Education Code section 47602.

This Education Code section, as added by Statutes 1992, chapter 781, and amended by Statutes 1993, chapter 589, Statutes 1996, chapter 849, Statutes 1998, chapter 34, and Statutes 1998, chapter 673 provides:

> (a)(1) In the 1998-99 school year, the maximum total number of charter schools authorized to operate in this state shall be 250. In the 1999-2000 school year, and in each successive school year thereafter, an additional 100 charter schools are authorized to operate in this state each successive school year. For the purposes of implementing this section, the State Board of Education shall assign a number to each charter petition that it grants pursuant to subdivision (j) of Section 47605 and to each charter notice it receives pursuant to subdivision (i) and paragraph (5) of subdivision (j) of Section 47605, based on the chronological order in which the notice is received. The limits contained in this paragraph may not be waived pursuant to Section 33050 or any other provision of law.
>
> (2) By July 1, 2003, the Legislative Analyst shall, pursuant to the criteria in Section 47616.5, report to the Legislature on the effectiveness of the charter school approach authorized under this part and recommend whether to expand or reduce the annual rate of growth of charter schools authorized pursuant to this section.
>
> (b) No charter shall be granted under this part that authorizes the conversion of any private school to a charter school. No charter school shall receive any public funds for a pupil if the pupil also attends a private school that charges the pupil's family for tuition. The State Board of Education shall adopt regulations to implement this section.

Claimants identify that Education Code section 47602, subdivision (a), as amended by Statutes 1998, chapter 673, "increases the number of charter schools that are authorized to operate in the state." The statutory language is directed to the State Board of Education and the state Legislative Analyst's Office, and claimants do not specifically identify any new reimbursable activities or duties imposed upon local educational agencies by this amended Education Code section. Therefore, the Commission finds that Education Code section 47602 does not impose a new program or higher level of service upon school districts or county offices of education.

[11] Statutes 1992, chapter 781, enacting Education Code sections 47605 and 47607. See previously approved test claim *Charter Schools*, CSM-4437.

Education Code section 47604.

This Education Code section, as added by Statutes 1998, chapter 34, provides:

> (a) Charter schools may elect to operate as, or be operated by, a nonprofit public benefit corporation, formed and organized pursuant to the Nonprofit Public Benefit Corporation Law (Part 2 (commencing with Section 5110) of Division 2 of Title 1) of the Corporations Code).
>
> (b) The governing board of a school district that grants a charter for the establishment of a charter school formed and organized pursuant to this section shall be entitled to a single representative on the board of directors of the nonprofit public benefit corporation.
>
> (c) It is the intent of the Legislature that an authority that grants a charter to a charter school to be operated by, or as, a nonprofit public benefit corporation shall not be liable for the debts or obligations of the charter school.

Claimants allege that, despite the language of subdivision (c), the school district or county office of education granting a charter,

> may be liable for the acts or obligations of the charter school due to the granting authority's statutory oversight responsibilities or because the nonprofit corporation laws may shield the charter school, but not the granting authority, from liability. County offices of education and school districts must determine the impact of section 47604 on self-provided or purchased insurance. Further, county offices of education and school districts may incur additional costs for such insurance as the result of the election of a charter school to operate as or by a nonprofit public benefit corporation.

Claimants have not offered legal support for this contention. Alternatively, DOF, in its response of July 28, 2000, argues:

> Districts have a choice as to whether or not to buy more liability insurance. Further, the law makes the districts and county offices better off than before by specifying in statute that they should have no liability. Indeed, the district's need for such coverage would seem to decrease, as they are now responsible for fewer students. The Department of Education's legal opinion, [test claim Attachment 1, dated June 12, 1997], similarly concludes the chartering agency has no liability for charter school activities.

The CDE's June 12, 1997 legal opinion, *Charter School Liability and Accountability*, provides extensive statutory and case law analysis on public sector imputed and vicarious liability law, and concludes, "Given the purpose of the enabling legislation, we believe the better view is that chartering entities are completely immune from liability incurred by charter schools under existing law." Following this opinion, the Legislature enacted Education Code section 47604, subdivision (c), to confirm that chartering entities, including school districts and county offices of education, are not to be liable for the debts or obligations of a charter school, when operated as, or by, a non-profit.

In claimant San Diego Unified School District's September 30, 2002 comments on the draft staff analysis, the claimant expresses agreement "with staff's recommendation regarding the purchase

of insurance for charter schools established as nonprofit public benefit corporation[s]." Claimant then goes on to argue that:

> However, charter schools not operating as a nonprofit corporation have been the sponsoring entity's responsibility for acts or obligations.
>
> DOF contends under Education Code section 47604 "districts have a choice as to whether or not to buy more liability insurance." Given that school districts *shall* purchase insurance in accordance with Education Code section 35208 (a)[12] there is no reasonable alternative for the sponsoring district of a charter but to purchase insurance for charter schools that are not a nonprofit public benefit corporation.
>
> Education Code section 47604 for the first time determined the responsibility of sponsoring districts with charter schools not operating as nonprofit corporations. Therefore, in accordance with Education Code section 35208 (a) purchasing insurance for the charter school is mandatory as it would be for other school sites.

It is unclear about how this new argument connects with the test claim legislation. First, Education Code section 35208, subdivision (a), which requires school districts to carry liability insurance, was not pled as part of the test claim allegations. Second, even if the section was properly pled and before the Commission now, it does not fall within the jurisdiction of the Commission under article XIII B, section 6, subdivision (c) of the California Constitution, because Education Code section 35208 was enacted prior to 1975.[13] Claimant raises a new argument for reimbursement of a chartering entity's costs of purchasing liability insurance to cover a charter school not run as a non-profit. The Commission finds no connection from the test claim legislation pled, namely Education Code section 47604, to this newly asserted expense. Education Code section 47604, as cited in its entirety above, simply allows a charter school to operate as a non-profit. It has nothing to do with purchasing liability insurance, or for determining "the responsibility of sponsoring districts with charter schools *not operating* as nonprofit corporations." [Emphasis added.]

The Commission finds that Education Code section 47604 does not require any new activities on the part of school districts or county offices of education. As discussed in *Long Beach*, "mandates" is to be understood "in the ordinary sense of 'orders' or 'commands.'"[14] The state, by permitting charter schools to operate as a nonprofit public benefit corporation, in no way is ordering school districts to purchase additional insurance, therefore the statute does not impose a new program or higher level of service upon school districts or county offices of education for the alleged costs and activities.

---

[12] Claimant's footnote contains complete text of the cited code section.

[13] Former Education Code of 1959, section 1017 was renumbered by Statutes 1976, chapter 1010 as section 35208.

[14] *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d at 174.

Education Code section 47605.

This Education Code section, as added by Statutes 1992, chapter 781, and amended by Statutes 1993, chapter 589, Statutes 1996, chapter 786, Statutes 1998, chapters 34 and 673,[15] provides the standards and instructions for filing and reviewing a petition to establish a charter school. This code section, as added by Statutes 1992, chapter 781, was the subject of the prior test claim, *Charter Schools*, and was found to impose a reimbursable state mandate for school districts for new activities related to processing initial charter school petitions. Claimants allege new reimbursable state mandates are imposed by amended subdivision (j) and new subdivision (k). Each subdivision will be analyzed individually below. Amended subdivision (j)(1) provides:

> (j)(1) If the governing board of a school district denies a petition, the petitioner may elect to submit the petition for the establishment of a charter school to either the county board of education or directly to the State Board of Education. The county board of education or the State Board of Education, as the case may be, shall review the petition pursuant to subdivision (b). If the petitioner elects to submit a petition for establishment of a charter school to the county board of education and the county board of education denies the petition, the petitioner may file a petition for establishment of a charter school with the State Board of Education.

Claimants allege "subdivision (j) now allows a charter petitioner to submit a charter petition directly with the county board of education ... whenever a school district denies a charter petition." By replacing subdivision (j), the Legislature eliminated the previously approved mandate activities for county superintendents to convene a review panel to evaluate a denied charter petition and substituted a new review procedure.

Claimants indicate intent to request a parameters and guidelines amendment to incorporate any new activities into the existing *Charter Schools* parameters and guidelines. The reimbursable activities of former subdivision (j), as added by Statutes 1992, chapter 781, should be eliminated from the *Charter Schools* parameters and guidelines, effective January 1, 1999, and replaced with the new requirements of subdivision (j)(1). The Commission finds that Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673, imposes a new program or higher level of service upon county offices of education for the following activity:

- After the governing board of a school district denies a charter school petition and the charter school petitioner submits the petition to the county board of education, the county board of education shall review the petition pursuant to Education Code section 47605, subdivision (b).

Claimants also allege that Statutes 1998, chapter 673 further amended

> subdivision (j) to allow a charter petitioner to file a judicial action challenging a school district's denial of the petition if the county board of education or the State Board of Education fails to act on a direct petition within 120 days. Thus, school districts must respond to, prepare for, and participate in a judicial proceeding,

[15] This statute has been further amended by Statutes 1999, chapter 828, Statutes 2000, chapter 580, and Statutes 2001, chapter 344, none of which are included or amended into the present test claim allegations. Nor did claimants include the amendments made by Statutes 1993, chapter 589, or Statutes 1996, chapter 786 in the test claim allegations.

rather than a county board of education review, if the charter petitioner challenges a decision by a school district to deny a charter petition.

Claimants refer to subdivision (j)(3):

> If either the county board of education or the State Board of Education fails to act on a petition within 120 days of receipt, the decision of the governing board of the school district to deny a petition shall, thereafter, be subject to judicial review.

DOF argues, "No new mandate is established as charters always had a right to file a judicial action. The Education Code is permissive; as long as an action is not prohibited, it is permitted." In addition, the Commission notes that response to judicial review is not imposed by state action, but by the action of a member of the public filing a lawsuit. Subdivision (j)(3) merely sets a time period after which the charter petitioner can demonstrate to a court that they have exhausted all statutory administrative remedies. Therefore, the Commission finds that Education Code section 47605, subdivision (j)(3), as amended by Statutes 1998, chapter 673, does not impose a new program or higher level of service upon school districts.

Finally, claimants allege a reimbursable state mandate is imposed by Education Code section 47605, subdivision (k)(3), in pertinent part:

> A charter school that has been granted its charter by the State Board of Education and elects to seek renewal of its charter shall, prior to expiration of the charter, submit its petition for renewal to the governing board of the school district that initially denied the charter.

DOF's response "concur[s] that the law imposes new duties on the agency that previously denied a charter." The Commission agrees, and finds that Education Code section 47605, subdivision (k)(3), as added by Statutes 1998, chapter 673, imposes a new program or higher level of service upon school districts for the following activity:

- Review charter school petitions for renewal, when submitted directly to the governing board of the school district that initially denied the charter, prior to expiration of the charter granted by the State Board of Education.

Education Code section 47605.5.

This Education Code section, as added by Statutes 1998, chapter 34, provides:

> A petition may be submitted directly to a county board of education in the same manner as set forth in Section 47605 for charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services. Any denial of a petition shall be subject to the same process for any other county board of education denial of a charter school petition pursuant to this part.

Claimants allege that this code section imposes "new requirements for responding to information requests, evaluating charter school petitions, conducting public hearings, monitoring charter school performance, and responding to appeals of decisions with respect to charter school petitions made directly to the county board of education."

Prior law of Education Code section 47605, as added by Statutes 1992, chapter 781, only permitted proponents of a charter school to apply to a county office of education for review when

the governing board of a school district denied a petition. New Education Code section 47605.5 sets up a requirement for county boards of education to review submitted charter school petitions under the criteria of section 47605, if the proposed charter school is designed to "serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services." This requires county boards of education to incur expenses for activities previously found reimbursable to school districts under the *Charter Schools* parameters and guidelines. The Commission finds that Education Code section 47605.5, as added by Statutes 1998, chapter 34, imposes a new program or higher level of service upon county offices of education for the following new activity:

- Review charter school petitions submitted directly to the county board of education, in the same manner as set forth in Education Code section 47605, for charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services.

Education Code section 47607.

This Education Code section, as added by Statutes 1992, chapter 781, and amended by Statutes 1998, chapter 34, provides,

> (a)(1) A charter may be granted pursuant to Sections 47605, 47605.5, and 47606 for a period not to exceed five years. A charter granted by a school district governing board, a county board of education or the State Board of Education, may be granted one or more subsequent renewals by that entity. Each renewal shall be for a period of five years. A material revision of the provisions of a charter petition may be made only with the approval of the authority that granted the charter. The authority that granted the charter may inspect or observe any part of the charter school at any time.
>
> (2) Renewals and material revisions of charters shall be governed by the standards and criteria in Section 47605.
>
> (b) A charter may be revoked by the authority that granted the charter under this chapter if the authority finds that the charter school did any of the following:
>
> (1) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter.
>
> (2) Failed to meet or pursue any of the pupil outcomes identified in the charter.
>
> (3) Failed to meet generally accepted accounting principles, or engaged in fiscal mismanagement.
>
> (4) Violated any provision of law.
>
> (c) Prior to revocation, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils.

This statute was included in the original *Charter Schools* test claim filed on the enactment of Statutes 1992, chapter 781. The primary amendment by Statutes 1998, chapter 34 was the addition of subdivision (c).

Claimants allege that Education Code section 47607, as amended, requires the school district or county office of education granting a charter school petition to "provide notice to that charter school prior to any proposed charter revocation ... and also requires the charter granting authority to give the charter school a reasonable opportunity to cure" violations that do not pose a threat to health and safety. DOF agrees "that the cost of preparing a written notification is new." Claimants acknowledge that other activities required by Education Code section 47607 are already reimbursable through the original *Charter Schools* claims process.

Under the provisions of Education Code section 47605, subdivision (b), school districts, and county offices of education required to review charter school petitions, "*shall* grant a charter for the operation of a school under this part if it is satisfied that the charter is consistent with sound educational practice." Under the statute, local educational agencies must cite facts and make specific written findings in order to reject a charter application; the rejection cannot be arbitrary. Thus, acceptance and approval of a complete charter petition is not a discretionary act on the part of school districts and county offices of education.

Once a charter school petition is approved the chartering agency maintains some oversight responsibilities. For example, Education Code section 47613 states, "a chartering agency may charge for the actual costs of supervisorial oversight of a charter school." If in the course of that oversight, the school district or county office of education determines that the standards or criteria of the approved charter are not being met, the chartering agency has a duty to revoke the charter by following the mandatory procedure described in Education Code section 47607, subdivision (c). Therefore, the Commission finds that Education Code section 47607, as amended by Statutes 1998, chapter 34, imposes a new program or higher level of service upon school districts and county offices of education for the following new activity:

- Prior to revocation of a charter, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils.

Education Code section 47613 (formerly 47613.7).

When the test claim was filed, the test claim statute was Education Code section 47613.7, as added by Statutes 1998, chapter 34. The section was renumbered Education Code section 47613 by Statutes 1999, chapter 78, effective July 7, 1999. No amendments were made to the statutory language.

> (a) Except as set forth in subdivision (b), a chartering agency may charge for the actual costs of supervisorial oversight of a charter school not to exceed 1 percent of the revenue of the charter school.
>
> (b) A chartering agency may charge for the actual costs of supervisorial oversight of a charter school not to exceed 3 percent of the revenue of the charter school if the charter school is able to obtain substantially rent free facilities from the chartering agency.

(c) A local agency that is given the responsibility for supervisorial oversight of a charter school, pursuant to paragraph (1) of subdivision (k) of Section 47605, may charge for the costs of supervisorial oversight, and administrative costs necessary to secure charter school funding, not to exceed 3 percent of the revenue of the charter school. A charter school that is charged for costs under this subdivision shall not be charged pursuant to subdivision (a) or (b).

(d) This section shall not prevent the charter school from separately purchasing administrative or other services from the chartering agency or any other source.

(e) For the purposes of this section, a chartering agency means a school district, county department of education, or the State Board of Education, that granted the charter to the charter school.

Claimants allege that although the code section allows school districts to charge a charter school for the actual costs of supervisorial oversight, the maximum charge of one percent (or three percent if the school district provides substantially rent-free facilities to the charter school) of charter school revenue, is insufficient to pay for the oversight costs.

DOF argues "that if the Legislature had intended that chartering agencies' requirements should be more costly, they would not have imposed a limit on the reimbursements. On the contrary, we believe this limitation was in keeping with the intent of the Charter law that oversight be just that and was intended to discourage micromanagement."

The Commission notes that this statute alone does not impose a new program or higher level of service, but instead establishes a fee system for which the chartering agency can impose a maximum charge of one or three percent of the charter school revenue for the actual costs of supervisorial oversight. Supervisorial oversight is a reimbursable activity in the original *Charter Schools* Parameters and Guidelines, as follows:

4. Monitoring the charter

Subsequent administrative review, analysis, and reporting on the charter school's performance for purposes of charter reconsideration, renewal, revision, evaluation, or revocation by the governing body.

In comments on the draft staff analysis, claimant San Diego Unified School District states that they are "unable to locate in the Parameters and Guidelines or in the Claiming Instructions the term 'Supervisorial oversight.'" The Commission agrees that this is not the exact language utilized, however, claimant has not cited any other definition of "supervisorial oversight" in the Education Code indicating that the term should not be read as comparable to the "Monitoring the charter" activity allowed for in *Charter Schools* Parameters and Guidelines.

Claimant argues that "the supervisorial oversight activities are a new program or higher level of service that is required to be performed by the sponsoring entity and must be a reimbursable [sic] for any amounts exceeding 1% or 3%." Again, supervisorial oversight is not a *new activity* required by the law claimed in the present test claim allegations. Claimant cannot make a successful claim for subvention for the costs of supervisorial oversight without first pleading and establishing that a new law or executive order imposed a new program or higher level of service upon school districts or county offices of education. The laws relating to supervisorial oversight as *an activity* were pled in the original *Charter Schools* test claim based upon the enactment of Statutes 1992, chapter 781, and have already been found by the Commission to impose certain

reimbursable costs mandated by the state. The Commission finds that Education Code section 47613 does not require any new activities, but rather establishes a fee authority to be used by a school district or county office of education to offset any costs of charter school supervisorial oversight.[16]

The Commission finds that Education Code section 47613, as added by Statutes 1998, chapter 34, renumbered by Statutes 1999, chapter 78, does not impose a new program or higher level of service upon school districts or county offices of education.

Education Code section 47613.5.

Education Code section 47613.5, as added by Statutes 1998, chapter 34, effective January 1, 1999, and repealed by Statutes 1999, chapter 78, effective July 7, 1999, follows, in pertinent part:

> (a) Notwithstanding Sections 47612 and 47613, commencing with the 1999-2000 school year and only upon adoption of regulations pursuant to subdivision (b), charter school operational funding shall be equal to the total funding that would be available to a similar school district serving a similar pupil population, provided that a charter school shall not be funded as a necessary small school or a necessary small high school, nor receive revenue limit funding that exceeds the statewide average for a school district of a similar type.
>
> (b) The State Department of Education shall propose, and the State Board of Education may adopt, regulations to implement subdivision (a) and, to the extent possible and consistent with federal law, provide for simple and, at the option of the charter school, local or direct allocation of funding to charter schools.

Claimants allege that "Education Code section 47613.5 required the State Department of Education to propose, and the State Board of Education to adopt, regulations that provide for these alternative methods of funding." The statutory language is directed exclusively to the CDE and the State Board of Education and does not impose any activities or duties upon school districts.

In addition, as discussed above, it appears that the proposed regulations were never published or operative prior to the repeal of this implementing Education Code section, effective July 9, 1999. Any potential activities for local educational agencies would have resulted from the implementation of the regulations originally required by this statute, not from the statute alone. Therefore, the Commission finds that Education Code section 47613.5 did not impose a new program or higher level of service upon school districts or county offices of education.

Education Code section 47614.

This Education Code section was added by Statutes 1998, chapter 34, operative January 1, 1999.

> A school district in which a charter school operates shall permit a charter school to use, at no charge, facilities not currently being used by the school district for instructional or administrative purposes, or that have not been historically used for

[16] Government Code section 17514 defines "costs mandated by the state" as increased costs a district is "required to incur," therefore any costs that are recoverable through sources other than district tax revenues are not reimbursable costs mandated by the state.

rental purposes provided the charter school shall be responsible for reasonable maintenance of those facilities.

Education Code section 47614 was replaced by language from Initiative Measure, Proposition 39, section 6, effective November 8, 2000, as follows in part:

> The intent of the people in amending Section 47614 is that public school facilities should be shared fairly among all public school pupils, including those in charter schools.
>
> Each school district shall make available, to each charter school operating in the school district, facilities sufficient for the charter school to accommodate all of the charter school's in-district students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending other public schools of the district. Facilities provided shall be contiguous, furnished, and equipped, and shall remain the property of the school district. The school district shall make reasonable efforts to provide the charter school with facilities near to where the charter school wishes to locate, and shall not move the charter school unnecessarily.

The statutory language of Education Code section 47614, as added by Statutes 1998, chapter 34 was replaced by vote of the people upon the approval of Proposition 39, and thus is no longer subject to article XIII B, section 6 of the California Constitution, which only requires subvention when "the Legislature or any state agency mandates a new program or higher level of service." Therefore, the Commission finds that any potential reimbursement period for Education Code section 47614 begins on January 1, 1999, and concludes on November 8, 2000.

Claimants allege that Education Code section 47614 imposes a reimbursable state mandate, including "the fair rental value of the facility as determined by the school district governing board plus other direct and indirect costs associated with the charter school's use of the facility."

DOF's July 28, 2000 response to the test claim allegations concludes:

> The law specifically states that the district must provide facilities only if they are excess facilities or are not already being rented. As such, there is no loss of rent to the district, as the "fair rental value" of an unrented property is zero. However, there could be minor, one-time administrative costs in establishing a free use agreement with the charter. Additionally, even if there were a revenue loss, it would not appear to constitute a reimbursable new program nor higher level of service within the meaning of the mandate law. Finally, the law also provides offsetting savings, because the law requires that any facilities provided for use by the charter be maintained by the charter, thus relieving the chartering agency from the costs of maintenance on the surplus facility.

The Commission also disagrees with the claim for state subvention for any lost rental value of a facility utilized by a charter school under this section as it contradicts the court's holding in *County of Sonoma v. Commission on State Mandates*. In *County of Sonoma*, the court concluded that lost revenue is not reimbursable under article XIII B, section 6 of the California Constitution.[17]

---

[17] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1285.

In *County of Sonoma*, the counties contended that reduced allocation of tax revenues was a reimbursable cost under article XIII B, section 6. The court disagreed. After analyzing Supreme Court cases on mandates, reviewing Government Code section 17500 et seq. and other Constitutional provisions differentiating "costs" from "lost revenue," the court came to the following conclusions:

> [I]t is the expenditure of tax revenues of local governments that is the appropriate focus of section 6 (*County of Fresno v. State of California* [citation omitted]) [stating that section 6 was "designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues."][18]
>
> No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes.[19]
>
> The obvious view of the Legislature is that reimbursement is intended to replace actual costs incurred, not as compensation for revenue that was never received.[20]
>
> The presence of these references to reimbursement for lost revenue in article XIII supports a conclusion that by using the word "cost" in section 6 the voters meant the common meaning of cost as an expenditure or expense actually incurred.[21]

And finally, the court held that "we cannot extend the provisions of section 6 to include concepts such as lost revenue."[22] Accordingly, the Commission finds that the claim for the lost fair rental value is not subject to article XIII B, section 6, because lost revenue, such as rental income, does not constitute a cost.

As for associated "direct and indirect costs" of providing property to charter schools, Statutes 1998, chapter 34 only required that school districts provide property if it was not being currently used for instructional or administrative purposes, *and*, if it had not been historically rented. In other words, the statute only required school districts to provide truly vacant, unutilized property. There was no state requirement to evict current tenants, establish a lease agreement, or prepare property for a charter school in any way. In return for use of the unutilized property, charter schools "shall be responsible for reasonable maintenance of those facilities," thus, providing a potential benefit to school districts, not a cost.

However, any potential offsetting savings does not preclude finding that a new program or higher level of service was imposed upon school districts for the administrative expenses resulting directly from the statutory requirement to permit charter schools to utilize unused district facilities, such as "one-time administrative costs in establishing a free use agreement with the charter," as proposed by DOF.

---

[18] *Id.* at 1283.

[19] *Id.* at 1284.

[20] *Ibid.*

[21] *Id.* at 1285.

[22] *Ibid.*

Thus, the Commission finds that Education Code section 47614, as added by Statutes 1998, chapter 34, imposes a new program or higher level of service upon school districts from January 1, 1999 to November 8, 2000, for the following new activity:

- Permitting a charter school to use, at no charge, facilities not currently being used by the school district for instructional or administrative purposes, or that have not been historically used for rental purposes provided the charter school shall be responsible for reasonable maintenance of those facilities. (Reimbursement for this activity is limited to administrative expenses resulting directly from the requirement to permit charter schools to utilize unused district facilities. Rental value of the facility is specifically excluded as a reimbursable expense.)

Test Claim Executive Orders: California Department of Education Memorandum:

Implementation of New Charter School Funding Model, dated April 28, 1999.

Claimants allege the memorandum is an executive order imposing a reimbursable state mandated program for the processing of payments of property tax from school districts to charter schools. The April 28, 1999 document is a letter "intended to help charter schools make" decisions on the new funding model options described in Education Code section 47613.5. The memorandum discusses the plan for implementation of Education Code section 47613.5, however the code section was repealed on July 7, 1999, and thus the memorandum was no longer of use.

Under Government Code section 17516, an "executive order" may include "any order, plan, requirement, rule, or regulation issued by . . . any agency, department, board, or commission of state government." For the period of time the memorandum applied, it was informational regarding the new charter school funding model, however, the Commission finds that the memorandum did not meet the definition of an executive order for school districts and county offices of education, as it did not issue any directives or require any activities on the part of such local educational agencies. The Commission finds that the CDE memorandum dated April 28,1999, did not impose a new program or higher level of service upon school districts or county offices of education.

Issue 3: Does the test claim legislation found to contain a new program or higher level of service also impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Reimbursement under article XIII B, section 6 is required only if any new program or higher-level of service is also found to impose "costs mandated by the state." Government Code section 17514 defines "costs mandated by the state" as any *increased* cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service.

DOF makes an argument against subvention for the part of the test claim legislation, based upon the exception of Government Code section 17556, subdivision (e): that there are no costs mandated by the state if the statute or executive order provides *offsetting savings* to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

DOF contends that Statutes 1998, chapter 673, in amending Education Code section 47605, subdivision (j), the Legislature eliminated a mandate that county offices of education "convene a

review panel to determine if a district acted properly in denying a petition. However, it also: a) adds a requirement that county offices review petitions directly submitted to them; and b) allows charter schools to file judicial action against a district in the case of a denial if the entity fails to act on a petition within 120 days."

DOF argues, "There would seem to be considerable offsetting savings resulting from the elimination of the earlier mandate. We believe these alternative activities to be comparable and therefore no reimbursable mandate exists."

DOF's analysis does not comport with the complete description of offsetting savings in the exception to reimbursement described in Government Code section 17556, subdivision (e). Because the prior requirements in Education Code section 47605 were found to constitute a reimbursable state mandated program as part of the original *Charter Schools* test claim, the elimination of part of the mandate and the substitution of other requirements does not provide *offsetting savings which result in no net costs* to the school district. Following the program evolution in a timeline: first, there is no program prior to the development of charter schools legislation; next, there is a new program in Statutes 1992, chapter 781, resulting in a reimbursable state mandate; finally, part of the new program activities are eliminated and substituted with alternative activities by Statutes 1998, chapter 673. But, under DOF's argument, because the newest program is comparable, suddenly "no reimbursable mandate exists." This does not follow – if the previous program activities were reimbursable, the substituted activities must be as well, unless another exception to subvention exists.

In addition, the test claim legislation does not include additional revenue that was specifically intended to fund the entire cost of the state mandate. Accordingly, the Commission finds that Government Code section 17556, subdivision (e), does not apply to deny a finding of costs mandated by the state for the activities identified as imposing a reimbursable state mandated program.

The Commission finds none of the other exceptions to finding a reimbursable state mandate under Government Code section 17556 apply here. Accordingly, the Commission finds that the activities identified in the conclusion, below, qualify for reimbursement because the activities impose costs mandated by the state within the meaning of Government Code section 17514.

CONCLUSION

The Commission concludes that Education Code sections 47605, subdivision (j)(1) and (k)(3), 47605.5, 47607, and 47614 contain new programs or higher levels of service for school districts and/or county offices of education 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 17514, for the following specific new activities:

School Districts:

- Review charter school petitions for renewal, when submitted directly to the governing board of the school district that initially denied the charter, prior to expiration of the charter granted by the State Board of Education. (Ed. Code, § 47605, subd.(k)(3).)[23]

[23] As amended by Statutes 1998, chapter 673, operative January 1, 1999.

- Prior to revocation of a charter, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607.)[24]

- Permitting a charter school to use, at no charge, facilities not currently being used by the school district for instructional or administrative purposes, or that have not been historically used for rental purposes, provided the charter school shall be responsible for reasonable maintenance of those facilities. (Reimbursement for this activity is limited to administrative expenses resulting directly from the requirement to permit charter schools to utilize unused district facilities. Rental value of the facility is specifically excluded as a reimbursable expense.) (Ed. Code, § 47614.)[25]

County Offices of Education:

- Review charter school petitions submitted directly to the county board of education, pursuant to Education Code section 47605, subdivision (b), when the governing board of a school district denies a charter school petition and the charter school petitioner submits the petition to the county board of education. (Ed. Code, § 47605, subd. (j)(1).)[26]

- Review charter school petitions submitted directly to the county board of education, in the same manner as set forth in Education Code section 47605, for charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services. (Ed. Code, § 47605.5.)[27]

- Prior to revocation of a charter, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607.)[28]

The Commission finds that Education Code section 47613[29] establishes a fee authority that must be used by a school district or county office of education to offset any claimed reimbursement

---

[24] As amended by Statutes 1998, chapter 34, operative January 1, 1999.

[25] As added by Statutes 1998, chapter 34, operative January 1, 1999. Mandate eliminated by voter approval of Proposition 39, which replaced Education Code section 47614, operative November 8, 2000.

[26] As amended by Statutes 1998, chapter 673, operative January 1, 1999. This mandate replaces the previously approved mandate in *Charter Schools* for a review process for denied charter petitions. (Ed. Code, § 47605, subd. (j), as added by Stats. 1992, ch. 781; replaced by Stats. 1998, ch. 673.)

[27] As added by Statutes 1998, chapter 34, operative January 1, 1999.

[28] As amended by Statutes 1998, chapter 34, operative January 1, 1999.

[29] As added by Statutes 1998, chapter 34, operative January 1, 1999, and renumbered by Statutes 1999, chapter 78.

for the costs of charter school supervisorial oversight under the *Charter Schools* parameters and guidelines.

The Commission finds that Education Code sections 47602, 47604, 47613, 47613.5, 47614 and CDE Memorandum dated April 28, 1999, do not require any additional mandatory activities of school districts or county offices of education, and therefore do not impose a new program or higher level of service.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

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

November 22, 2002, I served the:

Adopted Statement of Decision
Charter Schools II, 99-TC-03
Los Angeles County Office of Education and
San Diego Unified School District, Claimants
Statutes 1998, Chapter 34, et al.

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

Mr. Arthur M. Palkowitz
San Diego Unified School District
4100 Normal Street, Room 3159
San Diego, CA 92103-2682

Ms. Marlene Dunn
Los Angeles County Office of Education
9300 Imperial Highway
Downey, CA 90242

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 November 22, 2002, at Sacramento, California.

Victoria Soriano
VICTORIA SORIANO

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Section 47605, Subdivision (b), and former Subdivisions (j)(1), (j)(2), and (j)(3); Education Code Section 47607, Subdivisions (a) and (b); Statutes 1992, Chapter 781; Filed on December 1, 1993; By San Diego Unified School District; and Education Code Sections 47602, 47604, 47605, 47605.5, 47607, 47613 (formerly 47613.7), 47613.5, and 47614; Statutes 1998, Chapters 34 and 673; California Code of Regulations, Title 5, Sections 15410-15428; California Department of Education Memorandum dated April 28, 1999; Filed on June 29, 1999; By Los Angeles County Office of Education and San Diego Unified School District, Claimants.	No. CSM 4437 *Charter Schools* and No. 99-TC-03 *Charter Schools II* ADOPTION OF PARAMETERS AND GUIDELINES PURSUANT TO GOVERNMENT CODE SECTION 17557 AND CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1183.12 *(Adopted on December 2, 2003)*

CONSOLIDATED PARAMETERS AND GUIDELINES

On December 2, 2003, the Commission on State Mandates adopted the attached Consolidated Parameters and Guidelines.

PAULA HIGASHI, Executive Director Date

CONSOLIDATION OF PARAMETERS AND GUIDELINES

Education Code Section 47605, Subdivision (b), and
former Subdivisions (j)(1), (j)(2), and (j)(3)
Education Code Section 47607, Subdivisions (a) and (b)

Statutes 1992, Chapter 781

Charter Schools (CSM 4437)

and

Education Code Sections 47605, Subdivisions (j)(1) and (k)(3),
47605.5, 47607, and 47614

Statutes 1998, Chapters 34 and 673

Charter Schools II (99-TC-03)

I. SUMMARY OF THE MANDATE

Charter Schools

On July 21, 1994, the Commission on State Mandates (Commission) adopted its Statement of Decision finding that Education Code sections 47605 and 47607, as added by Statutes 1992, chapter 781, require new activities related to initial charter school petitions and for monitoring and evaluating the performance of charter schools pertaining to the revision or renewal of approved charters, which constitute a new program or higher level of service for school districts and/or county offices of education 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 17514. Specifically, the Commission approved the *Charter Schools* test claim for the increased costs of performing the following activities:

School Districts

- Respond to requests from the public for information on the charter school program. (Ed. Code, § 47605.)
- Conduct a public hearing within thirty days of receipt of a petition to determine community support for the petition. (Ed. Code, § 47605, subd. (b).)
- Grant or deny the petition within sixty days of receipt, subject to a thirty-day extension upon agreement of the parties. (Ed. Code, § 47605, subd. (b).)
- Provide persons to take part in a review panel to review the decision of the governing board of the school district and, if necessary, request the governing board of the school district to reconsider the charter request. (Former Ed. Code, § 47605, subd. (j).)[1]

[1] Effective January 1, 1999, this activity was replaced with the new requirements of Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673.

- Respond to any request of the review panel selected and convened by the county superintendent of schools pursuant to an appeal of any petition denied by the school district. (Former Ed. Code, § 47605, subd. (j).)[2]
- Monitor the performance of charter schools for which they have granted charters to determine if they have achieved their goals and objectives. (Ed. Code, § 47607.)
- Evaluate and decide upon requests for revision or extension of approved charters. (Ed. Code, § 47607.)

County Boards of Education

- Select and convene a review panel to review the decision of the governing board of the school district and, if necessary, request the governing board of the school district to reconsider the charter request. (Former Ed. Code, § 47605, subds. (j)(1) and (j)(2).)[3]
- Hear a petition following a denial on reconsideration by the governing board of a school district. (Former Ed. Code, § 47605, subd. (j)(3).)[4]
- Conduct a public hearing within thirty days of receipt of a petition to determine community support for the petition. (Former Ed. Code, § 47605, subd. (j)(3).)[5]
- Grant or deny the petition within sixty days of receipt, subject to a thirty-day extension upon agreement of the parties. (Former Ed. Code, § 47605, subd. (j)(3).)[6]
- Monitor the performance of charter schools for which they have granted charters to determine if they have achieved their goals and objectives. (Ed. Code, § 47607.)
- Evaluate and decide upon requests for revision or extension of approved charters. (Ed. Code, § 47607.)

The Commission determined that the following provisions of Education Code sections 47605 and 47607 did not impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, for school districts and county boards of education to:

- Plan and prepare procedures for implementation of the Charter Schools Act of 1992.

---

[2] Effective January 1, 1999, this activity was replaced with the new requirements of Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673.

[3] Effective January 1, 1999, this activity was replaced with the new requirements of Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673.

[4] Effective January 1, 1999, this activity was replaced with the new requirements of Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673.

[5] Effective January 1, 1999, this activity was replaced with the new requirements of Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673.

[6] Effective January 1, 1999, this activity was replaced with the new requirements of Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673.

- Disseminate information regarding charter schools to staff, students, parents, and the community.

Charter Schools II

On November 21, 2002, the Commission adopted its Statement of Decision finding that Education Code sections 47605, subdivisions (j)(1) and (k)(3), 47605.5, 47607, and 47614 require new activities, as specified below, which constitute new programs or higher levels of service for school districts and/or county offices of education 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 17514:

School Districts

- Review charter school petitions for renewal, when submitted directly to the governing board of the school district that initially denied the charter, prior to expiration of the charter granted by the State Board of Education. (Ed. Code, § 47605, subd. (k)(3).)
- Prior to revocation of a charter, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607, subd. (c).)
- Permit a charter school to use, at no charge, facilities not currently being used by the school district for instructional or administrative purposes, or that have not been historically used for rental purposes, provided the charter school shall be responsible for reasonable maintenance of those facilities. (Reimbursement for this activity is limited to administrative expenses resulting directly from the requirement to permit charter schools to utilize unused district facilities. Rental value of the facility is specifically excluded as a reimbursable expense.) (Ed. Code, § 47614.)

County Offices of Education

- Review charter school petitions submitted directly to the county board of education, pursuant to Education Code section 47605, subdivision (b), when the governing board of a school district denies a charter school petition and the charter school petitioner submits the petition to the county board of education. (Ed. Code, § 47605, subd. (j)(1).)
- Review charter school petitions submitted directly to the county board of education, in the same manner as set forth in Education Code section 47605, for charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services. (Ed. Code, § 47605.5.)
- Prior to revocation of a charter, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607, subd. (c).)

The Commission also found that Education Code section 47613 establishes a fee authority that must be used by a school district or county office of education to offset any claimed reimbursement for the costs of charter school supervisorial oversight under the *Charter Schools* Parameters and Guidelines.

In addition, the Commission found that Education Code sections 47602, 47604, 47613, 47613.5, 47614 and California Department of Education Memorandum dated April 28, 1999, do not require any additional mandatory activities of school districts or county offices of education, and therefore, do not impose a new program or higher level of service.

II. ELIGIBLE CLAIMANTS

Any "school district," as defined in Government Code section 17519, except for community colleges, which incurs increased costs as a result of this mandate, is eligible to claim reimbursement. Charter schools are not eligible claimants.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557 states that a test claim must be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. Although the *Charter Schools II* test claim was filed on August 24, 1999, which establishes a reimbursement period beginning July 1, 1998, the test claim legislation was not operative until January 1, 1999. Therefore, this consolidated set of parameters and guidelines is operative for costs incurred from January 1, 1999, and beyond.

Education Code section 47614, as added by Statutes 1998, chapter 34, was replaced by voter approval of Proposition 39, which was operative November 8, 2000. Therefore, costs incurred for compliance with Education Code section 47614 is only reimbursable for the period January 1, 1999, through November 7, 2000.

Costs for *Charter Schools* (CSM 4437) that have been claimed for fiscal years 1998-1999, 1999-2000, 2000-2001, 2001-2002, and 2002-2003 as of the effective date of these parameters and guidelines pursuant to the State Controller's claiming instructions for Program 140 may not be claimed and are not reimbursable under these parameters and guidelines.

Actual costs for one fiscal year should be included in each claim. Estimated costs for the subsequent year may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1), all claims for reimbursement of initial years' costs shall be submitted within 120 days of the issuance of the State Controller's claiming instructions.

If total costs for a given year do not exceed $1,000, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

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

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are reimbursable:

Charter Schools[7]

A. School Districts

1. Responding to information requests

   Provide information, upon request, to the community regarding the Charter Schools Act of 1992 and governing board's charter policy and procedures. (Ed. Code, § 47605.)[8]

2. Evaluating petitions

   Review and evaluate qualified charter petitions for compliance with criteria for the granting of charters. (Ed. Code, § 47605.)[9]

3. Public hearings

   Prepare for public hearings, to be done within thirty days of receiving the petition, to consider the level of community support for a charter school petition, and grant or deny the charter school petition within sixty days of receiving the petition, subject to one thirty-day continuance by agreement of the parties, pursuant to Education Code section 47605. (Ed. Code, § 47605.)[10]

---

[7] Effective January 1, 1999, many activities from the original *Charter Schools* Parameters and Guidelines were amended by Statutes 1998, chapters 34 and 673, and are reflected in the *Charter Schools II* activities.)

[8] As added by Statutes 1992, chapter 781.

[9] As added by Statutes 1992, chapter 781.

[10] As added by Statutes 1992, chapter 781.

B. School Districts and County Offices of Education[11]

1. Monitoring: Renewal, Material Revision, and Revocation of the Charter[12]

   a. Review, analyze, and report on the charter school's performance for purposes of charter reconsideration, renewal, revision, evaluation, or revocation by the governing body. (Ed. Code, § 47607, subds. (a) and (b).)[13]

   b. Evaluate and decide upon material revisions, renewals, or revocations of charters. (Ed. Code, § 47607, subds. (a) and (b).)[14]

Charter Schools II

A. School Districts

1. Review charter school petitions for renewal that are submitted directly to the governing board of the school district that initially denied the charter.[15] Pursuant to Education Code section 47605, subdivision (k)(3), the petition must be submitted prior to expiration of the charter granted by the State Board of Education. (Ed. Code, § 47605, subd. (k)(3).)[16]

2. Notify the charter public school of any violation of Education Code section 47607, subdivision (b), prior to revocation of a charter. Pursuant to Education Code section 47607, subdivision (c), the school shall be given a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607, subd. (c).)[17]

B. County Offices of Education

1. Review charter school petitions submitted directly to the county board of education, pursuant to Education Code section 47605, subdivision (b):

   a. When the governing board of a school district denies a charter school petition and the charter school petitioner submits the petition to the county board of education. (Ed. Code, § 47605, subd. (j)(1).)[18]

---

[11] See section VII. Offsetting Savings and Reimbursements.

[12] The fee authority established by Education Code section 47613 must be used by a school district or county office of education to offset any claimed reimbursement for the cost of these activities.

[13] As added by Statutes 1992, chapter 781.

[14] As added by Statutes 1992, chapter 781.

[15] Each renewal is for a period of five years.

[16] As amended by Statutes 1998, chapter 673.

[17] As amended by Statutes 1998, chapter 34.

[18] As amended by Statutes 1998, chapter 673. As amended by Statutes 1998, chapter 673. This replaces the previously approved activity in the original *Charter Schools* Parameters and Guidelines related to "Petition Appeals." (Ed. Code, § 47605, subd. (j), as added by Stats. 1992, ch. 781; replaced by Stats. 1998, ch. 673.)

b. For charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services. (Ed. Code, § 47605.5.)[19]

2. Notify the charter public school of any violation of Education Code section 47607, subdivision (b), prior to revocation of a charter. Pursuant to Education Code section 47607, subdivision (c), the school shall be given a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607, subd. (c).)[20]

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. Direct costs that are eligible for reimbursement are:

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the dates when services were performed and itemize all costs for those services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for

[19] As added by Statutes 1998, chapter 34.

[20] As amended by Statutes 1998, chapter 34.

purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs include: (a) the indirect costs originating in each department or agency of the governmental unit carrying out state mandated programs, and (b) the costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

School districts must use the J-380 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

County offices of education must use the J-580 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[21] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING SAVINGS AND REIMBURSEMENTS

Any offsetting savings the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, including but

[21] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

Education Code section 47613 establishes a fee authority that must be used by a school district or county office of education to offset any claimed reimbursement for the costs of charter school supervisorial oversight under the *Charter Schools* Parameters and Guidelines. This refers to activity B. 1. under *Charter Schools* in section IV. of these parameters and guidelines.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the statute or executive order creating the mandate and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (a), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.

Adopted: October 22, 1980
Amendments Adopted: 8/19/81
(Amendments applicable only to claims for costs incurred after June 30, 1981)
Amended: 3/17/83
Amended: 9/29/83
Amended: 12/15/83
Amended: 6/27/85
Amended: 10/20/88
Amended: 7/22/93
G:\PG\CH961.75

PARAMETERS AND GUIDELINES
Chapter 961, Statutes of 1975
Collective Bargaining

An act to repeal Article 5 (commencing with Section 13080) of Chapter 1 of Division 10 of the Education Code, and to add Chapter 10.7 (commencing with Section 3540) to Division 4 of Title 1 of the Government Code, relating to public educational employment relations, and making an appropriation. This bill, which was operative July 1, 1976, repealed the Winton Act and enacted provisions to meet and negotiate, thereby creating a collective bargaining atmosphere for public school employers.

A. Operative Date of Mandate

The provisions relating to the creation, certain duties of, and appropriations for the Public Employment Relations Board were operative on January 1, 1976. The provisions relating to the organizational rights of employees, the representational rights of employee organizations, the recognition of exclusive representatives, and related procedures were operative on April 1, 1976. The balance of the added provisions were operative on July 1, 1976.

B. Period of Claim

Only costs incurred after January 1, 1978, may be claimed. The initial claim should have included all costs incurred for that portion of the fiscal year from January 1, 1978, to June 30, 1978.

Pursuant to language included in the 1980-81 budget, claims shall no longer be accepted for this period. All subsequent fiscal year claims should be filed with the State Controller's Office for processing.

C. Mandated Cost

Public school employers have incurred costs by complying with the requirements of Section 3540 through 3549.1

established by Chapter 961, Statutes of 1975. In addition, some costs have been incurred as a result of compliance with regulations promulgated by the Public Employment Relations Board (PERB). Since these activity costs (referred to collectively as "Rodda Act" activities and costs in this document), in many respects, simply implement the original legislation, it is intended that these parameters and guidelines have embodied those regulations or actions taken by PERB prior to December 31, 1978.

D. County Superintendent of Schools Filing

If the County Superintendent of Schools files a claim on behalf of more than one school district, the costs of the individual school district must be shown separately.

E. Governing Authority

The costs for salaries and expenses of the governing authority, for example the School Superintendent and Governing Board, are not reimbursable. These are costs of general government as described by the federal guideline entitled "Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government," OASC-10.

F. Certification

The following certification must accompany all claims:

I DO HEREBY CERTIFY:

THAT Section 1090 to 1096, inclusive, of the Government Code and other applicable provisions of the law have been complied with; and

THAT I am the person authorized by the local agency to file claim for funds with the State of California.

_____

Signature of Authorized Representative Date

_____

Title
Telephone Number

_____

G. Claim Components (Reimbursable Costs)

Reimbursable activities mandated by Chapter 961, Statutes of 1975 are grouped into six components, G1 through G6. The cost of activities grouped in components G1, G2, and G3 are subject to offset by the historic cost of similar Winton Act activities as described in H2.

1. Determination of appropriate bargaining units for representation and determination of the exclusive representation and determination of the exclusive representatives.

   a. Unit Determination: Explain the process for determining the composition of the certificated employee council under the Winton Act, and the process for determining appropriate bargaining units including the determination of management, supervisory and confidential employees, under Chapter 961, Statutes of 1975, if such activities were performed during the fiscal year being claimed.

   b. Determination of the Exclusive Representative: Costs may include receipt and posting of the representation and decertification notices and, if necessary, adjudication of such matters before the PERB.

   c. Show the actual increased costs including salaries and benefits for employer representatives and/or necessary costs for contracted services for the following functions:

      (1) Development of proposed lists for unit determination hearings if done during the fiscal year being claimed. Salaries and benefits must be shown as described in Item H3.

      (2) Representation of the public school employer at PERB hearings to determine bargaining units and the exclusive representative. Actual preparation time will be reimbursed. Salaries and benefits must be shown as described in Item H3.

      (3) If contracted services are used for either (a) or (b) above, contract invoices must be submitted with the claim. Contract costs must be shown as described in Item H5.

(4) Indicate the cost of substitutes for release time for employer and exclusive bargaining unit witnesses who testify at PERB hearings. The job classification of the witnesses and the date they were absent must also be submitted. Release time for employee witnesses asked to attend the PERB hearing by bargaining units will not be reimbursed.

(5) Identify the travel costs for employer representatives to any PERB hearing. Reimbursement shall reflect the rate specified by the regulations governing employees of the local public school employer.

(6) Cost of preparation for one transcript per PERB hearing will be reimbursed.

2. Elections and decertification elections of unit representatives are reimbursable in the event the Public Employment Relations Board determines that a question of representation exists and orders an election held by secret ballot.

a. Submit with your claim any Public Employment Relations Board agreements or orders which state how the election must be held.

b. If a precinct voting list was required by PERB, indicate the cost of its development. Salaries and benefits must be shown as described in Item H3.

c. The salary and benefits of a school employer representative, if required by PERB for time spent observing the counting of ballots, will be reimbursed. The representatives' salary must be shown as described in Item H3.

3. Negotiations: Reimbursable functions include -- receipt of exclusive representative's initial contract proposal, holding of public hearings, providing a reasonable number of copies of the employer's proposed contract to the public, development and presentation of the initial district contract proposal, negotiation of the contract, reproduction and distribution of the final contract agreement.

a. Show the costs of salaries and benefits for employer representatives participating in negotiations. Contracted services will be

reimbursed. Costs for maximum of five public school employer representatives per unit, per negotiation session will be reimbursed. Salaries and benefits must be shown as described on Page 7, Item H3.

b. Show the costs of salaries and benefits for employer representatives and employees participating in negotiation planning sessions. Contracted services for employer representatives will be reimbursed. Salaries and benefits must be shown as described in Item H3.

c. Indicate the cost of substitutes for release time of exclusive bargaining unit representatives during negotiations. Give the job classification of the bargaining unit representative that required a substitute and dates the substitute worked. Substitute costs for a maximum of five representatives per unit, per negotiation session will be reimbursed. The salaries of union representatives are not reimbursable.

d. Reasonable costs of reproduction for a copy of the initial contract proposal and final contract, which is applicable and distributed to each employer representative (i.e. supervisory, management, confidential) and a reasonable number of copies for public information will be reimbursed. Provide detail of costs and/or include invoices. Costs for copies of a final contract provided to collective bargaining unit members are not reimbursable.

e. If contract services are used for a. and/or b. above, contract invoices must be submitted. Contract costs must be shown as described in Item H5.

f. A list showing the dates of all negotiation sessions held during the fiscal year being claimed must be submitted.

4. <u>Impasse Proceedings</u>

a. Mediation

(1) Costs for salaries and benefits for employer representative personnel are reimbursable. Contracted services will be reimbursed. Costs for a <u>maximum of five public school employer representatives per mediation</u>

session will be reimbursed. Salaries and benefits must be shown as described in Item H3.

(2) Indicate the costs of substitutes for the release time of exclusive bargaining unit representatives during impasse proceedings. The job classification of the employee witnesses and the date they were absent shall be indicated. Costs for a maximum of five representatives per mediation session will be reimbursed.

(3) Renting of facilities will be reimbursed.

(4) Costs of the mediator will not be reimbursed.

(5) If contract services are used under 1, contract invoices must be submitted with the claim. Contract costs must be shown as described in Item H5.

b. Fact-finding publication of the findings of the fact-finding panel. (To the extent fact-finding was required under the Winton Act during the 1974-75 fiscal year, costs are not reimbursable.)

(1) All costs of the school employer panel representative shall be reimbursed. Salaries and benefits must be shown as described in Item H3.

(2) Fifty percent of the costs mutually incurred by the fact-finding panel shall be reimbursed. This may include substitutes for release time of witnesses during fact-finding proceedings, and the rental of facilities required by the panel.

(3) Special costs imposed on the public school employer for the development of unique data required by a fact-finding panel will be reimbursed. Describe the special costs and explain why this data would not have been required by a fact-finding panel under the Winton Act. Salaries and benefits must be shown as described in Item H3.

5. <u>Contract administration and adjudication of contract disputes either by arbitration or litigation. Reimbursable functions include grievances and administration and enforcement of the contract.</u>

   a. Salaries and benefits of employer personnel involved in adjudication of contract disputes. Contracted services will be reimbursed. Salaries and benefits must be shown as described in Item H3.

   b. Indicate substitutes necessary for release time of the representatives of an exclusive bargaining unit during adjudication of contract disputes. The job classification of the employee witnesses and the dates they were absent shall also be indicated.

   c. Reasonable costs incurred for a reasonable number of training sessions held for supervisory and management personnel on contract administration/interpretation of the negotiated contract are reimbursable. Contract interpretations at staff meetings are not reimbursable. Personal development and informational programs, i.e., classes, conferences, seminars, workshops, and time spent by employees attending such meetings are not reimbursable. Similarly, purchases of books and subscriptions for personal development and information purposes are not reimbursable. Salaries and benefits must be shown as described in Item H3.

   d. The cost of one transcript per hearing will be reimbursed.

   e. Reasonable public school employer costs associated with a contract dispute which is litigated are reimbursable, as follows:

      1. Reasonable public school employer costs associated with issues of contract disputes which are presented before PERB are reimbursable.

      2. Reasonable public school employer cost of litigation as a defendant in the court suit involving contract disputes may be reimbursable.

3. Where the public school employer is the plaintiff in a court suit to appeal a PERB ruling, costs are reimbursable only if the public school employer is the prevailing party (after all appeals, final judgment).

4. No reimbursement is allowed where the public school employer has filed action directly with the courts without first submitting the dispute to PERB, if required.

5. No reimbursement shall be provided for filing of amicus curiae briefs.

f. Expert witness fees will be reimbursed if the witness is called by the public school employer.

g. Reasonable reproduction costs for copies of a new contract which is required as a result of a dispute will be reimbursed.

h. If contract services are used under "a" above, copies of contract invoices must be submitted with your claim. Contract costs must be shown as described in Item H5.

i. Public school employer's portion of arbitrators' fees for adjudicating grievances, representing 50% of costs, will be reimbursed.

6. Unfair labor practice adjudication process and public notice complaints.

a. Show the actual costs for salaries and benefits of employer representatives. Services contracted by the public school employer are reimbursable. Salaries and benefits must be shown as described in Item H3.

b. Indicate cost of substitutes for release time for representatives of exclusive bargaining units during adjudication of unfair practice charges.

c. The cost of one transcript per PERB hearing will be reimbursed.

d. Reasonable reproduction costs will be reimbursed.

e. Expert witness fees will be reimbursed if the witness is called by the public school employer.

f. If contract services are used under "a" above, contract invoices must be submitted. Contract costs must be shown as described in Item H5.

g. No reimbursement for an appeal of an unfair labor practice decision shall be allowed where the Public Employee Relations Board is the prevailing party.

h. No reimbursement for filing of amicus curiae briefs shall be allowed.

H. Supporting Data for Claims--Report Format for Submission of Claim.

1. Description of the Activity: Follow the outline of the claim components. Cost must be shown separately by component activity. Supply workload data requested as part of the description to support the level of costs claimed. The selection of appropriate statistics is the responsibility of the claimant.

2. Quantify "Increased" Costs: Public school employers will be reimbursed for the "increased costs" incurred as a result of compliance with the mandate.

a. For component activities G1, G2, and G3:

1. Determination of the "increased costs" for each of these three components requires the costs of current year Rodda Act activities to be offset [reduced] by the cost of the base-year Winton Act activities. The Winton Act base-year is generally fiscal year 1974-75.

Winton Act base-year costs are adjusted by the Implicit Price Deflator prior to offset against the current year Rodda Act costs for these three components. The Implicit Price Deflator shall be listed in the annual claiming instructions of the State Controller.

2. The cost of a claimant's current year Rodda Act activities are offset [reduced] by the cost of the base-year Winton Act activities either: by matching each component, when claimants can provide sufficient documentation to segregate each component of the Winton Act base-year activity costs; or, by combining all three components when claimants cannot satisfactorily segregate each component of Winton Act base-year costs.

b. For component activities G4, G5, and G6:

All allowable activity costs for these three Rodda Act components are "increased costs" since there were no similar activities required by the Winton Act; therefore, there is no Winton Act base-year offset to be calculated.

BASE YEAR	ADJUSTMENT	
1974-1975	1.490	1979-80 FY
"	1.560	1980-81 FY
"	1.697	1981-82 FY
"	1.777	1982-83 FY
"	1.884	1983-84 FY

3. Salary and Employees' Benefits: Show the classification of the employees involved, amount of time spent, and their hourly rate. The worksheet used to compute the hourly salary rate must be submitted with your claim. Benefits are reimbursable. Actual benefit percent must be itemized. If no itemization is submitted, 21 percent must be used for computation of claim costs. Identify the classification of employees committed to functions required under the Winton Act and those required by Chapter 961, Statutes of 1975.

4. Services and Supplies: Only expenditures which can be identified as a direct cost as a result of the mandate can be claimed.

5. Professional and Consultant Services: Separately show the name of professionals or consultants, specify the functions the consultants performed relative to the mandate, length of appointment, and the itemized costs for such services. Invoices must be submitted as supporting documentation with your claim. The maximum reimbursable fee for contracted services is $100 per hour. Annual retainer fees shall be no greater than $100 per hour. Reasonable expenses will also be paid as identified on the monthly billings of consultants. However, travel expenses for consultants and experts (including attorneys) hired by the claimant shall not be reimbursed in an amount higher than that received by State employees, as established under Title 2, Div. 2, Section 700ff, CAC.

6. Allowable Overhead Cost: Public school employer's indirect costs may only be claimed through an indirect costs rate proposal prepared in accordance with the provision on Federal Regulation OASC-10 (formerly OMB Circular A-87 and FMC 74-4). For the 1978-79 fiscal

year, public school employers may use the J-86 nonrestrictive indirect cost rate approved by the State Department of Education (SDE). For the 1979-80 and subsequent fiscal years, public school employers may use the J-41A nonrestrictive indirect cost rate approved by SDE. Public school employers that do not have an approved J-41A must use the J-85 restrictive indirect cost rate for the 1978-79 fiscal year, and J-73A rate for the 1980-81 and subsequent fiscal years. The J-41A or the J-13A must be submitted with your claim.

7. Costs previously included in the J-86 indirect cost calculation which are now included in the J-41A direct support cost category are eligible for reimbursement if the method of computation is explained in the claim.

   Indirect cost rate should not be applied to costs classified as General Support in the J-41A or J-73A under EDP codes 400, 405, and 410 in column three.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Government Code Section 3547.5 as added by Chapter 1213, Statutes of 1991, and the California Department of Education Management Advisory 92-01 And filed on December 29, 1997; By the Alameda County Office of Education, Claimant.	NO. 97-TC-08 *Collective Bargaining Agreement Disclosure* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (Adopted on March 26, 1998)

STATEMENT OF DECISION

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

This Decision shall become effective on April 7, 1998.

Paula Higashi

Paula Higashi, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	NO. 97-TC-08
Government Code Section 3547.5 as added by Chapter 1213, Statutes of 1991, and the California Department of Education Management Advisory 92-01 And filed on December 29, 1997; By the Alameda County Office of Education, Claimant.	*Collective Bargaining Agreement Disclosure* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (Adopted on March 26, 1998)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) on March 26, 1998, heard this test claim during a regularly scheduled hearing. Keith Peterson appeared for the Alameda County Office of Education and Carol Berg appeared for the Education Mandated Cost Network.

At the hearing, evidence both oral and documentary was introduced, the test claim was submitted, and the vote was taken.

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

The Commission, by a vote of 7-0 approved this test claim.

Issue

> Do the provisions of Government Code section 3547.5, as added by Chapter 1213, Statutes of 1991, and the California Department of Education's Management Advisory 92-01, impose a new program or higher level of service upon school districts within the meaning of section 6, article XIII B of the California Constitution and Government Code section 17514?

Prior Law

Before the test claim legislation, school districts were only required to publicly disclose all *initial* proposals for collective bargaining agreements. Government Code section 3547

provides in pertinent part: "[a]ll initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records."

Test Claim Legislation

Chapter 1213, Statutes of 1991, added section 3547.5 to the Government Code, as follows:

> "Before a public school employer enters into a written agreement with an exclusive representative covering matters within the scope of representation, the major provisions of the agreement, including, but not limited to, the costs that would be incurred by the public school employer under the agreement for the current and subsequent fiscal years, shall be disclosed at a public meeting of the public school employer in a format established for this purpose by the Superintendent of Public Instruction."

Under section 3547.5, school districts must now publicly disclose the major provisions of all collective bargaining agreements before they enter into a written agreement. The purpose of this new legislation is to ensure that the public is aware of the costs associated with the major provisions of the tentative collective bargaining agreement before it becomes binding on the school district.

California Department of Education Management Advisory 92-01[1]

Government Code section 3547.5 requires the Superintendent of Public Instruction to establish a format for the information that is to be publicly disclosed. To this end, the California Department of Education released Management Advisory 92-01 on May 15, 1992. The Advisory specifies the minimum procedures, format, and information required to be disclosed under section 3547.5.

Commission Findings

In order for a statute, which is the subject of a test claim, to impose a reimbursable state mandated program, the statutory language (1) must direct or obligate an activity or task upon local governmental entities, and (2) the required activity or task must be new or it must create an increased or higher level of service over the former required level of service. To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately

[1] California Department of Education Management Advisory 92-01 is referenced in Claimant's initial filing dated December 29, 1997.

prior to the enactment of the test claim legislation.[2] Finally, the newly required activity or increased level of service must be state mandated.[3]

The Commission found that immediately before Government Code section 3547.5 was enacted under Chapter 1231, Statutes of 1991, public school employers were under no obligation to publicly report the major provisions of a collective bargaining agreement *after* discussion with an exclusive representative of an employee group prior to entering into a written agreement.

The Commission found that under prior law school districts were only required to publicly disclose all *initial* proposals for collective bargaining agreements.

The Commission found that Government Code section 3547.5, as added by Chapter 1231, Statutes of 1991, requires school districts to publicly disclose major provisions of a collective bargaining agreement *after* negotiations, but before this agreement becomes binding.

The Commission found that the California Department of Education issued its Management Advisory 92-01, dated May 15, 1992, to establish the public disclosure format for school district compliance with the test claim statute. The Commission found that the Advisory sets forth the minimum procedures, format, and information for school districts to disclose under the new public reporting requirements. Further, the Commission found that the Advisory constitutes an "executive order" under Government Code section 17516[4] and is therefore a part of the test claim.

Conclusion

The Commission concludes that that Government Code section 3547.5, as added by Chapter 1213, Statutes of 1991, and the California Department of Education Management Advisory 92-01, impose a new program or higher level of service upon local school districts and therefore are reimbursable under section 6, article XIII B of the California Constitution and Government Code section 17514.

Further, the Commission concludes that the parameters and guidelines should allow reimbursement for compliance with the minimum procedures, format, and information specified in the California Department of Education's Management Advisory 92-01, as applicable and appropriate under the test claim statute.

---

[2] Both Keith Peterson and Carol Berg disagreed at the hearing regarding the appropriate measurement date. Carol Berg wanted this sentence stricken from the Statement of Decision, while Keith Peterson wished to lodge his formal objection to staff's use of the measurement date. However, both supported adoption of the Statement of Decision.

[3] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835.

[4] Government Code section 17516 provides in relevant part: "Executive order means any order, plan, requirement, rule, or regulation issued by any of the following: (a) The Governor. (b) Any officer or official serving at the pleasure of the Governor. (c) *Any agency, department, board, or commission of state government.*" (Emphasis added.)

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	No. CSM 97-TC-08
Government Code Section 3540 et seq., as added by Chapter 961, Statutes of 1975 et al Government Code Section 3547.5, as added by Chapter 1213, Statutes of 1991, and the California Department of Education Advisory 92-01 And filed on December 29, 1997; By the Alameda County Office of Education, Claimant.	*Consolidation of Collective Bargaining and Collective Bargaining Agreement Disclosure* ADOPTION OF AMENDED PARAMETERS AND GUIDELINES PURSUANT TO GOVERNMENT CODE SECTION 17557 AND CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTIONS 1183.12 AND 1183.2. (Adopted on August 20, 1998)

DECISION

The attached *amended* Parameters and Guidelines of the Commission on State Mandates were hereby adopted in the above-entitled matter.

This Decision shall become effective on August 25, 1998.

Paula Higashi

PAULA HIGASHI, Executive Director

F:\Mandates\1997/97-tc-08/pgorder

Adopted: October 22, 1980
Amendments Adopted: 8/19/81
(Amendments applicable only to claims for costs incurred after June 30, 1981)
Amended: 3/17/83
Amended: 9/29/83
Amended: 12/15/83
Amended: 6/27/85
Amended: 10/20/88
Amended: 7/22/93
Amended: 8/20/98
f:\mandates/1997\97tc08\pgfinal.doc
Document Date: August 21, 1998

CLAIMANT'S PROPOSED CONSOLIDATED PARAMETERS AND GUIDELINES, AS MODIFIED BY STAFF

Chapter 961, Statutes of 1975
Chapter 1213, Statutes of 1991

Collective Bargaining
and
Collective Bargaining Agreement Disclosure

An act to repeal Article 5 (commencing with Section 13080) of Chapter 1 of Division 10 of the Education Code, and to add Chapter 10.7 (commencing with Section 3540) to Division 4 of Title 1 of the Government Code, relating to public educational employment relations, and making an appropriation. This bill, which was operative July 1, 1976, repealed the Winton Act and enacted provisions to meet and negotiate, thereby creating a collective bargaining atmosphere for public school employers. Chapter 1213, Statutes of 1991 added section 3547.5 to the Government Code. Government Code section 3547.5 requires school districts to publicly disclose major provisions of a collective bargaining agreement after negotiations, but before the agreement becomes binding.

A. Operative Date of Mandate

The provisions relating to the creation, certain duties of, and appropriations for the Public Employment Relations Board were operative on January 1, 1976. The provisions relating to the organizational rights of employees, the representational rights of employee organizations, the recognition of exclusive representatives, and related procedures were operative on April 1, 1976. The balance of the added provisions were operative on July 1, 1976.

The provisions relating to Collective Bargaining Agreement Disclosure added by Chapter 1213, Statutes of 1991 were operative on January 1, 1992. The California Department of

Education issued Management Advisory 92-01 dated May 15, 1992, to establish the public disclosure format for school district compliance with the test claim statute.

B. Period of Claim

Only costs incurred after January 1, 1978 may be claimed. The initial claim should have included all costs incurred for that portion of the fiscal year from January 1, 1978, to June 30, 1978.

Pursuant to language included in the 1980-81 budget, claims shall no longer be accepted for this period. All subsequent fiscal year claims should be filed with the State Controller's Office for processing.

The test claim on Chapter 1213, Statutes of 1991 was filed with the Commission on December 29, 1997. Accordingly, the period of reimbursement for the provisions relating to disclosure begins July 1, 1996. Only disclosure costs incurred after July 1, 1996 may be claimed.

C. Mandated Cost

Public school employers have incurred costs by complying with the requirements of Section 3540 through 3549.1 established by Chapter 961, Statutes of 1975. In addition, some costs have been incurred as a result of compliance with regulations promulgated by the Public Employment Relations Board (PERB). Since these activity costs (referred to collectively as "Rodda Act" activities and costs in this document), in many respects, simply implement the original legislation, it is intended that these parameters and guidelines have embodied those regulations or actions taken by PERB prior to December 31, 1978.

D. County Superintendent of Schools Filing

If the County Superintendent of Schools files a claim on behalf of more than one school district, the costs of the individual school district must be shown separately.

E. Governing Authority

The costs for salaries and expenses of the governing authority, for example the School Superintendent and Governing Board, are not reimbursable. These are costs of general government as described by the federal guideline entitled "Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government," ASMB C-10.

F. Certification

The following certification must accompany all claims:

I DO HEREBY CERTIFY:

THAT Section 1090 to 1096, inclusive, of the Government Code and other applicable provisions of the law have been complied with; and

THAT I am the person authorized by the local agency to file claim for funds with the State of California.

_____ Signature of Authorized Representative

Date

_____ Title Telephone

Number

_____

G. Claim Components (Reimbursable Costs)

Reimbursable activities mandated by Chapter 961, Statutes of 1975 and Chapter 1213, Statutes of 1991 are grouped into seven components, G1 through G7. The cost of activities grouped in components G1, G2, and G3 are subject to offset by the historic cost of similar Winton Act activities as described in H2.

1. Determination of appropriate bargaining units for representation and determination of the exclusive representatives.

   a. Unit Determination: Explain the process for determining the composition of the certificated employee council under the Winton Act, and the process for determining appropriate bargaining units including the determination of management, supervisory and confidential employees, under Chapter 961, Statutes of 1975, if such activities were performed during the fiscal year being claimed.

   b. Determination of the Exclusive Representative: Costs may include receipt and posting of the representation and decertification notices and, if necessary, adjudication of such matters before the PERB.

c. Show the actual increased costs including salaries and benefits for employer representatives and/or necessary costs for contracted services for the following functions:

(1) Development of proposed lists for unit determination hearings if done during the fiscal year being claimed. Salaries and benefits must be shown as described in Item H3.

(2) Representation of the public school employer at PERB hearings to determine bargaining units and the exclusive representative. Actual preparation time will be reimbursed. Salaries and benefits must be shown as described in Item H3.

(3) If contracted services are used for either (a) or (b) above, contract invoices must be submitted with the claim. Contract costs must be shown as described in Item H5.

(4) Indicate the cost of substitutes for release time for employer and exclusive bargaining unit witnesses who testify at PERB hearings. The job classification of the witnesses and the date they were absent must also be submitted. Release time for employee witnesses asked to attend the PERB hearing by bargaining units will not be reimbursed.

(5) Identify the travel costs for employer representatives to any PERB hearing. Reimbursement shall reflect the rate specified by the regulations governing employees of the local public school employer.

(6) Cost of preparation for one transcript per PERB hearing will be reimbursed.

2. Elections and decertification elections of unit representatives are reimbursable in the event the Public Employment Relations Board determines that a question of representation exists and orders an election held by secret ballot.

a. Submit with your claim any Public Employment Relations Board agreements or orders which state how the election must be held.

b. If a precinct voting list was required by PERB, indicate the cost of its development. Salaries and benefits must be shown as described in Item H3.

c. The salary and benefits of a school employer representative, if required by PERB for time spent observing the counting of ballots, will be reimbursed. The representatives' salary must be shown as described in Item H3.

3. Negotiations: Reimbursable functions include -- receipt of exclusive representative's initial contract proposal, holding of public hearings, providing a reasonable number of copies of the employer's proposed contract to the public, development and presentation of the initial district contract proposal, negotiation of the contract, reproduction and distribution of the final contract agreement.

a. Show the costs of salaries and benefits for employer representatives participating in negotiations. Contracted services will be reimbursed. Costs for maximum of five public school employer representatives per unit, per negotiation session will be reimbursed. Salaries and benefits must be shown as described on Page 7, Item H3.

b. Show the costs of salaries and benefits for employer representatives and employees participating in negotiation planning sessions. Contracted services for employer representatives will be reimbursed. Salaries and benefits must be shown as described in Item H3.

c. Indicate the cost of substitutes for release time of exclusive bargaining unit representatives during negotiations. Give the job classification of the bargaining unit representative that required a substitute and dates the substitute worked. Substitute costs for a maximum of five representatives per unit, per negotiation session will be reimbursed. The salaries of union representatives are not reimbursable.

d. Reasonable costs of reproduction for a copy of the initial contract proposal and final contract, which is applicable and distributed to each employer representative (i.e. supervisory, management, confidential) and a reasonable number of copies for public information will be reimbursed. Provide detail of costs and/or include invoices. Costs for copies of a final contract provided to collective bargaining unit members are not reimbursable.

e. If contract services are used for a. and/or b. above, contract invoices must be submitted. Contract costs must be shown as described in Item H5.

f. A list showing the dates of all negotiation sessions held during the fiscal year being claimed must be submitted.

4. Impasse Proceedings

a. Mediation

(1) Costs for salaries and benefits for employer representative personnel are reimbursable. Contracted services will be reimbursed. Costs for a maximum of five public school employer representatives per mediation session will be reimbursed. Salaries and benefits must be shown as described in Item H3.

(2) Indicate the costs of substitutes for the release time of exclusive bargaining unit representatives during impasse proceedings. The job classification of the employee witnesses and the date they were absent shall be indicated. Costs for a maximum of five representatives per mediation session will be reimbursed.

(3) Renting of facilities will be reimbursed.

(4) Costs of the mediator will not be reimbursed.

(5) If contract services are used under 1, contract invoices must be submitted with the claim. Contract costs must be shown as described in Item H5.

b. Fact-finding publication of the findings of the fact-finding panel. (To the extent fact-finding was required under the Winton Act during the 1974-75 fiscal year, costs are not reimbursable.)

(1) All costs of the school employer panel representative shall be reimbursed. Salaries and benefits must be shown as described in Item H3.

(2) Fifty percent of the costs mutually incurred by the fact-finding panel shall be reimbursed. This may include substitutes for release time of witnesses during fact-finding proceedings, and the rental of facilities required by the panel.

(3) Special costs imposed on the public school employer for the development of unique data required by a fact-finding panel will be reimbursed. Describe the special costs and explain why this data would not have been required by a fact-finding panel under the Winton Act. Salaries and benefits must be shown as described in Item H3.

5. Collective Bargaining Agreement Disclosure

Disclosure of collective bargaining agreement *after* negotiation and *before* adoption by governing body, as required by Government Code section 3547.5 and California State Department of Education Management Advisory 92-01 (or subsequent replacement), attached to the amended Parameters and Guidelines. Procedures or formats which exceed those or which duplicate activities required under any other statute or executive order are not reimbursable under this item.

a. Prepare the disclosure forms and documents, as specified.

b. Distribute a copy of the disclosure forms and documents, to board members, along with a copy of the proposed agreement, as specified.

c. Make a copy of the disclosure forms and documents and of the proposed agreement available to the public, prior to the day of the public meeting, as specified.

d. Training employer's personnel on preparation of the disclosure forms and documents, as specified.

e. Supplies and materials necessary to prepare the disclosure forms and documents, as specified.

For 5. a., b., and c., list the date(s) of the public hearing(s) at which the major provisions of the agreement were disclosed in accordance with the requirements of Government Code section 3547.5 and Department of Education Advisory 92-01 (or subsequent replacement).

6. Contract administration and adjudication of contract disputes either by arbitration or litigation. Reimbursable functions include grievances and administration and enforcement of the contract.

a. Salaries and benefits of employer personnel involved in adjudication of contract disputes. Contracted services will be reimbursed. Salaries and benefits must be shown as described in Item H3.

b. Indicate substitutes necessary for release time of the representatives of an exclusive bargaining unit during adjudication of contract disputes. The job classification of the employee witnesses and the dates they were absent shall also be indicated.

c. Reasonable costs incurred for a reasonable number of training sessions held for supervisory and management personnel on contract administration/interpretation of the negotiated contract are reimbursable. Contract interpretations at staff meetings are not reimbursable. Personal development and informational programs, i.e., classes, conferences, seminars, workshops, and time spent by employees attending such meetings are not reimbursable. Similarly, purchases of books and subscriptions for personal development and information purposes are not

reimbursable. Salaries and benefits must be shown as described in Item H3.

d. The cost of one transcript per hearing will be reimbursed.

e. Reasonable public school employer costs associated with a contract dispute which is litigated are reimbursable, as follows:

1. Reasonable public school employer costs associated with issues of contract disputes which are presented before PERB are reimbursable.

2. Reasonable public school employer cost of litigation as a defendant in the court suit involving contract disputes may be reimbursable.

3. Where the public school employer is the plaintiff in a court suit to appeal a PERB ruling, costs are reimbursable only if the public school employer is the prevailing party (after all appeals, final judgment).

4. No reimbursement is allowed where the public school employer has filed action directly with the courts without first submitting the dispute to PERB, if required.

5. No reimbursement shall be provided for filing of amicus curiae briefs.

f. Expert witness fees will be reimbursed if the witness is called by the public school employer.

g. Reasonable reproduction costs for copies of a new contract which is required as a result of a dispute will be reimbursed.

h. If contract services are used under "a" above, copies of contract invoices must be submitted with your claim. Contract costs must be shown as described in Item H5.

i. Public school employer's portion of arbitrators' fees for adjudicating grievances, representing 50% of costs, will be reimbursed.

7. Unfair labor practice adjudication process and public notice complaints.

a. Show the actual costs for salaries and benefits of employer representatives. Services contracted by the public school employer are reimbursable. Salaries and benefits must be shown as described in Item H3.

b. Indicate cost of substitutes for release time for representatives of exclusive bargaining units during adjudication of unfair practice charges.

c. The cost of one transcript per PERB hearing will be reimbursed.

d. Reasonable reproduction costs will be reimbursed.

e. Expert witness fees will be reimbursed if the witness is called by the public school employer.

f. If contract services are used under "a" above, contract invoices must be submitted. Contract costs must be shown as described in Item H5.

g. No reimbursement for an appeal of an unfair labor practice decision shall be allowed where the Public Employee Relations Board is the prevailing party.

h. No reimbursement for filing of amicus curiae briefs shall be allowed.

H. Supporting Data for Claims--Report Format for Submission of Claim.

1. Description of the Activity: Follow the outline of the claim components. Cost must be shown separately by component activity. Supply workload data requested as part of the description to support the level of costs claimed. The selection of appropriate statistics is the responsibility of the claimant.

2. Quantify "Increased" Costs: Public school employers will be reimbursed for the "increased costs" incurred as a result of compliance with the mandate.

a. For component activities G1, G2, and G3:

1. Determination of the "increased costs" for each of these three components requires the costs of current year Rodda Act activities to be offset [reduced] by the cost of the base-year Winton Act activities. The Winton Act base-year is generally fiscal year 1974-75.

Winton Act base-year costs are adjusted by the Implicit Price Deflator prior to offset against the current year Rodda Act costs for these three components. The Implicit Price Deflator shall be listed in the annual claiming instructions of the State Controller.

2. The cost of a claimant's current year Rodda Act activities are offset [reduced] by the cost of the base-year Winton Act activities either: by matching each component, when claimants can provide sufficient documentation to segregate each component of the Winton Act base-year activity costs; or, by combining all three components when claimants

cannot satisfactorily segregate each component of Winton Act base-year costs.

b. For component activities G4, G6, and G7:

All allowable activity costs for these three Rodda Act components are "increased costs" since there were no similar activities required by the Winton Act; therefore, there is no Winton Act base-year offset to be calculated.

BASE YEAR	ADJUSTMENT	
1974-1975	1.490	1979-80 FY
"	1.560	1980-81 FY
"	1.697	1981-82 FY
"	1.777	1982-83 FY
"	1.884	1983-84 FY

3. Salary and Employees' Benefits: Show the classification of the employees involved, amount of time spent, and their hourly rate. The worksheet used to compute the hourly salary rate must be submitted with your claim. Benefits are reimbursable. Actual benefit percent must be itemized. If no itemization is submitted, 21 percent must be used for computation of claim costs. Identify the classification of employees committed to functions required under the Winton Act and those required by Chapter 961, Statutes of 1975.

4. Services and Supplies: Only expenditures which can be identified as a direct cost as a result of the mandate can be claimed.

5. Professional and Consultant Services: Separately show the name of professionals or consultants, specify the functions the consultants performed relative to the mandate, length of appointment, and the itemized costs for such services. Invoices must be submitted as supporting documentation with your claim. The maximum reimbursable fee for contracted services is $100 per hour. Annual retainer fees shall be no greater than $100 per hour. Reasonable expenses will also be paid as identified on the monthly billings of consultants. However, travel expenses for consultants and experts (including attorneys) hired by the claimant shall not be reimbursed in an amount higher than that received by State employees, as established under Title 2, Div. 2, Section 700ff, CAC.

6. Allowable Overhead Cost: School districts must use the Form J-380 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

County Offices of Education must use the Form J-580 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

Community College Districts must use one of the following three alternatives:

- A Federally-approved rate based on OMB Circular A-21;
- The State Controller's FAM-29C which uses the CCFS-311; or
- Seven percent (7%).

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment and business address is 1300 I Street, Suite 950, Sacramento, California 95814.

On August 24, 1998, I served the attached *amended* Parameters and Guidelines for test claim CSM-*97-TC-08, Collective Bargaining and Collective Bargaining Agreement Disclosure* of the Commission on State Mandates by placing a true copy thereof in an envelope addressed to each of the persons listed on the attached mailing list, and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully prepaid.

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 August 24, 1998, at Sacramento, California.

CHRISTINE A. WEIN

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:	Case No.: 00-TC-17/01-TC-14
Government Code Sections 3543, 3546, and 3546.3; Statutes 1980, Chapter 816; Statutes 2000, Chapter 893; Statutes 2001, Chapter 805; California Code of Regulations, Title 8, Sections 34030 and 34055 Filed on June 27, 2001, and Amended on May 15, 2002, by Clovis Unified School District, Claimant.	*Agency Fee Arrangements* 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 December 9, 2005*)

STATEMENT OF DECISION

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

Paula Higashi — Dec. 14, 2005

PAULA HIGASHI, Executive Director — Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM:	Case No.: 00-TC-17/01-TC-14
Government Code Sections 3543, 3546, and 3546.3; Statutes 1980, Chapter 816; Statutes 2000, Chapter 893; Statutes 2001, Chapter 805; California Code of Regulations, Title 8, Sections 34030 and 34055 Filed on June 27, 2001, and Amended on May 15, 2002, by Clovis Unified School District, Claimant.	*Agency Fee Arrangements* 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 December 9, 2005*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on December 9, 2005. Mr. Keith Petersen appeared on behalf of Clovis Unified School District, Claimant. Ms. Susan Geanacou, Senior Staff Counsel, 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 to approve this test claim at the hearing by a vote of 6 to 0.

The Commission finds that Government Code section 3546, subdivisions (a) and (f), and California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose a new program or higher level of service for K-14 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 17514, for the following new activities:

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Gov. Code, § 3546, subd. (a).)

- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit. (Gov. Code, § 3546, subd. (f).)
- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed. (Cal. Code Regs., tit. 8, §§ 34030, subd. (a), and 34055, subd. (a).)

BACKGROUND

The *Agency Fee Arrangements* test claim, filed by Clovis Unified School District, addresses issues within the collective bargaining process and employer-employee relations in California's K-14 public school systems. Specifically, the test claim legislation focuses on the payment of fees by non-union member (or "fair share") employees to exclusive representative organizations. In 1975, the Legislature enacted the Educational Employment Relations Act (EERA).[1] In doing so, the Legislature sought to "promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California."[2] This policy aimed at furthering the public interest in "maintaining the continuity and quality of educational services."[3]

The EERA imposes on school districts the duty to "meet and negotiate" with an employee organization selected as the exclusive representative of an employee bargaining unit on matters within the scope of representation.[4] The scope of representation is limited to "matters relating to wages, hours of employment, and other terms and conditions of employment."[5] The EERA explicitly includes "organizational security" within the scope of representation.[6]

---

[1] Statutes 1975, chapter 961. Pursuant to Government Code section 3541.3, subdivision (g), the Public Employment Relations Board (PERB) is vested with the authority to "adopt... rules and regulations to carry out the provisions and effectuate the purposes and policies" of the EERA. (Government Code sections 3540 et seq.). Accordingly, in Code of Regulations, title 8, section 32001, subdivision (c), PERB has declared that "'[s]chool district' as used in the EERA means a school district of any kind or class, including any public community college district, within the state").

[2] Government Code section 3540.

[3] *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 11.

[4] Government Code section 3543.3.

[5] Government Code section 3543.2.

[6] Former Government Code section 3546 provided that "organizational security... shall be within the scope of representation." (Stats. 1975, ch. 961, § 2). In 2000, former Government Code section 3546 was repealed (Stats. 2000, ch. 893), but similar language was added via the same bill to Government Code section 3540.1, subdivision (i), which now provides that

Government Code section 3540.1, subdivision (i), provides two definitions for "organizational security." The first describes organizational security as:

> [a]n arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him or her, as a condition of continued employment, if he or she does join, to maintain his or her membership in good standing for the duration of the written agreement...

Thus, such an arrangement would provide that once an employee organization has been selected by an employee bargaining unit as exclusive representative, each employee has the option of either joining or not joining the employee organization.

Alternatively, the second definition describes organizational security as:

> [a]n arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the agreement...

This type of organizational security arrangement dictates that an employee in a bargaining unit for which an employee organization has been selected as exclusive representative *must* either (a) join the employee organization, or (b) pay such organization a service fee or agency fee arrangement. The EERA explicitly declares that the "employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit."[7]

Under prior law, organizational security arrangements were subject to the collective bargaining process. Statutes 2000, chapter 893 created a statutory organizational security arrangement -- removing the basic issue from the bargaining process.

Claimant's Position

Claimant, Clovis Unified School District, filed a test claim on June 27, 2001, alleging Government Code sections 3543 and 3546, as amended by Statutes 2000, chapter 893, impose reimbursable state-mandated activities on K-14 school districts for activities including establishing and implementing payroll procedures for collecting fair share service fees, and remitting the fees to the certified employee organization. Claimant alleges a new activity to: "Draft, approve and distribute an appropriate and neutral notice to existing non-member employees and new employees, which explains the additional payroll deduction for 'fair share services fees' for non-member employees of a certified employee organization."

Additionally, claimant alleges that Government Code section 3546.3 as added by Statutes 1980, chapter 816, requires school districts to "Establish and implement procedures to determine which employees claim a conscientious objection to the withholding of 'fair share services fees,'" and

---

"'Organizational security' is within the scope of representation... ."

[7] Government Code section 3544.9.

establish and implement payroll procedures to prevent automatic deductions from the wages of such conscientious objectors.

Claimant also alleges the California Code of Regulations, title 8, sections 34030 and 34055, requires K-14 school districts, within 20 days of a filed petition to rescind or reinstate the collective bargaining agreement, file with the regional office of the Public Employment Relations Board (PERB) an alphabetical list containing the names and job titles or classifications of the persons employed in the unit as of the last date of the payroll period immediately preceding the date the petition, and establish new payroll procedures, as needed.

On May 15, 2002, claimant filed a test claim amendment alleging the following reimbursable state-mandated activities from amendments by Statutes 2001, chapter 805:

- Establish procedures and thereafter implement such procedures to verify, at least annually, that payments to nonreligious, nonlabor charitable organizations have been made by employees who have claimed conscientious objections pursuant to Government Code section 3546.3.
- Adjust payroll withholdings for rebates or withholding reductions for that portion of fair share service fees that are not germane to the employee organization function as the exclusive bargaining representative when so determined pursuant to regulations adopted by PERB, pursuant to Government Code section 3546, subdivision (a).
- Take any and all necessary actions, when necessary, to recover reasonable legal fees, legal costs and settlement or judgment liabilities from the recognized employee organization, arising from any court or administrative action relating to the school district's compliance with the section pursuant to Government Code section 3546, subdivision (e);
- Provide the exclusive representative of a public school employee a list of home addresses for each employee of a bargaining unit, regardless of when the employees commenced employment, and periodically update and correct the list to reflect changes of address, additions for new employees and deletions of former employees, pursuant to Government Code section 3546, subdivision (f).

Claimant's complete, detailed allegations are found in the Amendment to the Test Claim Filing, pages five through nine, received May 15, 2002.

Claimant filed comments on the draft the Commission analysis on October 31, 2005. The substantive comments will be summarized in the analysis below.

Department of Finance's Position

Department of Finance filed comments on August 3, 2001, and July 30, 2002, addressing the allegations stated in the test claim and subsequent amendment. Regarding claimant's allegations that the test claim legislation mandates a variety of activities involving the establishment and maintenance of payroll procedures to account for deducting fair share service fees and transmitting those fees to the employee organization, Department of Finance contends that public school employers who did not negotiate and implement organizational security arrangements prior to the enactment of Statutes 2000, chapter 893 are justified in claiming mandated costs.

However, those employers who did negotiate and implement organizational security arrangements prior to the enactment of Statutes 2000, chapter 893 are not justified in making similar claims for reimbursement. Department of Finance argues that those employers who did negotiate and implement such arrangements prior to the 2000 amendments "would presumably have already established" such payroll procedures and those employers should not "be reimbursed for costs they voluntarily incurred."

Department of Finance has similar arguments regarding claimant's allegations on costs incurred in complying with PERB's regulations in the event a petition to rescind or reinstate an organizational security arrangement is filed.

Regarding claimant's allegation that it must draft notices explaining the fee deductions to employees paying fair share service fees, Department of Finance argues that no such mandate exists. Department of Finance relies on California Code of Regulations, title 8, section 32992 which provides that each employee "required to pay an agency fee shall receive written notice from the exclusive representative" regarding the fee deduction.

Likewise, responding to claimant's allegation that it must incur costs in taking the necessary actions in recovering legal fees from an exclusive representative under Government Code section 3546, subdivision (e), Department of Finance asserts that the subdivision, by its plain language, does not impose any duties on the public school employer.

Department of Finance's other comments and arguments will be addressed in the analysis below, where pertinent.[8]

---

[8] Claimant argues that the Department of Finance's comments are "incompetent" and should be stricken from the record since they do not comply with section 1183.02, subdivision (d), of the Commission's regulations. That regulation requires written responses to be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge, information, or belief. The claimant contends that the Department of Finance's response "is signed without certification" and the declaration attached to the response "simply stipulate[s] to the accuracy of the citations of law in the test claim." (Claimant's comments to draft the Commission analysis, page 1-2.)

Determining whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution is a pure question of law. (*City of Jose, supra,* 45 Cal.App.4th at p. 1817; *County of San Diego, supra,* 15 Cal.4th at p. 109). Thus, any factual allegations raised by a party, including the Department of Finance, regarding how a program is implemented is not relied upon by the Commission at the test claim phase when recommending whether an entity is entitled to reimbursement under article XIII B, section 6. The Department's response contains comments on whether the Commission should approve this test claim and is, therefore, not stricken from the administrative record.

California Community Colleges Chancellor's Office Position

The California Community Colleges Chancellor's Office ("Chancellor's Office") filed comments regarding this test claim on July 30, 2001. The Chancellor's Office begins by noting that community colleges are subject to PERB's jurisdiction. Secondly, looking to the statutes regarding organizational security, the Chancellor's Office believes that "the provisions of Government Code [sections] 3540.1 and 3546 and the related implementing regulations in the Code of Regulations impose a mandate of specific tasks for community college district the Commission."

The Chancellor's Office concludes by stating that no funds have been appropriated for costs incurred in performing these activities, and that none of the provisions of Government Code section 17556 apply to community colleges "complying with the mandate."

FINDINGS

The courts have found that article XIII B, section 6, of the California Constitution[9] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[10] "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."[11] 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.[12] 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.[13]

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

---

[9] Article XIII B, section 6, subdivision (a), provides: (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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

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

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

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

policy, but does not apply generally to all residents and entities in the state.[14] 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.[15] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[16]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[17]

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.[18] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[19]

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

Government Code Section 3543:

Government Code section 3543 was rewritten by Statutes 2000, chapter 893. Statutes 2001, chapter 805 amended one sentence, as indicated by underline below:

> (a) Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. If the exclusive representative of a unit provides notification, as specified by subdivision (a) of Section 3546, public school employees who are in a unit for which an exclusive representative has been selected, shall be required, as a condition of continued employment, to join the recognized employee organization or to pay the organization a fair share services fee, as required by Section 3546. If a majority

---

[14] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

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

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

[17] *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.

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

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

of the members of a bargaining unit rescind that arrangement, either of the following options shall be applicable:

(1) The recognized employee organization may petition for the reinstatement of the arrangement described in subdivision (a) of Section 3546 pursuant to the procedures in paragraph (2) of subdivision (d) of Section 3546.

(2) The employees may negotiate either of the two forms of organizational security described in subdivision (i) of Section 3540.1.

(b) Any employee may at any time present grievances to his or her employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

Before the amendment in 2000, prior law provided: "Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer." Current subdivision (b) is identical to prior law.

In order to be subject to article XIII B, section 6, of the California Constitution, the test claim legislation must impose a state-mandated activity on a local agency or school district.[20] Courts have adopted a "strict construction" interpretation of article XIII B, section 6.[21] Consistent with this narrow interpretation, the term "mandate" has been construed according to its commonly understood meaning as an "order" or "command."[22] Thus, the test claim legislation must require a local government entity to perform an activity in order to fall within the scope of article XIII B, section 6.

According to the well-settled rules of statutory construction, an examination of a statute claimed to constitute a reimbursable state mandate begins with the plain language of the statute, and "where the language is clear there is no room for interpretation."[23] Where the Legislature has not found it appropriate to include express requirements in a statute, it is inappropriate for a court

---

[20] *Kern High School Dist., supra,* 30 Cal.4th 727, 740.

[21] *City of San Jose, supra,* 45 Cal.App.4th 1802, 1816-17.

[22] *Long Beach Unified School Dist., supra,* 225 Cal.App.3d 155, 174.

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

to write such requirements into the statute.[24] The courts have noted that "[w]e cannot... read a mandate into language which is plainly discretionary."[25]

Beginning with the plain language of section 3543, subdivision (a), there is no activity imposed on the public school *employer*. While public school *employees* "shall be required" to either join the employee organization selected by the unit as exclusive representative or to pay such organization a service fee, there is nothing in the language of section 3543, subdivision (a), imposing upon the public school employer the obligation to perform any activities.

Government Code section 3543, subdivision (a), by its plain language, fails to impose any activities on school districts. Section 3543, subdivision (b), contains the same language found in former section 3543 and therefore is not new, nor does the plain language of subdivision (b) impose any duties upon school districts. Accordingly, the Commission finds that Government Code section 3543 is not subject to article XIII B, section 6, of the California Constitution.

Government Code Section 3546.3:

Government Code section 3546.3 was added by Statutes 1980, chapter 816, as follows:

> Notwithstanding subdivision (i) of Section 3540.1, Section 3546, or any other provision of this chapter, any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to join, maintain membership in, or financially support any employee organization as a condition of employment; except that such employee may be required, in lieu of a service fee, to pay sums equal to such service fee either to a nonreligious, nonlabor organization, charitable fund exempt from taxation under Section 501(c) (3) of Title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in the organizational security arrangement, or if the arrangement fails to designate such funds, then to any such fund chosen by the employee. Either the employee organization or the public school employer may require that proof of such payments be made on an annual basis to the public school employer as a condition of continued exemption from the requirement of financial support to the recognized employee organization. If such employee who holds conscientious objections pursuant to this section requests the employee organization to use the grievance procedure or arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using such procedure.

Claimant asserts that section 3546.3 requires school districts to establish and maintain procedures for determining which employees may claim a conscientious objection, establish procedures to ensure that fair share service fee deductions are not made from the wages of those employees claiming such objections, and to establish procedures to ensure, at least annually, that those employees are making payments to charitable organizations in lieu of service fee deductions. Claimant asserts that if section 3546.3 was determined to not impose any state-

---

[24] *Whitcomb Hotel, Inc. v. California Employment Commission* (1944) 24 Cal.App.2d 753, 757.

[25] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816.

mandated activities on school districts, then it must also be interpreted that "there is no requirement for religious objectors to pay any sum of money to either their employee organization or the specified alternative approved organizations."[26]

Department of Finance, in its August 3, 2001 comments, argues that school districts that negotiated and implemented organizational security arrangements prior to the enactment of the 2000 amendments are not justified in claiming mandated costs, but that school districts that did not negotiate such arrangements are justified in claiming mandated costs. Department of Finance's position is grounded in the discretionary nature of the collective bargaining process, and that employers who negotiated organizational security arrangements prior to the enactment of the 2000 amendments should not "be reimbursed for costs they voluntarily incurred."[27]

For the reasons below, the Commission finds that Government Code section 3546.3 is not subject to article XIII B, section 6, of the California Constitution because section 3546.3 does not impose any state-mandated activities on school districts.

In order to be subject to article XIII B, section 6, of the California Constitution, the test claim legislation must impose a state-mandated activity on a local agency or school district.[28] Courts have adopted a "strict construction" interpretation of article XIII B, section 6.[29] Consistent with this narrow interpretation, the term "mandate" has been construed according to its commonly understood meaning as an "order" or "command."[30] Thus, the test claim legislation must require a local government entity to perform an activity in order to fall within the scope of article XIII B, section 6.

According to the well-settled rules of statutory construction, an examination of a statute claimed to constitute a reimbursable state mandate begins with the plain language of the statute, and "where the language is clear there is no room for interpretation."[31] Where the Legislature has not found it appropriate to include express requirements in a statute, it is inappropriate for a court to write such requirements into the statute.[32] The courts have noted that "[w]e cannot... read a mandate into language which is plainly discretionary."[33]

Just as discussed above regarding Government Code section 3543, the plain language of Government Code section 3546.3 is also discretionary. Section 3546.3 states only that an employee holding a conscientious objection to joining or financially supporting an employee organization "*may* be required" to make payments to a nonreligious, nonlabor, charitable organization in lieu of paying a fair share service fee to such organization. (Emphasis added).

---

[26] Claimant's comments to draft the Commission analysis, page 3.

[27] Department of Finance, August 3, 2001 Comments, page 3.

[28] *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 740.

[29] *City of San Jose*, *supra*, 45 Cal.App.4th 1802, 1816-17.

[30] *Long Beach Unified School Dist.*, *supra*, 225 Cal.App.3d 155, 174.

[31] *City of Merced*, *supra*, 153 Cal.App.3d 777.

[32] *Whitcomb Hotel, Inc.*, *supra*, 24 Cal.App.2d 753, 757.

[33] *City of San Jose*, *supra*, 45 Cal.App.4th 1802, 1816.

Section 3546.3 does not impose any obligation on school districts. Section 3546.3 provides that "*[e]ither* the employee organization *or* the public school employer *may* require that proof of such payments be made on an annual basis." (Emphasis added). Section 3546.3, by its plain meaning, does not require or command school districts to perform an activity. Accordingly, the Commission finds that Government Code section 3546.3 is not subject to article XIII B, section 6, of the California Constitution.

Remaining Test Claim Legislation:

In order for the remaining test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." Government Code section 3546 provides, in part, that "the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization," and that "[t]he employer of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit... ." California Code of Regulations, title 8, sections 34030 and 34055 require that a school district employer file an alphabetical list containing the names and job titles or classifications of the persons employed in the unit within 20 days after a petition is filed to rescind or reinstate an organizational security arrangement.

In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[34] The court has held that only one of these findings is necessary.[35]

Department of Finance asserts that Government Code section 3546, subdivision (a), as it relates to rebates and reductions to the fair share service fee do not constitute a program because it neither provides a service to the public nor qualifies as a function unique to governmental entities. Department of Finance claims that the United States Supreme Court's holding in *Communication Workers v. Beck* (1988) 487 U.S. 735, which addresses fair share service fees, applies to both private and public employees. The Court in *Beck* interpreted and applied the provisions of the National Labor Relations Act (NLRA). However, the NLRA by its own terms expressly excludes public employees from its coverage. Section 2, subdivision (2), of the NLRA (29 U.S.C. § 152(2)) provides, in pertinent part, that "[t]he term 'employer' ... shall not include... any State or political subdivision thereof..." Furthermore, section 2, subdivision (3), of the NLRA (29 U.S.C. § 152(3)) provides that "[t]he term 'employee' ... shall not include any individual employed... by any... person who is not an employer as herein defined."[36]

---

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

[35] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

[36] See *Carmen v. San Francisco Unified School District* (1997) 982 F.Supp. 1396, 1409 (concluding that "school districts are considered 'political subdivisions' of the State of California within the meaning of 29 U.S.C. § 152(2), and therefore are exempt from coverage under the NLRA").

The Commission finds that Government Code section 3546 and California Code of Regulations, title 8, sections 34030 and 34055, impose a program within the meaning of article XIII B, section 6 of the California Constitution under the second test, to the extent the test claim legislation requires school districts to engage in administrative activities solely applicable to public school administration. The test claim legislation imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state.

Accordingly, the Commission finds that the remaining test claim legislation constitutes a "program" and, thus, may be subject to subvention pursuant to article XIII B, section 6 of the California Constitution if the legislation also imposes a new program or higher level of service, and costs mandated by the state.

Issue 2: Does the remaining test claim legislation impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Test claim legislation imposes a new program or higher level of service within an existing program when it compels a local agency or school district to perform activities not previously required.[37] The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. Accordingly, "it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in existing programs."[38] A statute or executive order imposes a reimbursable "higher level of service" when the statute or executive order, as compared to the legal requirements in effect immediately before the enactment of the test claim legislation, increases the actual level of governmental service provided in the existing program.[39]

Government Code Section 3546:

Government Code section 3546, as enacted by Statutes 2000, chapter 893, and amended by Statutes 2001, chapter 805,[40] follows:

> (a) Notwithstanding any other provision of law, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, *the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization.* Thereafter, the employee shall, as a condition of continued employment, be required either to join the recognized employee organization or

---

[37] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 836.

[38] *County of Los Angeles, supra*, 43 Cal.3d 46, 56; *San Diego Unified School District, supra*, 33 Cal.4th 859, 874.

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

[40] Reworded subdivision (a), and added subdivisions (e) and (f).

pay the fair share service fee. The amount of the fee shall not exceed the dues that are payable by members of the employee organization, and shall cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative. Agency fee payers shall have the right, pursuant to regulations adopted by the Public Employment Relations Board, to receive a rebate or fee reduction upon request, of that portion of their fee that is not devoted to the cost of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative.

(b) The costs covered by the fee under this section may include, but shall not necessarily be limited to, the cost of lobbying activities designed to foster collective bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the employer.

(c) The arrangement described in subdivision (a) shall remain in effect unless it is rescinded pursuant to subdivision (d). The employer shall remain neutral, and shall not participate in any election conducted under this section unless required to do so by the board.

(d)(1) The arrangement described in subdivision (a) may be rescinded by a majority vote of all the employees in the negotiating unit subject to that arrangement, if a request for a vote is supported by a petition containing 30 percent of the employees in the negotiating unit, the signatures are obtained in one academic year. There shall not be more than one vote taken during the term of any collective bargaining agreement in effect on or after January 1, 2001.

(2) If the arrangement described in subdivision (a) is rescinded pursuant to paragraph (1), a majority of all employees in the negotiating unit may request that the arrangement be reinstated. That request shall be submitted to the board along with a petition containing the signatures of at least 30 percent of the employees in the negotiating unit. The vote shall be conducted at the worksite by secret ballot, and shall be conducted no sooner than one year after the rescission of the arrangement under this subdivision.

(3) If the board determines that the appropriate number of signatures have been collected, it shall conduct the vote to rescind or reinstate in a manner that it shall prescribe in accordance with this subdivision.

(4) The cost of conducting an election under this subdivision to reinstate the organizational security arrangement shall be borne by the petitioning party and the cost of conducting an election to rescind the arrangement shall be borne by the board.

(e) The recognized employee organization shall indemnify and hold the public school employer harmless against any reasonable legal fees, legal costs, and settlement or judgment liability arising from any court or administrative action

relating to the school district's compliance with this section. The recognized employee organization shall have the exclusive right to determine whether any such action or proceeding shall or shall not be compromised, resisted, defended, tried, or appealed. This indemnification and hold harmless duty shall not apply to actions related to compliance with this section brought by the exclusive representative of district employees against the public school employer.

(f) *The employer of a public school employee shall* provide the exclusive representative of a public employee with the home address of each member of a bargaining unit, regardless of when that employee commences employment, so that the exclusive representative can comply with the notification requirements set forth by the United States Supreme Court in *Chicago Teachers Union v. Hudson* (1986) 89 L.Ed. 2d 232. (Emphasis added.)

The test claim allegations regarding Government Code section 3546 will be analyzed in order of subdivision below.

Government Code Section 3546, Subdivision (a):

Claimant alleges that subdivision (a) of Government Code section 3546 constitutes a reimbursable state mandate in two respects by requiring school districts to (1) establish, implement, maintain and update payroll procedures to determine those employees from whose paychecks service fees must be deducted, and to make such deductions and transmit those fees to the employee organization; (2) "adjust payroll withholdings for rebates or withholding reductions" pursuant to the rebate or fee reduction provision of subdivision (a); and (3) provide notice to employees explaining the payroll deduction for the fair share service fees.

Department of Finance agrees that subdivision (a) requires school districts to deduct service fees from the wages of its employees, and then transmit those fees to the employee organization. However, Department of Finance also argues that those school districts that did establish organizational security arrangements prior to the enactment of the test claim legislation are not justified in claiming any mandated costs because those districts voluntarily chose to incur such costs, and so nothing new is mandated upon them by the test claim legislation. The Commission disagrees. Government Code section 17565 clearly provides that: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

Department of Finance also argues that the rebate and fee reduction provision imposes no activities on school districts. Department of Finance asserts that PERB's regulations squarely place the burden of issuing fee rebates to employees on the employee organization.

Under prior law, a school district could voluntarily enter into organizational security arrangements with an employee organization. Organizational security has been within the scope of representation since the EERA's enactment.[41] This results in a duty upon the school district to

[41] Former Government Code section 3546 (added by Stats. 1975, ch. 961, and repealed by Stats. 2000, ch. 893); Gov. Code, § 3540.1, subd. (i) (as amended by Stats. 2000, ch. 893).

meet and negotiate in good faith with the exclusive representative upon request.[42] Prior to the 2000 amendments, the EERA, while imposing a duty to bargain, did not compel the parties to reach agreement on organizational security. Thus, any agreement ultimately reached through the bargaining process was entered into voluntarily by both sides.

Government Code section 3546, subdivision (a), requires what was once voluntary. Section 3546, subdivision (a), bypasses the discretion of a school district, and instead compels the district to institute an organizational security arrangement "upon receiving notice from the exclusive representative." This new requirement that school districts shall implement organizational security arrangements requires school districts to make service fee deductions from the wages of employees, and consequently transmit those fees to the employee organization. Such fee deductions and payments to the employee organization were never required immediately preceding the enactment of the test claim legislation, and thus impose a new program or higher level of service on school districts.

In addition, under prior law, certificated and classified employees could pay the service fees directly to the certificated or recognized employee organization in lieu of having the school district deduct the service fees from the employee's salary or wage order.[43] Claimant argues that Government Code section 3546, subdivision (a), expressly states that its terms apply "notwithstanding any other provision of law." Thus, claimant argues that the employee's right to pay the service fee directly to the employee organization is "nullified." Claimant contends the school districts are now required to make the service fee deductions from the wages of all employees that work in a unit for which an exclusive representative has been selected and transmit those fees to the employee organization.[44]

The Commission agrees with claimant. Government Code section 3546, subdivision (a), states the following:

> *Notwithstanding any other provision of law*, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Emphasis added.)

The phrase "notwithstanding any other provision of law" has expressly been interpreted by the courts as "an express legislative intent to have the specific statute control despite the existence of other law which might otherwise govern."[45] Thus, any other provision of law that is contrary or inconsistent with the statute "is subordinated to the latter provision" containing the "notwithstanding" language.[46] In this case, the sections in the Education Code allowing the

---

[42] Government Code section 3543.3.

[43] Education Code sections 45061, 45168, 87834, and 88167.

[44] Claimant's response to draft the Commission analysis, page 4.

[45] *People v. Tillman* (1999) 73 Cal.App.4th 771, 784-785.

[46] *Id.* at page 786.

employee to directly pay the service fee to the employee organization is inconsistent with the test claim statute that requires, without exception, the employer to deduct the service fee from the wages of the employee that works in a unit for which an exclusive representative has been selected. Accordingly, the Commission finds that Government Code section 3456, subdivision (a), imposes a new program or higher level of service by requiring school districts to make service fee deductions from the wages of all certificated and classified employees that work in a unit for which an exclusive representative has been selected, and transmit those fees to the employee organization.

However, in order to be subject to the subvention requirement of article XIII B, section 6, of the California Constitution, the test claim legislation must also impose upon a local agency or school district "costs mandated by the state." Government Code section 17514 defines "costs mandated by the state" to mean "any increased costs which a local agency or school district is required to incur..."

Government Code section 17556 lists several exceptions which preclude the Commission from finding costs mandated by the state. Specifically, "The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: ... (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

Pursuant to Education Code sections 45061 and 87834, K-14 school districts retain the authority to levy the charges necessary to cover any costs incurred in making service fee deductions from the wages of certificated employees choosing not to join the employee organization. Education Code section 45061 applies to elementary and secondary districts, while Education Code section 87834 is for community colleges. Education Code section 45061 follows:

> The governing board of each school district when drawing an order for the salary or wage payment due to a certificated employee of the district shall, with or without charge, reduce the order for the payment of service fees to the certified or recognized organization as required by an organizational security arrangement between the exclusive representative and a public school employer as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code. However, the organizational security arrangement shall provide that any employee may pay service fees directly to the certified or recognized employee organization in lieu of having such service fees deducted from the salary or wage order.
>
> If the employees of a district do not authorize the board to make a deduction to pay their pro rata share of the costs of making deductions for the payment of service fees to the certified or recognized organization, the board shall deduct from the amount transmitted to the organization on whose account the payments were deducted the actual costs, if any, of making the deduction. No charge shall exceed the actual cost to the district of the deduction. These actual costs shall be determined by the board and shall include startup and ongoing costs.

Education Code section 87834 is nearly identical, the only difference being that section 87834 substitutes the words "community college district" for the words "school district" in the first sentence of section 45061. As is evident from the plain language of sections 45061 and 87834,

school districts may deduct service fees from the wages of certificated employees "*with or without charge*." (Emphasis added).

The language of Government Code section 17556, subdivision (d), is clear and unambiguous. In *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, the court found that "the plain language of the statute precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." In making such a determination, the court explicitly rejected the argument that the term "authority" should be construed as meaning "a practical ability in light of surrounding economic circumstances."[47] Accordingly, the focus is not whether a local agency or school district *chooses* to exercise an authority to levy service charges or fees, but rather whether such authority exists at all. Section 17556, subdivision (d), explicitly declares that if the local agency or school district "has the authority" to assess fees, then the commission shall be precluded from finding "costs mandated by the state." Here, school districts do possess such authority.

According to the Education Code sections, "No charge shall exceed the actual cost to the district of the deduction," but the costs for which the governing board is authorized to assess charges "shall be determined by the board and shall include startup and ongoing costs." Thus, the school district may assess charges for costs it must incur in establishing, maintaining, and adjusting its service fee deduction procedures, in addition to transmitting those fees to the employee organization.

Education Code sections 45061 and 87834 provide school districts with "the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program," within the meaning of Government Code section 17556, subdivision (d). Accordingly, the Commission finds that Government Code section 3546, subdivision (a), does not constitute a reimbursable state mandate because the test claim legislation does not impose "costs mandated by the state" as to activities regarding certificated employees.

This same fee authority does not apply for classified employees. Subdivision (b) of both Education Code sections 45168 and 88167 (for K-12 districts and community college districts, respectively), provide:

> The governing board of each [ ] district, when drawing an order for the salary or wage payment due to a classified employee of the district may, *without charge*, reduce the order ... for the payment of service fees to the certified or recognized organization as required in an organizational security arrangement between the exclusive representative and a [ ] district employer as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code. [Emphasis added.]

Thus, the Commission finds that Government Code section 3546, subdivision (a) imposes a new program or higher level of service upon school districts within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for the following new activity:

---

[47] *Ibid.*

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization.

This activity does not apply for certificated employees; fee authority is available pursuant to Education Code sections 45061 and 87834.

Claimant further alleges that Government Code section 3546, subdivision (a), requires school districts to make payroll adjustments for service fee deductions to account for fee reductions or rebates to which the fee-paying employees may become entitled. Claimant alleges that this activity is mandated since school districts are required to report accurate payroll information to their employees and the state and federal governments.[48]

Government Code section 3546, subdivision (a), recognizes the right of employees paying fair share service fees "to receive a rebate or fee reduction upon request, of that portion of their fee" determined to be beyond the permissible scope of the employee organization's role as exclusive bargaining representative. To implement these provisions, PERB regulations require the exclusive representative to provide annual notice to nonmembers that are required to pay the fair share service fee of the amount of the service fee deduction and the calculation used to arrive at the amount of the fee.[49] If the employee disagrees with the amount of the service fee deduction, the employee may file an agency fee objection and the exclusive representative is required to administer an agency fee appeal procedure.[50] The Commission finds that the requirement imposed by Government Code section 3546, subdivision (a), on school districts to deduct the correct amount from the wages of the employee after receiving notice from the exclusive representative of the amount, applies when the agency fee objection is resolved and it is determined that the employee is entitled to a reduction of future agency fee deductions.

But there is no mandate in the statutes or regulations plead by the claimant requiring the school district to make payroll adjustments for rebates. Rather, any rebates are paid by the exclusive representative. Under PERB regulations, once an agency fee objection is filed, the exclusive representative is required to hold any disputed agency fees in an escrow account for the duration of the dispute.[51] Escrowed agency fees that are being challenged shall not be released until after there is a mutual agreement between the agency fee objector and the exclusive representative, or an impartial decisionmaker has made a decision.[52] Interest at the prevailing rate shall be paid by the exclusive representative on all rebated fees.[53]

---

[48] Claimant's response to draft the Commission analysis, page 5.

[49] California Code of Regulations, title 8, section 32992, subdivision (a).

[50] California Code of Regulations, title 8, section 32994.

[51] California Code of Regulations, title 8, section 32995, subdivision (a).

[52] California Code of Regulations, title 8, section 32995, subdivision (b).

[53] California Code of Regulations, title 8, section 32995, subdivision (c).

Finally, claimant requests reimbursement to "draft, approve, and distribute an appropriate and neutral notice to existing nonmember employees and new employees which explains the additional payroll deduction for 'fair share service fees' for nonmember employees of an employee organization." Claimant argues that these activities are "implicit in the legislation" and are necessary since the employer is responsible for changes to employee payroll amounts. Claimant asserts this activity is required since there is no statutory requirement for the exclusive representative to provide such notices to employees about these payroll adjustments.[54] Neither Government Code section 3546, nor the PERB regulations, require school districts to provide notice to its employees regarding the service fee deduction. If this test claim is approved, however, the Commission can consider claimant's request at the parameters and guidelines stage and determine whether the requested activities are a reasonable method of complying with the mandate to deduct the fair share service fee in an amount authorized by Government Code section 3546.[55]

Government Code Section 3546, Subdivisions (b) through (e):

Government Code section 3546, subdivision (b), describes the permissible costs towards which an employee organization may apply the fair share service fees. Nothing in the language of subdivision (b), imposes any activities upon school districts.

Subdivision (c) provides that the "employer shall remain neutral, and shall not participate in any election conducted under this section unless required to do so by the board." Claimant alleges that subdivision (c) requires the public school employer to supply "administrative support" as required by PERB.[56] However, PERB has not enacted any rules or regulations requiring a school district's participation in an organizational security election.[57] Therefore, subdivision (c) does not impose any required activities on school districts.

Government Code section 3546, subdivision (d), contains four subparts. Subdivisions (d)(1) and (d)(2) describe the process by which employees in a bargaining unit may either rescind or reinstate, respectively, an organizational security arrangement. Such a process includes the submission of a petition to PERB and a consequent election among the employees if the petition meets PERB's requirements as promulgated by its regulations. Claimant alleges that subdivisions (d)(1) and (d)(2) require school districts to adjust payroll procedures when the organizational security arrangement is rescinded or reinstated to comply with the requirement to deduct fair share service fees in the appropriate amount from the employee salaries. Government Code section 3546, subdivisions (d)(1) and (d)(2), however, do not impose any state-mandated

---

[54] Claimant's response to draft the Commission analysis, pages 5 and 6.

[55] California Code of Regulations, title 2, section 1183.1, subdivision (a)(4).

[56] First Amendment to the Test Claim, page 6; claimant's response to draft the Commission analysis, page 6.

[57] See California Code of Regulations, title 8, division 3, chapter 2, subchapter 2 for PERB's regulations governing organizational security arrangements under the EERA.

activities on school districts and, therefore, reimbursement is not required to comply with these subdivisions.[58]

Subdivision (d)(3) provides that PERB shall conduct a vote to either rescind or reinstate an organizational security arrangement if the required number of employee signatures on a petition have been collected. Claimant alleges that subdivision (d)(3) requires school districts to "supply any required administrative support as may be required by PERB."[59] Claimant asserts that "it can be reasonably anticipated that if, for example, the Board determines that the appropriate number of signatures have not been collected, there may be some inquiry as to the content of the list of employees the school district is required to provide to PERB pursuant to Title 8, CCR, Sections 34030 and 34055."[60] Government Code section 3546, subdivision (d)(3), however, does not require anything of school districts, thus any mandated activities related to this subdivision would only arise from an executive order. No such executive order is included in this test claim, therefore no findings can be made that school districts have reimbursable state-mandated costs to supply administrative support to PERB.

Subdivision (d)(4) states that the costs of conducting an election to rescind an organizational security arrangement "shall be borne by the board," while the costs in an election to rescind "shall be borne by the petitioning party." The Commission finds that nothing in the plain language of section 3546, subdivision (d)(4), requires school districts to perform any activities.

Finally, Government Code section 3546, subdivision (e), requires that the "recognized employee organization shall indemnify and hold the public school employer harmless against any reasonable legal fees, legal costs, and settlement or judgment liability arising from any court or administrative action relating to the school district's compliance with this section."

Claimant argues that subdivision (e) requires school districts to take any and all necessary actions... to recover reasonable legal fees... from the recognized employee organization."[61] Claimant also contends that "the right to indemnification stems from this subdivision and the cause of civil action which may result in the indemnification of the school district arises from this code section, thus making it s a source of costs mandated by the state."[62] Department of Finance rebuts this argument by asserting that the plain language of subdivision (e) does not impose any activities on school districts.

---

[58] The requirement for school districts to deduct the fair share service fees from employee wages in the appropriate amount is mandated by Government Code section 3546, subdivision (a), and not subdivision (d). Thus, the requested activity to adjust payroll procedures to the reflect the amount required to be deducted from an employee's salary because of a rescission or reinstatement of the organizational security arrangement may be considered by the Commission as a reasonable method of complying with Government Code section 3546, subdivision (a), at the parameters and guidelines stage. (Cal. Code Regs., tit. 2, § 1183.1, subd. (a)(4).)

[59] First Amendment to the Test Claim, page 6.

[60] Claimant's response to draft the Commission analysis, page 6.

[61] First Amendment to the Test Claim, page 8.

[62] Claimant's response to draft the Commission analysis, page 7.

The Commission finds that the plain language of subdivision (e) does not impose any duties on school districts. Rather, subdivision (e) imposes a requirement on the *employee organization* to indemnify and hold harmless a school district for any legal expenses incurred in complying with implementing an organizational security arrangement. If a school district asserts its legal right to indemnification, that action is a decision of the school district and not a mandate by the state.

Accordingly, the Commission finds that Government Code section 3546, subdivisions (b), (c), (d), and (e) do not mandate a program, or impose a new program or higher level of service upon school districts within the meaning of article XIII B, section 6, of the California Constitution.

Government Code Section 3546, Subdivision (f):

Statutes 2001, chapter 805 added subdivision (f) to Government Code section 3546 "so that the exclusive representative can comply with the notification requirements set forth by the United States Supreme Court in *Chicago Teachers Union v. Hudson* (1986) 89 L.Ed. 2d 232."

Claimant asserts that Government Code section 3546, subdivision (f) imposes a state-mandated activity on school districts for providing a list of employee home addresses to the exclusive representative. Department of Finance, on the other hand, claims that the activity "consists of producing a report which should readily be available through the school district's payroll system,"[63] and that any costs incurred by the claimant in providing such a list are *de minimis*, and should therefore not be reimbursable because claimant's costs would be unlikely to reach the threshold for a claim.

Government Code section 3546, subdivision (f) requires school districts to file a list of employee home addresses with an employee organization selected by an employee bargaining unit to act as exclusive representative. Prior to the enactment of
Statutes 2001, chapter 805, no statutory or regulatory requirement obligated a school district to provide a list of home addresses to the exclusive representative. The requirements imposed upon school districts by Government Code section 3546, subdivision (f), impose a new program or higher level of service within the meaning of article XIII B, section 6, of the California Constitution for the following new activity:

- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit.

Government Code section 3546, subdivision (f), also imposes "costs mandated by the state" upon school districts as defined in Government Code section 17514. Government Code section 17556, states, in pertinent part:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: ...
>
> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.

---

[63] Department of Finance, July 30, 2002 Comments, page 3.

(c) [t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.

However, the Commission finds that Government Code section 17556, subdivisions (b) and (c) do not apply in this case.

In *Chicago Teachers Union v. Hudson, supra*, 475 U.S. 292, 305-07, the United States Supreme Court held that employee organizations must: (1) establish procedures prior to making agency fee deductions which will ensure that the funds from such fees are not used to finance ideological activities beyond the scope of collective bargaining; (2) provide agency fee payers with the methods used for calculating the amount of the agency fee; and (3) establish an appeals process to ensure that agency fee objections are addressed in a timely and fair manner by an impartial decision maker.

In order to facilitate the exclusive representative's responsibility to provide notice to nonmember employees regarding the service fee deductions and the methods used to calculate the amount of such fees, Government Code section 3546, subdivision (f) imposes upon school districts the obligation to provide a list of employee home addresses to the exclusive representative. Although subdivision (f) aims at imposing certain notification requirements upon the employee organization in order to comply with federal case law, the requirement that school districts provide the employee organization with a list of employee home addresses goes beyond mere compliance with federal case law.

In *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 817, the court found that Penal Code section 987.9, which requires counties to provide ancillary investigative services when providing defense services to indigent criminal defendants, constituted a federal mandate. The court determined that the right to counsel under the Sixth Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution include "the right to reasonably necessary ancillary services."[64] Accordingly, Penal Code section 987.9 "merely codified these constitutional guarantees," and thus section 987.9 simply required local compliance with the federal mandate.[65]

In *San Diego Unified School District, supra*, 33 Cal.4th 859, 889, the California Supreme Court adopted the reasoning that procedural protections that are merely incidental to the codification of a federal right, and which add only a *de minimis* financial impact, constitute an implementation of federal law not reimbursable under article XIII B, section 6, of the California Constitution.

Here, however, while the notification requirements imposed on the employee organization are mandated by the United States Supreme Court's holding in *Hudson*, nothing in the *Hudson* decision imposes any required activities on school districts. Thus, because Government Code section 3546, subdivision (f) imposes a new required activity on school districts beyond compliance with federal case law, Government Code section 17556, subdivisions (b) and (c) do not apply. Nor are any other provisions of Government Code section 17556 applicable here;

---

[64] *County of Los Angeles, supra*, 32 Cal.App.4th 805, 815.

[65] *Ibid.*

therefore, the Commission finds that Government Code section 3546, subdivision (f) imposes costs mandated by the state pursuant to Government Code section 17514.

California Code of Regulations, Title 8, Sections 34030 and 34055:

PERB has enacted regulations implementing the procedures for filing petitions to either rescind or reinstate an organizational security arrangement. Title 8, section 34030, was added to the California Code of Regulations in 1980, and subsection (b) was added, operative January 1, 2001:

> (a) Within 20 days following the filing of the petition to rescind an organizational security arrangement, the employer shall file with the regional office an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed, unless otherwise directed by the Board.
>
> (b) If after initial determination the proof of support is insufficient, the Board may allow up to 10 days to perfect the proof of support.
>
> (c) Upon completion of the review of the proof of support, the Board shall inform the parties in writing of the determination as to sufficiency or lack thereof regarding the proof of support.

Title 8, section 34055, was added to the California Code of Regulations, operative January 1, 2001, and is nearly identical in language to section 34030, except that it provides that the employer shall file the required list "Within 20 days following the filing of the petition *to reinstate* an organizational security provision ..."

Claimant alleges that section 34030, subdivision (a), and section 34055, subdivision (a), impose state-mandated activities on school districts to file a list of employee names and job titles with PERB. Department of Finance, on the other hand, contends that only those districts that did not negotiate and implement organizational security arrangements prior to the 2000 amendments are justified in claiming mandated costs. Department of Finance alleges that districts that did negotiate organizational security arrangements prior to the 2000 amendments should not be reimbursed for voluntarily assumed costs.

California Code of Regulations, title 8, section 34030, subdivision (a), was enacted by PERB in 1980. Prior to the enactment of Statutes 2000, chapter 893, any organizational security arrangement entered into between a school district and employee organization was the product of a voluntary agreement resulting from the collective bargaining process. Statutes 2000, chapter 893, however, required the parties to implement an organizational security arrangement.

Under prior law, a school district retained discretion on entering into an organizational security arrangement with an employee organization. Thus, the provisions of section 34030, subdivision (a), requiring school districts to file a list of names and job titles to PERB upon the submission of an employee petition to rescind an organizational security arrangement would not have been state-mandated or required. This conclusion flows from the fact that the decision to participate in the underlying program was within the school district's discretion, and thus any

downstream requirements imposed within such a program were also voluntary.[66] Accordingly, if the district did enter into an organizational security arrangement, compliance with PERB's filing requirements in section 34030, subdivision (a), did not constitute a mandate by the state until January 1, 2001, the operative date of Statutes 2000, chapter 893.

Government Code section 3546, subdivision (d)(1), as added by Statutes 2000, chapter 893, recognizes the right of public school employees in a unit for which an employee organization has been selected as exclusive representative to rescind an organizational security arrangement. Subdivision (d)(1), states that the organizational security arrangement required by subdivision (a) of section 3546 "may be rescinded by a majority vote of all the employees in the negotiating unit subject to that arrangement, if a request for a vote is supported by a petition containing 30 percent of the employees in the negotiating unit." If the organizational security arrangement is rescinded pursuant to such a vote, subdivision (d)(2) allows that "a majority of all employees in the negotiating unit may request that the arrangement be reinstated."[67]

Sections 34030 and 34055 implement the provisions of Government Code section 3546, subdivision (d). California Code of Regulations, title 8, sections 34030 and 34055 require that within 20 days of the submission of a petition to either rescind or reinstate an organizational security arrangement, the public school "employer shall file with the regional [PERB] office an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition." The Commission finds that California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution for the following new activity:

- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed.

None of the provisions of Government Code section 17556 are applicable; therefore, the Commission finds that California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a) impose costs mandated by the state pursuant to Government Code section 17514.

---

[66] *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742. The California Supreme Court addressed the issue whether legislation imposing certain notice and agenda requirements on school site councils administering various school-related educational programs constituted a reimbursable state mandate. The Court concluded that mandatory "downstream" requirements flowing from a local government entity's voluntary decision to participate in an underlying program do not constitute reimbursable state mandates.

[67] Government Code section 3546, subdivision (d)(2).

CONCLUSION

The Commission concludes that Government Code section 3546, subdivisions (a) and (f), and California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose new programs or higher levels of service for K-14 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 17514, for the following specific new activities:

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Gov. Code, § 3546, subd. (a).)[68]
- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit. (Gov. Code, § 3546, subd. (f).)[69]
- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed. (Cal. Code Regs., tit. 8, §§ 34030, subd. (a), and 34055, subd. (a).)[70]

The Commission concludes that Government Code sections 3543, 3546, subdivisions (b) through (e), and 3546.3, as added or amended by Statutes 1980, chapter 816, Statutes 2000, chapter 893, and Statutes 2001, chapter 805 are not reimbursable state-mandated programs within the meaning of article XIII B, section 6, and Government Code section 17514.

---

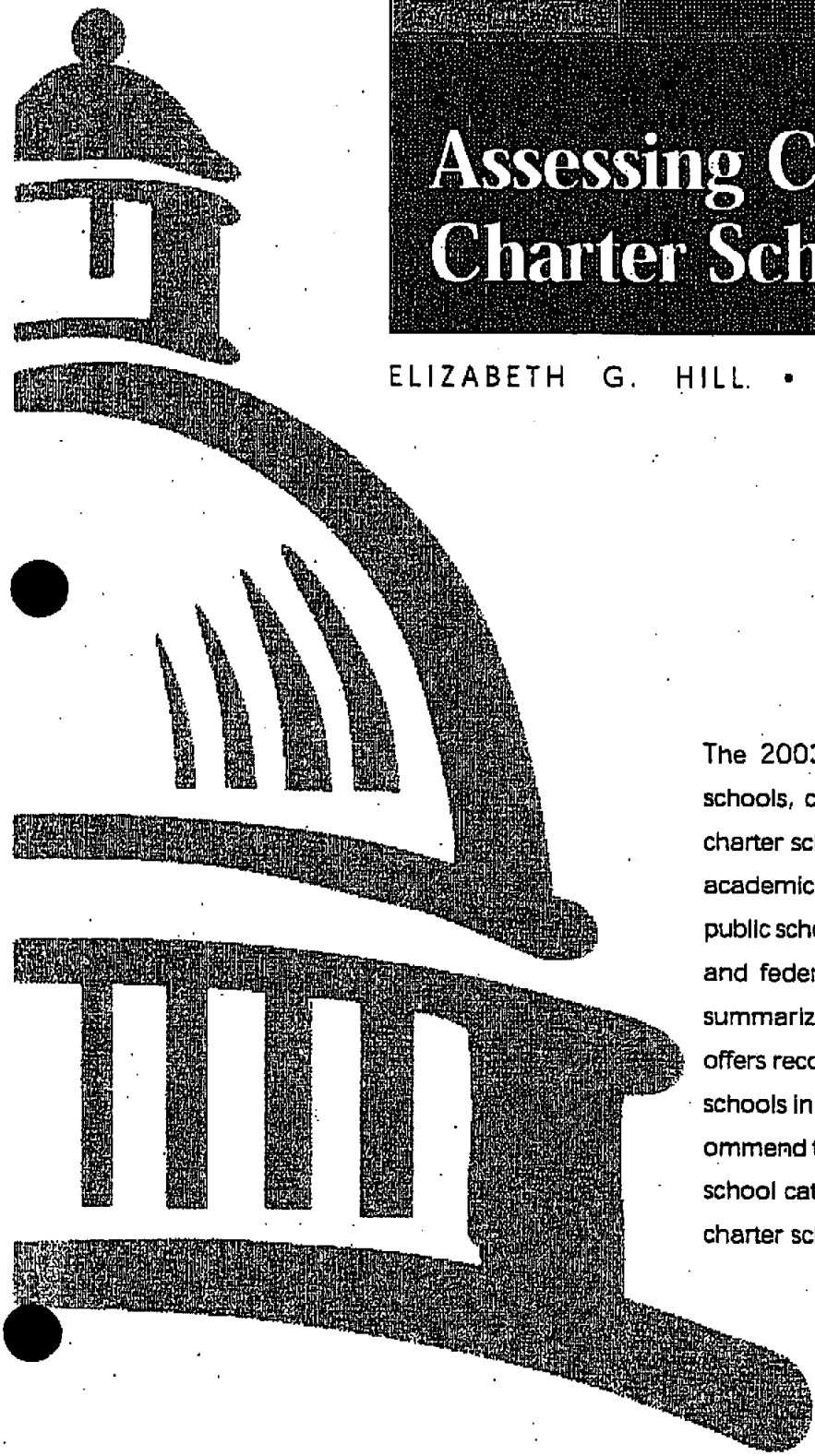
[68] As added by Statutes 2000, chapter 893, operative January 1, 2001.

[69] As amended by Statutes 2001, chapter 805, operative January 1, 2002.

[70] As amended and operative on January 1, 2001.

EXHIBIT F

January 2004



Assessing California's Charter Schools

ELIZABETH G. HILL • LEGISLATIVE ANALYST

The 2003 statewide evaluation of charter schools, conducted by RAND, concluded that charter schools were cost-effective—achieving academic results similar to those of traditional public schools even though they obtain less state and federal categorical funding. This report summarizes the findings of this evaluation and offers recommendations for improving charter schools in California. Most importantly, we recommend the Legislature restructure the charter school categorical block grant and strengthen charter school oversight and accountability. ■

I. Overview of Charter Schools 4

The "Basics" of Charter Schools in California 6

Major Charter School Legislation 9

Charter School Growth Over Last Decade 11

II. Synopsis of RAND's 2003 Charter School Evaluation 14

III. LAO Recommendations 19

Re-Examining the Need for an Annual Growth Cap 19

Reforming the Charter School Categorical Block Grant 20

Enhancing Charter School Oversight and Accountability 27

Clarifying and Capping Oversight Fees 33

Acknowledgments

This report was prepared by Jennifer Kuhn, and reviewed by Rob Manwaring. The Legislative Analyst's Office (LAO) is a nonpartisan office which provides fiscal and policy information and advice to the Legislature.

LAO Publications

To request publications call (916) 445-4656. This report and others, as well as an E-mail subscription service, are available on the LAO's Internet site at www.lao.ca.gov. The LAO is located at 925 L Street, Suite 1000, Sacramento, CA 95814.

EXECUTIVE SUMMARY

Since they first opened their doors in fall 1993, charter schools in California have grown in number and steadily increased enrollment. Over the last decade, the state has funded two comprehensive charter school evaluations—the findings of which were released in 1997 and 2003. Both evaluations concluded that charter schools are a viable reform strategy—expanding families' choices, encouraging parental involvement, increasing teacher satisfaction, enhancing principals' control over school-site decision making, and broadening the curriculum without sacrificing time spent on core subjects. The most recent evaluation deemed charter schools cost-effective—finding that charter schools achieve academic results similar to those of traditional public schools even though they obtain significantly less state and federal categorical funding. The evaluation also found, however, that the state continues to face challenges in the areas of charter school finance and accountability.

After summarizing the findings of the 2003 evaluation, this report offers recommendations for improving charter school finance and accountability. Most importantly, we recommend the Legislature:

- ***Restructure the Charter School Categorical Block Grant.*** We recommend shifting 14 currently excluded programs into the general block grant, shifting 10 other currently excluded programs into the disadvantaged-student component of the block grant, and rebenching the underlying per pupil funding rates in a cost-neutral manner.
- ***Strengthen Charter School Oversight.*** We recommend that school districts be permitted to opt out of charter authorizing, charter schools be allowed to choose among multiple authorizers, and specific safeguards be created to promote stronger accountability.
- ***Modify Charter School Facility and Oversight Fees.*** We recommend delineating more clearly between facility fees and oversight fees, capping these fees (at 2 percent and 1 percent, respectively, of total charter school revenues), and eliminating the mandate-claims process for oversight costs.

Taken together, these reforms would address many of the weaknesses the 2003 charter school evaluation identified and be a significant step forward in improving charter school funding and oversight in California.

INTRODUCTION

In 1992, California became the second state in the country to enact legislation allowing for the creation of charter schools. The first charter schools in California opened their doors for the 1993-94 school year and, during the past ten years, charter schools have grown in number and steadily increased enrollment. To assess how these schools are using their resources in educating students, the state recently funded a two-year evaluation—the results of which were released on June 30, 2003. The evaluation deemed charter schools cost-effective—achieving academic results similar to those of traditional public schools despite receiving less state funding.

Chapter 34, Statutes of 1998 (AB 544, Lempert), required the Legislative Analyst's Office (LAO) to contract for the statewide evaluation. The LAO contracted with RAND, and the state provided a total of $666,000 for the evaluation. (In addition to this evaluation, the state has funded three other independent charter school studies. For a summary of these other reports, please see the shaded box on page 5.)

Chapter 34 also required the LAO to report to the Legislature on the general effectiveness of charter schools and, specifically, to recommend whether to expand or reduce the state cap on the number of allowable charter schools.

This report responds to this legislative directive. In this report, we:

- Discuss some general similarities and differences among charter schools and track the growth of charter schools nationwide and in California over the last decade.
- Summarize the findings of RAND's charter school evaluation.
- Offer recommendations for: (1) adjusting the state cap on the number of allowable charter schools, (2) improving the charter school funding model, (3) strengthening charter school oversight, and (4) modifying policies relating to oversight fees.

OVERVIEW OF CHARTER SCHOOLS

Charter schools are publicly funded K-12 schools. These schools are subject to state testing and accountability requirements, but they are exempt from many laws relating to specific education programs. Because of these exemptions, charter schools have greater fiscal and programmatic flexibility than traditional public schools. This expanded flexibility was intended to promote innovation in local education practices. Charter schools also were intended to expand students' educational options, thereby generating competition and enhancing incentives for traditional public schools to make educational improvements.

In this section, we:

- Provide some background information on charter schools in California—including information on chartering authorities, types of charter schools, differences

among charter schools' general modes of instruction, and charter school finance.

- Summarize eight especially significant charter school laws.
- Track the growth of charter schools nationwide and in California.

OTHER STATE-INITIATED EVALUATION EFFORTS

In addition to the 2003 RAND evaluation, the state has undertaken several other evaluation activities relating to charter schools, as detailed below.

First Statewide Evaluation Affirmed Charter Schools as Viable Reform Option (1997). The first statewide evaluation was authorized by Chapter 767, Statutes of 1996 (AB 2135, Mazzoni), which appropriated $146,000 for the study. The LAO contracted with SRI International, Inc. (SRI) to conduct the evaluation, and the findings were released in December 1997. SRI found that charter schools were located in all parts of the state, operated in all types of communities, and served all grade levels. It found that statewide charter schools enrolled students who were similar to students in traditional public schools. It also found that charter schools, on average, had smaller student enrollments, higher parental involvement, and teachers who were more satisfied (because they had more control over decisions affecting their classrooms and felt a greater sense of ownership of their schools' educational program). SRI did raise concerns, however, with the legal ambiguities surrounding the liability of charter authorizers and the lack of oversight of charter schools' academic outcomes.

State Audit Concludes That Existing Oversight of Charter Schools Is Weak (2002). In November 2002, the Bureau of State Audits (BSA) released the findings of its audit of four large charter authorizers—the Fresno, Los Angeles, Oakland, and San Diego City Unified school districts. The BSA found widespread evidence that, (1) oversight of charter schools' academic outcomes and fiscal management was weak, (2) charter authorizers could not justify the oversight fees they charged charter schools because they did not track their actual costs, and (3) charter authorizers risked double-charging the state because they filed mandate claims for reimbursement of charter school oversight activities even though they could not demonstrate that the oversight fees they already had collected from charter schools were insufficient to cover these costs.

RAND Begins New Study of Charter Schools' Nonclassroom-Based Activities (Expected 2004). Chapter 892, Statutes of 2001 (SB 740, O'Connell), authorized a follow-up statewide evaluation on charter schools' nonclassroom-based activities. The *2002-03 Budget Act* provided $333,000 for this follow-up study. Specifically, this evaluation is to assess the state's funding system for nonclassroom-based activities as well as the State Board of Education's (SBE) regulations for making specific funding determinations for nonclassroom-based charter schools. The findings of this evaluation are scheduled to be released on October 1, 2004.

THE "BASICS" OF CHARTER SCHOOLS IN CALIFORNIA

In this section, we provide some basic background information about charter schools in California.

School District Board Most Common Charter Authorizer. Since the inception of charter schools, 258 government agencies have authorized (or officially granted) charters in California. These charter-granting authorizers consist of the SBE, 23 county school boards, and 234 school district boards. School district boards have authorized the vast majority of charter schools (87 percent). Most charter authorizers (69 percent) have approved only one charter. Less than 10 percent have authorized more than three charters.

Approximately One of Every Ten Charter Petitions Denied. To operate in California, a charter school must submit a petition to a charter authorizer. A petition must include specific information that is delineated in statute, such as a description of the education program of the charter school and the student outcomes the school will use to measure its performance. Charter authorizers report denying approximately 10 percent of all submitted petitions. (Given RAND's survey was distributed only to charter authorizers that were currently overseeing charter schools, this percentage is likely to understate the actual denial rate because it does not include data from charter authorizers that have denied *all* submitted petitions. Additionally, it does not account for informal actions on behalf of charter authorizers that might have discouraged groups even from submitting a petition.) Although the original 1992 charter school law did not require charter authorizers to provide reasons for denying a charter petition, later amendments require that charter authorizers now prepare written documentation justifying their denials. The most common reasons charter authorizers report for denying charter petitions are "an unsound educational program" and a concern that the proposed school is "demonstrably unlikely to succeed."

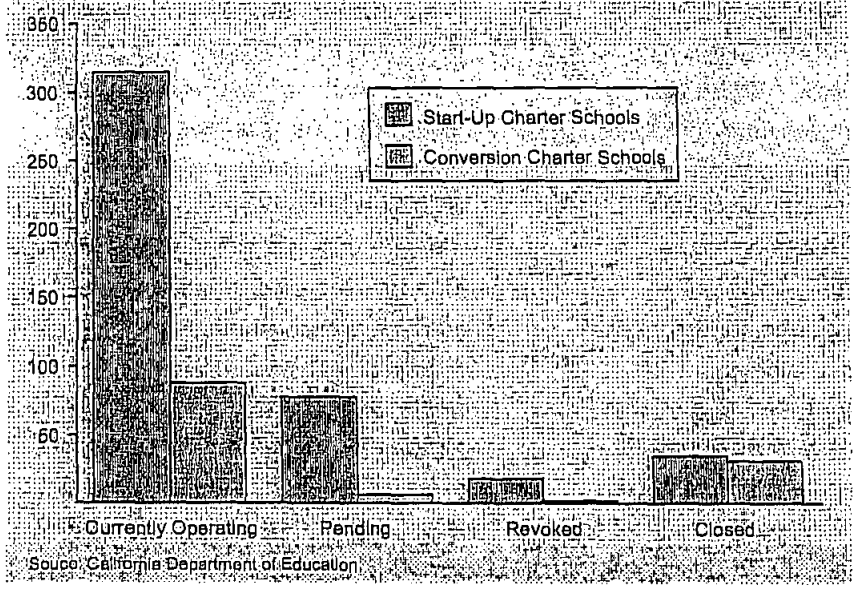
Since 1993, the State Department of Education (SDE) Has Tracked Almost 575 Charter Schools. When a petition is approved or pending, SDE assigns the charter school a unique tracking number. Since the inception of charter schools, SDE has assigned tracking numbers to 573 schools. Of these 573 charter schools, 403 schools (70 percent) are currently operating, 84 schools (15 percent) have petitions pending with a charter authorizer, 20 charters (3 percent) have been revoked, and 66 charter schools (12 percent) have been closed. (In addition to these schools, SDE has issued 31 "inoperative" numbers associated with schools that had approved charters but either never opened or later withdrew their charter.)

"Start-Up" Charter Schools More Common Than Conversion Charter Schools. In California, charter schools may be newly created as a start-up charter school or else a traditional public school may close and reopen as a "conversion" charter school. Figure 1 shows the number of start-up and conversion charter schools that are (1) currently operating, (2) pending, (3) have closed, or (4) have had their charter revoked. As the figure shows, about four out of every five currently operating charter schools are start-up schools whereas one out of every five is a conversion school.

Figure 1

Start-Up Charter Schools More Common Than Conversion Charter Schools

(1993-2003)



Source: California Department of Education

Conversion Charter Schools Serve More Students Than Start-Up Charter Schools. Although start-up charter schools are more common than conversion charter schools, conversion charter schools actually enroll a greater number of students. Of all charter school students in the elementary grades, 72 percent are enrolled in a conversion charter school whereas 28 percent are enrolled in a start-up school. Of all charter school students in the secondary grades, 46 percent are enrolled in a conversion charter school whereas 54 percent are enrolled in a start-up school. (In 2002-03, charter school enrollment was split about evenly between the elementary and secondary grades.)

Charter Schools Offer Two General Modes of Instruction—Classroom-Based and Nonclassroom-Based. Charter schools provide instruction either primarily in a traditional classroom setting or in a nonclassroom setting. The SDE classifies a charter school as a classroom-based school if at least 80 percent of its instructional time is offered on the school site, with the school site being a facility used principally for classroom instruction. A nonclassroom-based school, in contrast, is one in which more than 20 percent of instructional time is offered in a location different from the primary school site. Nonclassroom-based charter schools tend to rely on individualized, self-paced student learning plans. Nonclassroom-based instruction includes independent study, home study, distance study, computer-based study, and work-study. Some of these types of instruction (for example, independent study) are common in traditional public schools as well as charter schools whereas others (for example, home study) are unique to charter schools.

Approximately One-Third of All Charter Schools Are Nonclassroom-Based. In 2001-02, SBE classified 118 charter schools, or approximately one-third of all charter schools, as nonclassroom-based. Start-up charter schools are much more likely to be nonclassroom-based than conversion charter schools (57 percent and 11 percent, respectively). State law prohibits nonclassroom-based schools from hiring teach-

ers without state credentials. Additionally, state law requires SBE to establish general rules for determining the appropriate funding level for nonclassroom-based charter schools. The board's regulations specify that funding determinations are to be based on: (1) the percentage of total expenditures associated with teacher salaries and benefits, (2) the percentage of total expenditures associated with instruction, and (3) the student-teacher ratio. Nonclassroom-based charter schools that devote a greater share of their budget to teacher salaries and instruction and have lower student-teacher ratios are eligible for higher levels of funding.

Charter School Funding Model Intended to Result in Funding Comparable to Traditional Public Schools. In 1999, the Legislature adopted the current charter school funding model. Prior to this time, charter schools received funding on a program-by-program basis through negotiation with their charter authorizer. Under the current model, charter schools receive funds through the following three funding streams:

- ***Revenue Limit Funding.*** Charter schools receive revenue limit funding equal to the average revenue limit of all traditional public schools in the state. A different revenue limit rate is calculated for each of four grade spans—K-3, 4-6, 7-8, and 9-12. As with other public schools, revenue limit funding is continuously appropriated general purpose funding that charter schools may expend at their discretion.

- ***Categorical Block Grant.*** In lieu of applying separately for certain categorical programs, charter schools receive categorical block grant funding, which is specified as a line item in the annual budget act. The block grant allocation to each charter school includes: (1) general block grant funding and (2) disadvantaged student funding. Similar to the revenue limit calculation, the general block grant rate provides per pupil funding equal to the average amount of funding traditional public schools receive in total for certain categorical programs. This rate also is calculated separately for each of the four grade spans. The disadvantaged student component is a single rate equivalent to the statewide average per pupil funding rate provided to traditional public schools for Economic Impact Aid. Unlike other public schools (which may not participate in the categorical block grant), charter schools may expend categorical block grant funding at their discretion and are not bound by the specific programmatic requirements of each categorical program included within the block grant.

- ***Other Categorical Programs.*** Charter schools also may apply separately for categorical programs not included in the categorical block grant. Charter schools that apply for these categorical programs, such as the Governor's Mathematics and Reading Professional Development program or the Principal Training program, are required to abide by all associated programmatic requirements.

MAJOR CHARTER SCHOOL LEGISLATION

This section highlights eight pieces of state legislation that have had an especially strong impact on charter school operations and facilities.

Charter School Operations

Chapter 781, Statutes of 1992 (SB 1448, Hart)—Authorized the Creation of Charter Schools in California. The Charter Schools Act of 1992 was the original law authorizing the creation of publicly funded schools that could operate independently from school districts and be exempt from existing education laws. The law established a statewide cap of 100 charter schools and a districtwide cap of ten charter schools. The law established petition requirements, designed a two-stage appeals process, and specified certain conditions under which charters could be revoked. It required the qualifications of personnel to be specified in a school's charter, but it did not require staff to hold state credentials. The law also stated that the Superintendent of Public Instruction (SPI) was to make annual apportionments to each charter school, but in practice, charter schools initially negotiated funding with the school district rather than receiving it directly from the state. The original law did not address charter school facility issues.

Chapter 34—Instituted Significant Charter School Reforms. This law increased the statewide cap to 250 charter schools for the 1998-99 school year, with an additional 100 charter schools allowed to open annually thereafter, and eliminated the districtwide cap. It slightly eased (1) petition requirements, (2) the petition submittal process, (3) the appeals process, and (4) the revocation process. Unlike the 1992 law, it also required all core-subject teachers to hold a state credential. Additionally, it clarified that charter schools could receive funding directly from the state. It also required school districts to offer charter schools any unused district facilities at no charge, and it capped the oversight charges school districts could assess charter schools.

Chapter 162, Statutes of 1999 (SB 434, Johnston)—Applied Independent Study Laws to Charter Schools. This law required charter schools that offered independent study to comply with all laws and regulations governing independent study generally. This law also required charter schools to offer a minimum number of instructional minutes equal to that of other public schools, maintain written records of pupil attendance, and release these records for audit and inspection. Additionally, it required charter schools to certify that their students participated annually in the state's testing programs.

Chapter 78, Statutes of 1999 (AB 1115, Strom-Martin)—Created Charter School Funding Model. This law clarified the language regarding funding by expressing legislative intent to provide charter schools with operational funding equal to the total operational funding available to similar public schools serving similar student populations. It also established a funding model that allowed charter schools to receive funds either locally through the school district or directly from the state. The model consisted of three basic components: (1) revenue limit funding, (2) categorical block grant funding, and (3) separate categorical program funding—all of which were designed to yield charter school funding rates that were comparable to those of similar public schools.

Chapter 892—Reduced Funding for Nonclassroom-Based Charter Schools. This law required SBE to: (1) adopt regulations governing nonclassroom-based instruction, (2) develop criteria for determining the amount of funding to be provided for it, and (3) make specific funding determinations for individual charter schools. This law included certain guidelines regarding funding levels. Specifically, funding for nonclassroom-based charter schools was to be reduced by no more than 10 percent in 2001-02, no less than 20 percent in 2002-03, and no less than 30 percent in 2003-04. The board, however, retained the discretion, on a case-by-case basis, to adjust funding by different percentages. The board was to make funding determinations on a five-year cycle if a charter school did not make material changes to its charter and was deemed to be in good standing.

Chapter 1058, Statutes of 2002 (AB 1994, Reyes)—Established Geographic Restrictions and Enhanced County Oversight. This law required, with few specified exceptions, that a charter school consist of a single school site located within the geographic jurisdiction of its chartering school district. If adequate justification was provided, the law, however, allowed for two exceptions. Specifically, a group could receive a countywide charter (to operate at multiple sites throughout that county) or a statewide charter (to operate at multiple sites throughout the state). In either case, a charter school group had to justify the educational benefit of operating programs at multiple sites spanning multiple local jurisdictions. Additionally, the law granted County Offices of Education (COEs) general authority to conduct both fiscal and programmatic oversight of charter schools. The law, for example, allowed COEs to conduct an investigation of a charter school based on parental complaints or fiscal irregularities.

Charter School Facilities

Proposition 39 (November 2000)—Required School Districts to Provide "Reasonably Equivalent" Charter School Facilities. This law, approved by the voters at a statewide election, allowed school districts to pass local school facility bonds with a 55 percent vote instead of a two-thirds vote. In addition, the law required school districts to provide charter schools with reasonably equivalent facilities that were sufficient to accommodate all their classroom-based students. This requirement must be met even if unused facilities are not available and the district would incur costs to provide the facilities. The school district, however, is not required to spend its general discretionary revenues to provide charter school facilities. Instead, the district could use other revenue sources, including state and local bonds. The law also: (1) required that charter facilities be reasonably equivalent to other district facilities, (2) allowed school districts that funded charter school facilities with discretionary revenues to charge the associated charter schools a facility fee, and (3) exempted a school district from providing facilities to charter schools that served fewer than 80 students.

Chapter 935, Statutes of 2002, (AB 14, Goldberg) and Proposition 47 (November 2002)—Created Charter Schools Facilities Program and Approved Sizeable Bond Funding. Chapter 935 established a pilot program—the Charter Schools Facilities Program—to determine the optimum method for funding charter school facilities. The law specified that the State Allocation Board (SAB) was to approve a set of projects that was "fairly representative"

of: (1) the various geographic regions of the state; (2) urban, suburban, and rural regions; (3) large, medium, and small schools; (4) and the various grade levels. While ensuring this fair representation was achieved, SAB also was required to give preference to charter schools in overcrowded school districts and low-income areas as well as to charter schools operated by not-for-profit organizations. This facilities program was linked with voter approval of Proposition 47, which provided up to $100 million (of a total of $3.5 billion) for the construction of new charter schools. On July 2, 2003, SAB provided preliminary facility apportionments to six charter schools—committing a total of $97 million in Proposition 47 bond monies.

Charter Schools Have Experienced Notable Growth Over Last Decade

In this section, we track the recent growth of charter schools nationwide and in California.

Charter Schools Spread Across Country in 1990s. During the 1990s, legislation allowing for the creation of charter schools was adopted by most state governments. Figure 2 tracks this growth. Today, 40 states as well as the District of Columbia (DC) have charter school laws.

Almost 2,700 Charter Schools Serving More Than 684,000 Students Nationwide. Currently charter schools are operating in 36 states and DC. In 2002-03, almost 2,700 charter schools served more than 684,000 students nationwide. Of these schools, almost 400 were new charter schools that opened in fall 2002. Figure 3 (see next page) shows the number of charter schools for each state and indicates the percentage of all public K-12 students in each state who attend charter schools. The data are provided for

Figure 2
Charter School Legislation Spreading Across Country[a]

Year Legislation Enacted	State
1991	Minnesota
1992	California
1993	Colorado
	Georgia
	Massachusetts
	Michigan
	New Mexico
	Wisconsin
1994	Arizona
	Hawaii
	Kansas
1995	Alaska
	Arkansas
	Delaware[b]
	Louisiana
	New Hampshire[b]
	Rhode Island
	Texas
	Wyoming[b]
1996[c]	Connecticut
	Florida
	Illinois
	New Jersey
	North Carolina
	South Carolina
1997	Mississippi
	Nevada
	Ohio
	Pennsylvania
1998	Idaho
	Missouri
	New York
	Utah
	Virginia
1999	Oklahoma
	Oregon
2001	Indiana
2002	Iowa[b]
	Tennessee
2003	Maryland

a The following ten states currently do not have charter school laws: Alabama, Kentucky, Maine, Montana, Nebraska, North Dakota, South Dakota, Vermont, Washington, and West Virginia.
b Indicates states that have charter school laws but no charter schools currently operating.
c The District of Columbia also adopted charter school legislation in 1996.
Source: Center for Education Reform.

Briefs and Other Related Documents

Supreme Court of California
In re Michael Lee JENNINGS on Habeas Corpus.
No. S115009.

Aug. 23, 2004.

Background: Defendant was convicted in the Superior Court, Sacramento County, No. 00M07614, Gail D. Ohanesian, J., of statutory misdemeanor offense of purchasing an alcoholic beverage for a person under 21 who thereafter proximately caused great bodily injury. Defendant appealed. The Superior Court, Appellate Division, affirmed and certified the case for transfer to the Court of Appeal. The Court of Appeal declined certification. Defendant petitioned for writ of habeas corpus. The Supreme Court issued an order to show cause on the petition, returnable to the Court of Appeal. The Court of Appeal denied the writ of habeas corpus, ruling that the statute did not require defendant's knowledge that the person for whom he purchased the alcohol was under age 21.

Holdings: The Supreme Court, Werdegar, J., held that:
(1) statute prohibiting the purchasing of alcohol for an underage person did not require proof of knowledge or intent on the part of defendant to establish a violation, and
(2) defendant was entitled to raise a mistake of fact defense concerning the person's age.
Petition for writ of habeas corpus granted, and case remanded to superior court.

Opinion, 131 Cal.Rptr.2d 233, superseded.

West Headnotes

[1] Statutes ⚷181(1)
361k181(1) Most Cited Cases

[1] Statutes ⚷188
361k188 Most Cited Cases
To determine the meaning of a statute, the court looks to the intent of the Legislature in enacting the law, being careful to give the statute's words their plain, commonsense meaning.

[2] Statutes ⚷188
361k188 Most Cited Cases

[2] Statutes ⚷214
361k214 Most Cited Cases
If the language of a statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary.

[3] Statutes ⚷208
361k208 Most Cited Cases

[3] Statutes ⚷223.1
361k223.1 Most Cited Cases
In interpreting a statutory code section, the court must interpret the section in context with the entire statute and the statutory scheme.

[4] Intoxicating Liquors ⚷159(1)
223k159(1) Most Cited Cases
Statute prohibiting the furnishing of alcohol to an underage person applies to any situation in which an individual purchases alcoholic beverages for an underage person. West's Ann.Cal.Bus. & Prof.Code § 25658(c).

[5] Statutes ⚷184
361k184 Most Cited Cases
(Formerly 361k217.2, 361k190)
Where the words of the statute are clear, the court may not add to or alter them to accomplish a purpose that does not appear on the face of the

Copr. © Bancroft-Whitney and West Group 1998

statute or from its legislative history.

[6] Intoxicating Liquors ⚷159(2)
223k159(2) Most Cited Cases
To obtain a conviction under statute prohibiting the furnishing of alcohol to an underage person, the People need not prove the offender knew the person to whom he or she furnished, sold, or gave an alcoholic beverage was in fact not yet 21 years old. West's Ann.Cal.Bus. & Prof.Code § 25658(a).

[7] Criminal Law ⚷20
110k20 Most Cited Cases

[7] Criminal Law ⚷23
110k23 Most Cited Cases
So basic is the requirement that there must be a union of act and wrongful intent or criminal negligence, that it is an invariable element of every crime unless excluded expressly or by necessary implication.

[8] Criminal Law ⚷21
110k21 Most Cited Cases
For certain types of penal laws, often referred to as public welfare offenses, the Legislature does not intend that any proof of scienter or wrongful intent be necessary for conviction; such offenses generally are based upon the violation of statutes which are purely regulatory in nature and involve widespread injury to the public.

[9] Criminal Law ⚷21
110k21 Most Cited Cases

[9] Criminal Law ⚷23
110k23 Most Cited Cases
In determining whether a penal statute requires that the prosecution prove some form of guilty intent, knowledge, or criminal negligence, courts commonly take into account:(1) the legislative history and context; (2) any general provision on mens rea or strict liability crimes; (3) the severity of the punishment provided for the crime; (4) the seriousness of harm to the public that may be expected to follow from the forbidden conduct; (5) the defendant's opportunity to ascertain the true facts; (6) the difficulty prosecutors would have in proving a mental state for the crime; and (7) the number of prosecutions to be expected under the statute.

[10] Courts ⚷89
106k89 Most Cited Cases
An opinion is not authority for propositions not considered.

[11] Intoxicating Liquors ⚷159(2)
223k159(2) Most Cited Cases
Statute prohibiting the purchasing of alcohol for an underage person does not require proof of knowledge or intent on the part of defendant to establish a violation; the legislative history and context of the statute, along with the seriousness of the harm to the public, demonstrate that no knowledge that the accused knew that the person was under 21 years of age should be imposed. West's Ann.Cal.Bus. & Prof.Code § 25658(c).

[12] Statutes ⚷223.1
361k223.1 Most Cited Cases
Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes.

[13] Criminal Law ⚷20
110k20 Most Cited Cases
For crimes which impose severe punishment, the usual presumption that a defendant must know the facts that make his or her conduct illegal should apply.

[14] Criminal Law ⚷33
110k33 Most Cited Cases
Although the People, in a prosecution for purchasing alcohol for an underage person who thereafter caused great bodily injury or death, did not have to prove that defendant knew the person was under 21 years of age, defendant was entitled to raise a mistake of fact defense concerning the person's age. West's Ann.Cal.Bus. & Prof.Code § 25658(c).
See 2 Witkin & Epstein, Cal. Criminal Law (3d ed.

Copr. © Bancroft-Whitney and West Group 1998

2000) Crimes Against Public Peace and Welfare, § 291; Cal. Jur. 3d, Alcoholic Beverages, § 55.

[15] Criminal Law ⟹33
110k33 Most Cited Cases
As a general matter, a mistake of fact defense is not available unless the mistake disproves an element of the offense.
***647 *258 **908 Rothschild, Wishek & Sands, Kelly Lynn Babineau and M. Bradley Wishek, Sacramento, for Petitioner Michael Lee Jennings.

Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Carlos A. Martinez, Mathew Chan, Janet Neeley, David Andrew Eldridge, Stephen G. Herndon and Rachelle A. Newcomb, Deputy *259 Attorneys General; Robert A. Ryan, Jr., County Counsel, and James G. Wright, Deputy County Counsel, for Respondent State of California.

WERDEGAR, J.

Petitioner invited some guests to his home and served them alcoholic beverages. One of the guests, only 19 years old, after leaving the party caused an automobile accident resulting in serious injury. Charged with violating Business and Professions Code [FN1] section 25658, subdivision (c) (section 25658(c)), which prohibits the purchase of an alcoholic beverage for someone under 21 years old who, after drinking, proximately causes death or great bodily injury, petitioner sought to defend against the charge by claiming he did not know his guest was under the legal drinking age and in fact believed he was over 21 years old. The trial court and two levels of appellate courts ruled that because knowledge of age is not an element of the crime, a mistake of fact as to age is not a defense. We agree the People need not prove knowledge of age to establish a violation of section 25658(c), but we conclude petitioner was entitled to defend against the charge by claiming a mistake of fact as to age. Accordingly, we reverse the judgment.

FN1. All further statutory references are to the Business and Professions Code unless otherwise stated.

FACTS [FN2]

FN2. Petitioner waived his right to a jury trial and submitted his case on the police report. The facts are drawn largely from that report.

On May 30, 2000, petitioner Michael Jennings, a supervisor for Armor Steel Company in Rio Linda, invited coworkers Charles Turpin, Curtis Fosnaugh, Daniel Smith and Donald Szalay to his home to view a videotape demonstrating some new machinery the company was to obtain. Szalay stopped at a convenience store and bought a 12-pack of beer to bring to the gathering. At petitioner's direction, his wife went to a store and purchased another 12-pack of beer. The five men sat in the garage and drank beer.

Some time later, the men went into the house where they watched the videotape and drank more beer. Around 6:00 p.m., the party broke up. Fosnaugh left driving a white Ford pickup truck. Turpin then left driving his Volkswagen Beetle, accompanied by Smith. Fosnaugh stopped at a stop sign at the intersection of E Street and 20th Street in Rio Linda. Turpin, intending to overtake and pass Fosnaugh on the left without stopping at the intersection, drove on the wrong side of the ***648 road. By his own estimate, Turpin was driving around 55 miles per hour. Unaware of Turpin's intention to pass on the left, Fosnaugh attempted to make a left turn, resulting in a major collision and serious injuries to Turpin, Smith and Fosnaugh.

*260 Turpin, who had to be pried from his car with the Jaws of Life, told police responding to the scene that he drank about seven beers between 4:00 and 6:00 p.m. The results of a preliminary alcohol screening test indicated Turpin had a blood-alcohol concentration of .124 percent. Later at the hospital, a blood test determined Turpin's blood-alcohol concentration to be .16 percent. Turpin was 19 years old. Fosnaugh was 20 years old.

Copr. © Bancroft-Whitney and West Group 1998

Petitioner was charged with violating section 25658(c), purchasing alcohol for someone under 21 years old who consumes it and "thereby proximately causes great bodily injury or death to himself, herself, or any other person." The People moved in limine to exclude evidence that petitioner was unaware Turpin was not yet 21 years of age. Petitioner opposed the motion and made an offer of proof that he was ignorant of Turpin's age. Specifically, petitioner alleged that a few weeks before the accident, he was with several coworkers drinking beer in front of a local **909 market after work when a police officer arrived and confronted Turpin, who was holding a beer. Petitioner alleged he heard Turpin tell the officer he was 22 years old. In addition, petitioner alleged that, although he was Turpin's supervisor, he did not process Turpin's employment application (which did not, in any event, have a space for the applicant's age), and Turpin's employment file did not have a photocopy of his driver's license.

The trial court granted the People's motion, ruling that section 25658(c) was a strict liability offense and ignorance of Turpin's age was not a defense. Petitioner then submitted the case on the police report subject to a reservation of the right to challenge on appeal the correctness of the trial court's evidentiary ruling. The trial court found petitioner guilty as charged. The court sentenced him to six months in jail, with sentence suspended and probation granted on conditions including service of 60 days in jail.

DISCUSSION

A. Background

The regulation of alcoholic beverages in this country has taken a long and twisting path (see U.S. Const., 18th Amend. [prohibiting "the manufacture, sale, or transportation of intoxicating liquors" within the U.S.]; *id.*, 21 st Amend. [repealing the 18th Amend.]), but regulation has now devolved to the states, who "enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders." (*Capital Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691, 712, 104 S.Ct. 2694, 81 L.Ed.2d 580.) One active area of California's regulation of alcoholic beverages concerns underage drinkers. No citation to authority is necessary to establish that automobile accidents by underage drinkers lead to the injuries **261 and deaths of thousands of people in this country every year. Nevertheless, the statistics are sobering. "In 2002, 24% of drivers ages 15 to 20 who died in motor vehicle crashes had been drinking alcohol." (http://www.cdc.gov/ncipc/factsheets/drving.htm [as of Aug. 23, 2004].) "Analysis of data from 1991--1997 found that, consistently, more than one in three teens reported they had ridden with a driver who had been drinking alcohol in the past month. One in six reported having driven after drinking alcohol within the same one-month time period." (http:// www.cdc.gov/ncipc/factsheets/teenmvh.htm ***649 [as of Aug. 23, 2004].) "In 2002, 25 percent of 16--20-year-old passenger vehicle drivers fatally injured in crashes had high blood alcohol concentrations (0.08 percent or more). Teenage drivers with BACs in the 0.05-0.08 percent range are far more likely than sober teenage drivers to be killed in single-vehicle crashes--17 times more likely for males, 7 times more likely for females. At BACs of 0.08-0.10, risks are even higher, 52 times for males, 15 times for females." (http:// www.hwysafety.org/safety%5F facts%20qanda/underage.htm [as of Aug. 23, 2004].)

Given these facts, that our laws shield young people from the dangers of excess alcohol consumption is no surprise. Our state Constitution establishes the legal drinking age at 21, three years past the age of legal majority (see, e.g., Cal. Const., art. II, § 2 [must be at least 18 years old to vote]; Fam.Code, § 6500 [a "minor" is one under 18 years old]; Prob.Code, § 3901, subd. (a) ["adult" defined as one "who has attained the age of 18 years"]), both for purchases and personal consumption at on-sale premises. (Cal. Const., art. XX, § 22.) The "likely purpose" of this constitutional provision "is to protect such persons from exposure to the 'harmful influences' associated with the consumption of such beverages." (*Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 567, 28 Cal.Rptr.2d 638, 869 P.2d

Copr. © Bancroft-Whitney and West Group 1998

1163.)

The Legislature has implemented this constitutional mandate in a number of ways. For example, section 25658, subdivision (a) (§ 25658(a)) makes it a misdemeanor to sell or furnish an alcoholic beverage to any person under the age of 21 years. Section 25658, subdivision (b) makes it a misdemeanor for an underage person to buy alcohol or consume an alcoholic beverage in any on-sale premises. Under a new law enacted in 2003, a parent who permits his or her minor child to drink an intoxicating beverage can under **910 some circumstances be guilty of a misdemeanor. (§ 25658.2.) [FN3]

FN3. Section 25658.2 provides: "(a) A parent or legal guardian who knowingly permits his or her child, or a person in the company of the child, or both, who are under the age of 18 years, to consume an alcoholic beverage or use a controlled substance at the home of the parent or legal guardian is guilty of [a] misdemeanor if all of the following occur:
"(1) As the result of the consumption of an alcoholic beverage or use of a controlled substance at the home of the parent or legal guardian, the child or other underage person has a blood-alcohol concentration of 0.05 percent or greater, as measured by a chemical test, or is under the influence of a controlled substance.
"(2) The parent knowingly permits that child or other underage person, after leaving the parent's or legal guardian's home, to drive a vehicle.
"(3) That child or underage person is found to have caused a traffic collision while driving the vehicle."

*262 Of course, an underage person creates a potentially deadly situation when he or she drives after imbibing. Addressing that situation, the Legislature has provided penalties for persons under the age of 21 who drive with a blood-alcohol concentration much less than that prohibited for persons over 21 years old. For example, the Legislature has enacted what has been termed a "zero tolerance" law (*Coniglio v. Department of Motor Vehicles* (1995) 39 Cal.App.4th 666, 673, 46 Cal.Rptr.2d 123), making it unlawful for a person under 21 years old to operate a motor vehicle with as little as a 0.01 percent blood-alcohol concentration as measured by a preliminary alcohol screening device (Veh.Code, §§ 23136, 13390). Violation of this law carries civil penalties. An underage person ***650 who drives with a 0.05 percent blood-alcohol concentration is subject to a one-year loss of driving privileges as well as other administrative liabilities (*id.*, §§ 23140, 13202.5, subds. (a) & (d)(4), 13352.6; see also *id.*, § 23224 [possession of alcoholic beverages by an underage driver].) A driver 21 years old or older, by contrast, is not subject to criminal penalties until his or her blood-alcohol concentration rises to 0.08 percent or more. (*Id.*, § 23152, subd. (b).) Irrespective of his or her blood-alcohol concentration, of course, a person of any age is subject to criminal penalties if he or she drives while "under the influence of any alcoholic beverage." (*Id.*, § 23152, subd. (a).)

Specifically addressing the circumstance where an individual purchases alcohol for an underage person, section 25658(c) makes such purchase punishable where the underage person, as a consequence of consuming the alcohol, causes great bodily injury or death to anyone. Though just a misdemeanor, the offense is punishable by imprisonment in a county jail for a minimum of six months, by a fine of up to $1,000, or both. (§ 25658, subd. (e)(3).)

Section 25658(c) does not explicitly require that the offender have knowledge, intent, or some other mental state when purchasing the alcoholic beverage, and this lacuna forms the basis of the present dispute. The question is whether we should construe the statute to require some mental state as a necessary element of the crime. Preliminary to that question is a determination of what acts the section prohibits, for if petitioner's actions did not violate section 25658(c), his knowledge or mental state would be irrelevant.

***263 B. What Acts Does Section 25658(c)**

Copr. © Bancroft-Whitney and West Group 1998

Prohibit?

[1][2][3] To determine the meaning of section 25658(c), we look to the intent of the Legislature in enacting the law, "being careful to give the statute's words their plain, commonsense meaning. [Citation.] If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919, 129 Cal.Rptr.2d 811, 62 P.3d 54.) Additionally, we must interpret section 25658(c) in context with the entire statute and the statutory scheme. (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743, 110 Cal.Rptr.2d 828, 28 P.3d 876.)

[4] Section 25658(c) provides in full: "Any person who violates subdivision (a) by purchasing an alcoholic beverage for a person under the age of 21 years and the person under the age of 21 years thereafter consumes the alcohol and thereby proximately causes great bodily injury or death to himself, **911 herself, or any other person, is guilty of a misdemeanor." Subdivision (a), in turn, states that "every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." Consequently, subdivision (c) prohibits the selling, furnishing or giving away of alcohol to an underage person, but only in the circumstance therein specified, namely, by "purchasing" such beverage "for" an underage person. Only persons who (1) furnish or give away alcoholic beverages, (2) by purchasing such beverages, (3) for an underage person can be guilty of violating section 25658(c).

Section 25658(c) plainly embraces the situation in which an underage person, loitering in front of a liquor store, asks an approaching adult to buy alcoholic beverages for him or her, commonly known as the "shoulder tap" situation (see ***651 *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 293, 4 Cal.Rptr.2d 280 [describing how "minors tap adults on the shoulder" as they enter a market and "get them to buy liquor for the minors"]) or, more colloquially, "shoulder tapping" (http:// www.urbandictionary.com/define.php?term=shoulder+tapping [as of Aug. 23, 2004]). In such situations, that the buyer "*purchas* [*ed*] an alcoholic beverage *for* a person under the age of 21 years" (italics added) in violation of section 25658(c) is not open to doubt. Used in this sense, the statutory phrase "purchas[e] ... for" means the offender must stand in the shoes of the underage person and act as a buyer by proxy; the word "for" in this case means "in place of." (Webster's 3d New Internat. Dict. (2002) p. 886, col. 2 [giving example of definition 5a: "go to the store [for] me"].)

*264 That the Legislature's attention was focused on the phenomenon of shoulder tapping when it enacted section 25658(c) is clear from the legislative history. (*In re J.W.* (2002) 29 Cal.4th 200, 211, 126 Cal.Rptr.2d 897, 57 P.3d 363 ["To determine the purpose of legislation, a court may consult contemporary legislative committee analyses of that legislation, which are subject to judicial notice"].) Subdivision (c) of section 25658 began as Assembly Bill No.2029 (1997-1998 Reg. Sess.), introduced by Assemblyman Keeley on February 18, 1998. When the bill was introduced in the Assembly Committee on Public Safety on April 14, 1998, the author's comments were incorporated into the bill's analysis: " Last July, a tragedy occurred in the district I represent which brought to my attention the high level of access that minors have to alcohol. Three minors died in a drunk driving accident, in which the driver, a minor, had consumed alcohol that was purchased for him by an adult. The adult served 30 days in a county jail and the driver of the car is serving an eight-year sentence in state prison. [¶] According to the United Way, nationwide, 62% of 12th graders have been drunk. In Santa Cruz County alone, 95% of 11th graders say that they could easily obtain alcohol if they wanted to. *One of the top ways in which minors gain access to alcohol is by 'shoulder tapping,' or asking an adult, often in front of a liquor store, to purchase alcohol for a minor.* [¶] *Adults who do this must be held responsible for their actions.* The intention of [Assembly Bill No.] 2029 is to provide an effective deterrent to adults

Copr. © Bancroft-Whitney and West Group 1998

who are irresponsible enough to buy alcohol for minors.' " (Assem. Com. on Public Safety, Analysis of Assem. Bill No.2029 (1997-1998 Reg. Sess.) Apr. 14, 1998, italics added.) The Superintendent of the San Lorenzo Unified School District provided a similar argument in support of the bill. (*Ibid.*) Assemblyman Keeley's statement was later included in the state Senate's bill analysis. (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1204 (1997-1998 Reg. Sess.) June 23, 1998.) [FN4] No contrary statements of intent appear in any of the legislative history of these bills.

FN4. By this time, Assembly Bill No.2029 had been incorporated into Assembly Bill No. 1204 for technical procedural reasons.

Whether the statute is limited to the shoulder tap situation or embraces other circumstances is a more difficult question. The archetypal shoulder tap scenario involves strangers, a request from an underage person, a business establishment that sells alcohol, and no intent on the buyer's part to **912 share in drinking the purchased beverage. But does the statute apply when, for example, a parent, without solicitation, goes to a grocery store and buys ***652 beer for her underage son? In that hypothetical situation, as apparently in the instant case, no actual request to purchase the alcohol is made. Or does the statute apply when an adult attending a baseball game announces he is going to the concession stand and at the request of an underage friend brings him back a beer? Although that situation involves a request to purchase, the *265 participants (as in this case) are not strangers. Further, does section 25658(c) apply if an adult purchases beer for himself but days later gives one to an underage guest? In that case, no intent to purchase for a third party exists at the time of sale, but the purchaser later provides the alcohol to an underage person. Finally, does the statute apply to the social party host who purchases alcoholic beverages generally for a party but not for any particular guest? In that situation, the host certainly purchased the beverages for the party, [FN5] but did he do so for a particular underage guest?

FN5. In fact, party guest Szalay purchased some of the beer, and petitioner's wife purchased the remainder, at petitioner's request. Presumably petitioner's culpability as a purchaser of intoxicating beverages flows from his status as an aider and abettor, an issue we need not decide here inasmuch as he essentially entered a "slow plea" of guilty by submitting the case on the police report.

[5] In resolving the meaning of section 25658(c), we must be careful not to add requirements to those already supplied by the Legislature. (*Robert F. Kennedy Medical Center v. Belshé* (1996) 13 Cal.4th 748, 756, 55 Cal.Rptr.2d 107, 919 P.2d 721.) "Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562, 7 Cal.Rptr.2d 531, 828 P.2d 672.) Here, although the Legislature was focused on the shoulder tap scenario, the language of section 25658(c) is not so limited. Section 25658(c) imposes no requirement that the underage person make a request to a proxy to buy alcohol, nor that the two principal actors be unknown to each other. Nor is there a statutory requirement that the underage person wait outside the place of sale or that the buyer have no intention to share the beverage. The statute requires only that the offender "purchas[e]" an alcoholic beverage "for" an underage person. That event can occur in a variety of settings. In short, section 25658(c) embraces more than merely shoulder tapping.

Nevertheless, some limits are apparent when we consider section 25658(c) together with section 25658(a). (See *Renee J. v. Superior Court, supra,* 26 Cal.4th at p. 743, 110 Cal.Rptr.2d 828, 28 P.3d 876.) As indicated, subdivision (a) of section 25658 sweeps more broadly than does subdivision (c), criminalizing the selling, furnishing, or giving of alcoholic beverages "*to* any person under the age of 21" (italics added), whereas subdivision (c) criminalizes the violation of subdivision (a) "by purchasing an alcoholic beverage *for* a person under the age of 21 years" (italics added). Viewing together these two subdivisions of the same statute,

Copr. © Bancroft-Whitney and West Group 1998

it is apparent the acts prohibited by subdivision (c) involve a subset of the universe of possible situations in which one might violate subdivision (a). The Legislature's use of the phrase "purchas[e] ... for" delineates a smaller group of prohibited actions by identifying specific goal-directed behavior by the purchaser of alcoholic beverages, involving an identified and particular ***266** underage person. In other words, to violate section 25658(c), one must not only *furnish* alcohol *to* an underage person, one must *purchase* the alcohol *for* that person.

*****653** Although section 25658(a) clearly embraces the social party host (because such persons furnish or give away alcoholic beverages to their guests), the generalized actions of the typical social party host, providing libations for his or her guests, do not run afoul of the more specific section 25658(c) because, as a general matter, such hosts cannot be said to have purchased alcohol "for" any particular guest. [FN6] Although a social host could be said ****913** to have purchased alcoholic beverages for every one of his or her guests, such an interpretation would be unreasonable, as in that case, "purchase for" would mean the same as "furnish to," blurring the distinction between the two subdivisions. As used in section 25658(c), the term "for" is "used as a function word to indicate the person ... that something is to be delivered to." (Webster's 3d New Internat. Dict., *supra*, p. 886, col. 2 [giving example of definition 3d: "any letters [for] me"].)

FN6. We thus disagree with the People's position, stated at oral argument, that to ensure one does not violate section 25658(c), a social host can simply choose not to serve alcoholic beverages.

In light of the plain meaning of the statutory language, we conclude section 25658(c) applies to any situation in which an individual purchases alcoholic beverages for an underage person. This includes, but is not limited to, the buyer-by-proxy and shoulder tap scenarios. We now consider whether section 25658(c), so interpreted, requires proof of some mental state such as knowledge of age.

C. Knowledge of Age

1. *Section 25658(a)*

[6] Because section 25658(c) describes a subset of actions prohibited by section 25658(a), [FN7] if subdivision (a) requires the People to prove a violator knew the age of the person to whom alcohol was furnished, such proof would also be required to show a violation of subdivision (c). Conversely, if subdivision (a) is a strict liability offense, lacking any knowledge requirement, that fact would weigh heavily in our determination whether subdivision (c) requires proof of knowledge. We thus consider whether section 25658(a) requires such proof. We conclude it does not.

FN7. Of course, subdivision (c) has the additional requirement that the underage person actually consume the alcohol "and thereby proximately causes great bodily injury or death to himself, herself, or any other person." Strictly speaking, then, subdivision (c) is not a lesser included offense of subdivision (a).

[7] ***267** For criminal liability to attach to an action, the standard rule is that "there must exist a union, or joint operation of act and intent, or criminal negligence." (Pen.Code, § 20.) "[T]he requirement that, for a criminal conviction, the prosecution prove some form of guilty intent, knowledge, or criminal negligence is of such long standing and so fundamental to our criminal law that penal statutes will often be construed to contain such an element despite their failure expressly to state it. 'Generally, " '[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' ..." [Citation.] In other words, there must be a union of act and wrongful intent, or criminal negligence. [Citations.] "So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication." ' " (*In re Jorge M.* (2000) 23 Cal.4th

Copr. © Bancroft-Whitney and West Group 1998

866, 872, 98 Cal.Rptr.2d 466, 4 P.3d 297 (*Jorge M.*); see 1 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Elements, § 1, pp. 198-199.)

The prevailing trend in the law is against imposing criminal liability without ***654 proof of some mental state where the statute does not evidence the Legislature's intent to impose strict liability. (*People v. Simon* (1995) 9 Cal.4th 493, 521, 37 Cal.Rptr.2d 278, 886 P.2d 1271; *Liparota v. United States* (1985) 471 U.S. 419, 426, 105 S.Ct. 2084, 85 L.Ed.2d 434 [extension of strict liability crimes disfavored]; see 1 Witkin & Epstein, Cal.Criminal Law, *supra*, Elements, § 18, p. 223 [examples given of strict liability crimes are not "indicative of a trend. Indeed, the opposite appears to be true"].)

[8] "Equally well recognized, however, is that for certain types of penal laws, often referred to as public welfare offenses, the Legislature does not intend that any proof of scienter or wrongful intent be necessary for conviction. 'Such offenses generally are based upon the violation of statutes which are purely regulatory in nature and involve widespread injury to the public. [Citation.] "Under many statutes enacted for the protection of the public health and safety, e.g., traffic and food and drug regulations, criminal sanctions are relied upon even if there is no wrongful intent. These offenses usually involve light penalties and no moral obloquy or damage to reputation. Although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than **914 punishment or correction. The offenses are not crimes in the orthodox sense, and wrongful intent is not required in the interest of enforcement." ' " (*Jorge M., supra,* 23 Cal.4th at p. 872, 98 Cal.Rptr.2d 466, 4 P.3d 297.) [FN8] *268 Alcohol-related offenses, such as driving with a prohibited blood-alcohol concentration (*Ostrow v. Municipal Court* (1983) 149 Cal.App.3d 668, 197 Cal.Rptr. 40) and employment of a minor at an establishment selling alcoholic beverages (*Kirby v. Alcoholic Bev. etc. App. Bd.* (1968) 267 Cal.App.2d 895, 73 Cal.Rptr. 352), have been found to constitute such public welfare offenses.

FN8. Examples of public welfare offenses for which criminal liability attaches in the absence of any mens rea include improperly labeling and storing hazardous waste (Health & Saf.Code, § 25190; see *People v. Matthews* (1992) 7 Cal.App.4th 1052, 1057-1058, 9 Cal.Rptr.2d 348), sale of mislabeled motor oil (Bus. & Prof.Code, § 13480; *People v. Travers* (1975) 52 Cal.App.3d 111, 124 Cal.Rptr. 728), sale of food contaminated with fecal matter (*People v. Schwartz* (1937) 70 P.2d 1017, 28 Cal.App.2d Supp. 775), sale of shortweighted food (*In re Marley* (1946) 29 Cal.2d 525, 175 P.2d 832), and use of an unlicensed poison (*Aantex Pest Control Co. v. Structural Pest Control Bd.* (1980) 108 Cal.App.3d 696, 166 Cal.Rptr. 763).

[9] We found in *Jorge M., supra,* 23 Cal.4th 866, 98 Cal.Rptr.2d 466, 4 P.3d 297, a "useful" analytical framework "where the legislative intent is not readily discerned from the text [of the law] itself." (*Id.* at p. 873, 98 Cal.Rptr.2d 466, 4 P.3d 297.) We there explained that "courts have commonly taken into account ...:(1) the legislative history and context; (2) any general provision on mens rea or strict liability crimes; (3) the severity of the punishment provided for the crime ('Other things being equal, the greater the possible punishment, the more likely some fault is required'); (4) the seriousness of harm to the public that may be expected to follow from the forbidden conduct; (5) the defendant's opportunity to ascertain the true facts ('The harder to find out the truth, the more likely the legislature meant to require fault in not knowing'); (6) the difficulty prosecutors would have in proving a mental state for the crime ('The greater the difficulty, the more likely it is that the legislature intended to relieve the prosecution of that burden so that the law could be effectively enforced'); [and] (7) the number of prosecutions to be expected under the statute ('The fewer the expected prosecutions, ***655 the more likely the legislature meant to require the prosecuting officials to go into the issue of fault')." (*Ibid.*)

We need not address all of the *Jorge M.* factors

Copr. © Bancroft-Whitney and West Group 1998

because section 25658(a) falls easily into the category of crimes courts historically have determined to be public welfare offenses for which proof of knowledge or criminal intent is unnecessary. First, the statute does not expressly require a mental state. More to the point, the statute is closely akin to those public welfare offenses that " 'are purely regulatory in nature and involve widespread injury to the public.' " (*Jorge M., supra,* 23 Cal.4th at p. 872, 98 Cal.Rptr.2d 466, 4 P.3d 297.) Like those offenses, section 25658(a) is more regulatory than penal, addressed more to the public welfare than to the individual punishment of the transgressor. As one court has opined when addressing the purpose of section 25658: "[I]t may be assumed that the provisions prohibiting certain transactions with minors are designed to protect them from harmful influences." (*Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 188, 67 Cal.Rptr. 734; accord, *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd., supra,* 7 Cal.4th at p. 567, 28 Cal.Rptr.2d 638, 869 P.2d 1163.)

*269 The statute's goal of avoiding a broader societal harm rather than imposing individual punishment is illustrated by the light penalties prescribed for its violation. Violation of section 25658(a) imposes a $250 fine, between 24 and 32 hours of community service, or a combination thereof. (§ 25658, subd. (e)(1).) For a first offense involving a minor and not simply an underage person, the penalty is a $1,000 fine and at least 24 hours of community service. (*Id.,* subd. (e)(2).) No violation of section 25658(a) results in incarceration of any length. Thus, as for other public welfare offenses, section 25658(a) " ' "involve[s] light penalties and no moral obloquy or damage to reputation. Although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction." ' " **915(*Jorge M., supra,* 23 Cal.4th at p. 872, 98 Cal.Rptr.2d 466, 4 P.3d 297.) The light penalties for violating section 25658 (a) strongly suggest the Legislature has dispensed with any requirement that the People prove knowledge or some other criminal intent.

[10] Petitioner argues section 25658(a) must be interpreted to require knowledge of age despite any explicit statutory requirement, citing *Brockett v. Kitchen Boyd Motor Co.* (1972) 24 Cal.App.3d 87, 100 Cal.Rptr. 752. *Brockett* concerned civil, not criminal, liability. In passing, it stated about section 25658(a): "If one *wilfully* disobeys the law and *knowingly* furnishes liquor to a minor *with knowledge* that the minor is going to drive a vehicle on the public highways, as alleged in this case, he must face the consequences." (*Brockett, supra,* at p. 93, 100 Cal.Rptr. 752, italics added.) Not addressed in *Brockett* is whether one must face the same consequences absent such intent or knowledge. An opinion, of course, is not authority for propositions not considered. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 581, 110 Cal.Rptr.2d 809, 28 P.3d 860.) In any event, *Brockett* relied extensively on *Vesely v. Sager* (1971) 5 Cal.3d 153, 95 Cal.Rptr. 623, 486 P.2d 151, which subsequently was statutorily overruled. (See Bus. & Prof.Code, § 25602, subd. (c); Civ.Code, § 1714, subd. (b).)

More on point is *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd., supra,* 7 Cal.4th at page 569, 28 Cal.Rptr.2d 638, 869 P.2d 1163, where this court held as to seller-licensees that "the laws against sales to minors [citing Cal. Const., art. XX, § 22; Bus. & Prof.Code, § 25658(a)] can be violated *despite* the seller's (or its ***656 agents') lack of knowledge of the purchaser's minority." *Provigo,* then, at least suggests section 25658(a) also does not require proof of knowledge or intent by other persons who provide alcohol to underage persons. We conclude that to obtain a conviction under section 25658(a), the People need not prove the offender knew the person to whom he or she furnished, sold or gave an alcoholic beverage was in fact not yet 21 years old.

*270 2. *Section 25658(c)*

[11] Whether subdivision (c) of section 25658 dispenses with a proof of knowledge requirement is a more complex question. Unlike with subdivision (a), three factors mentioned in *Jorge M., supra,* 23 Cal.4th at page 873, 98 Cal.Rptr.2d 466, 4 P.3d 297

Copr. © Bancroft-Whitney and West Group 1998

--the legislative history and context of the statute, the severity of the punishment, and the seriousness of the harm to the public--have substantial application in the analysis for subdivision (c). Nevertheless, we similarly conclude the People need not prove knowledge or intent to establish a violation of subdivision (c).

First and foremost, the legislative history of section 25658(c) strongly suggests the Legislature intended to impose guilt without a showing the offender knew the age of the person for whom alcohol was purchased. As discussed, *ante,* section 25658(c) was an amendment to the existing statute, responding to an incident in Santa Cruz County in which someone over 21 years old purchased alcoholic beverages for an underage person who thereafter became intoxicated and crashed his car, killing three minors. As originally proposed, Assembly Bill No.2029 would have proscribed "furnish[ing]" an alcoholic beverage to a "minor" if the minor then caused death or great bodily injury. This original version of the bill made the new crime punishable as either a felony or a misdemeanor, commonly called a wobbler. (Assem. Bill No.2029 (1997-1998 Reg. Sess.) as introduced Feb. 18, 1998.) The bill was amended in the Assembly to substitute the phrase "purchasing ... for" in the place of "furnishing ... to." The amendment also deleted reference to a "minor" and replaced it with "a person under the age of 21 years." That the crime could be a felony punishable in state prison remained unchanged. (Assem. Amend. to Assem. Bill No.2029 (1997-1998 Reg. Sess.) Mar. 26, 1998.)

The bill was then referred to the Assembly Committee on Public Safety. Comments to the bill include this telling one: "*This bill requires little or no intent on the part of the purchaser of alcohol for underage persons.* There is no requirement that GBI [great bodily injury] or death be foreseeable to the **916 purchaser, other than the general knowledge that alcohol can sometimes lead to dangerous situations. As is stated above, a commercial vendor is only found civilly liable and guilty of a misdemeanor if he or she sells to an obviously intoxicated minor. [¶] *Should this bill be amended to provide that the purchaser must know, or reasonably should have known, that GBI was a likely result of the purchase of the alcohol for the underage person?* " (Assem. Com. on Public Safety, Analysis of Amend. to Assem. Bill No.2029 (1997-1998 Reg. Sess.) Apr. 14, 1998, italics added, underscoring in original.)

*271 Before the full Assembly a week later, Assembly Bill No.2029 was again amended. Proposed section 25658(c) was then to read in pertinent part: "Any person who violates subdivision (a) by purchasing an alcoholic beverage for a person under the age of 21 years and the person under the age of 21 years thereafter consumes the alcohol and thereby proximately causes great bodily injury to himself, herself, ***657 or any other person is guilty of a public offense punishable by imprisonment in a county jail not to exceed one year or in state prison. *In order to be punishable by imprisonment in the state prison pursuant to this subdivision:* [¶] *(1) The purchaser shall have known or reasonably should have known that the person for whom he or she was purchasing was under the age of 21 years* ...." (Assem. Amend. to Assem. Bill No.2029 (1997-1998 Reg. Sess.) Apr. 21, 1998, italics added.)

As the Legislative Counsel's Digest for this proposed amendment explained, "[t]he bill would require that to be punishable as a felony the purchaser must have known or reasonably should have known that the person for whom he or she was purchasing was under the age of 21 years ...." (Legis. Counsel's Dig., Assem. Bill No.2029 (1997-1998 Reg. Sess.) Apr. 21, 1998.)

The substance of Assembly Bill No.2029 was then added to Assembly Bill No. 1204, then before the state Senate. (Sen. Amend. to Assem. Bill No. 1204 (1997-1998 Reg. Sess.) June 3, 1998.) In the Senate Committee on Public Safety, a question was raised concerning the foreseeability of the injury caused by the underage drinker. "As the opposition notes, this provision would provide a potential prison sentence for an act not directly caused by the person. A 21 year old college student who gives a

Copr. © Bancroft-Whitney and West Group 1998

20 year old friend a beer could be subject to an increased misdemeanor penalty if that 20 year old friend were to trip down a flight of stairs after drinking the beer and breaks his/her arm." (Sen. Com. on Public Safety, Analysis of Amend. to Assem. Bill No. 1204 (1997-1998 Reg. Sess.) June 3, 1998.) "SHOULD WE PUNISH ONE PERSON FOR THE UNFORESEEABLE SUBSEQUENT BEHAVIOR OF ANOTHER BECAUSE THE FIRST PERSON COMMITTED AN OFFENSE?" (*Ibid.*)

Although a concern was raised in the Senate committee about the foreseeability of the injury, no question was raised about the felony provision or its requirement that the offender knew or should have known the age of the person for whom he was buying alcohol. Nevertheless, Assembly Bill No. 1204 was thereafter amended to delete the felony option together with its intent requirement, leaving section 25658(c) as a misdemeanor provision only, with no explicit intent requirement. (Sen. Amend. to Assem. Bill *272 No. 1204 (1997-1998 Reg. Sess.) June 30, 1998.) It was this version that was eventually passed, enrolled, sent to the Governor, and signed into law. [FN9]

FN9. As the Court of Appeal explained: "The substance of [Assembly Bill No.] 1204 was then incorporated into a related bill proceeding through the Senate, [Senate Bill No.] 1696, to ensure that its provisions would not be super[s]eded if both bills were enacted and [Senate Bill No.] 1696 was chaptered last. (Legis. Counsel's Dig., Sen. Bill No. 1696, Stats. 1998 (1997–1998 Reg. Sess.).) ([Senate Bill] 1696.) In fact, that is what happened. [Assembly Bill No.] 1204 was chaptered on September 14, 1998. [Senate Bill] 1696 was chaptered on September 18, 1998. Section 25658 was amended to include subdivision (c) by Senate Bill 1696."

The Court of Appeal below reasoned: "A review of this history shows that the Legislature considered incorporating an express mental state element into the statute when the subdivision could be prosecuted as a felony. It may be inferred that the Legislature intended the misdemeanor to be a strict liability statute when it deleted the felony provision **917 without moving the requirement of a specific mental state into the remaining misdemeanor portion of subdivision (c)." While this inference is ***658 strong, petitioner contends the appellate court's view of the legislative history is simplistic because it fails to view the totality of the legislative history, which indicates a legislative concern with not only the potential offender's knowledge of the drinker's age, but also with his or her subjective awareness of the foreseeability of the harm caused by the drinker.

As our recitation of the legislative history demonstrates, the Legislature was, at various points, concerned *both* with the possibility that one could be convicted of a felony under the new law even though unaware of the age of the person for whom alcohol was bought *and* with the possibility the purchaser could be convicted although unaware the drinker intended to become intoxicated or to drive. But that the Legislature may have entertained multiple concerns about the proposed law does not undermine the obvious inference that in deleting the felony option, with its attached intent requirement, the Legislature intended to leave the new crime a misdemeanor only, with no intent requirement.

Interpretation of section 25658(c) as a strict liability offense is bolstered by a consideration of other statutes addressing related issues, all of which appear in the same portion of the Business and Professions Code as does section 25658. (See art. 3 ["Women and Minors"], ch. 16 ["Regulatory Provisions"], div. 9 ["Alcoholic Beverages"].) For example, section 25658.2, subdivision (a) provides: "A parent or legal guardian who *knowingly* permits his or her child ... under the age of 18 years, to consume an alcoholic beverage ... at the home of the parent or legal guardian [under certain conditions] is guilty of [a] misdemeanor." (Italics added.) Similarly, section 25657, subdivision (b) provides: "In any place of business where alcoholic beverages are *273 sold to be consumed upon the premises, to employ or *knowingly permit* anyone to loiter in or about said premises for the purpose of

Copr. © Bancroft-Whitney and West Group 1998

begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting [is guilty of a misdemeanor]." (Italics added.) Finally, section 25659.5, subdivision (d) provides: "Any purchaser of keg beer who *knowingly* provides false information as required by subdivision (a) is guilty of a misdemeanor." (Italics added.)

[12] Because the wording of these statutes shows the Legislature if it wishes knows how to express its intent that knowledge be an element of an offense, the absence of such a requirement in section 25658(c) indicates it intended no such requirement. (*People v. Murphy* (2001) 25 Cal.4th 136, 159, 105 Cal.Rptr.2d 387, 19 P.3d 1129.) "It is a settled rule of statutory construction that where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes." (*People v. Norwood* (1972) 26 Cal.App.3d 148, 156, 103 Cal.Rptr. 7.) In sum, the legislative history and context of section 25658(c) tilts heavily in favor of criminal liability without proof of knowledge or intent.

[13] The second factor we find significant is the severity of the punishment. (*Jorge M., supra,* 23 Cal.4th at p. 873, 98 Cal.Rptr.2d 466, 4 P.3d 297.) The greater the punishment for a particular crime, the more likely the Legislature intended to require the state to prove an offender acted with some culpable mental state. "For crimes which impose severe punishment, '... the usual presumption that a defendant must know the facts that make his conduct illegal should apply.' (***659*Staples v. United States* [(1994)] 511 U.S. [600,] 619, [114 S.Ct. 1793, 128 L.Ed.2d 608].)" (*People v. Coria* (1999) 21 Cal.4th 868, 878, 89 Cal.Rptr.2d 650, 985 P.2d 970.) For example, we reasoned in *Jorge M.* that the "Legislature's choice of potential felony [rather than misdemeanor] punishment ... reinforces the presumption expressed by [Penal Code] section 20 and suggests that correspondingly strong evidence of legislative intent is required to exclude mens rea from the offense." (*Jorge M., supra,* at p. 880, 98 Cal.Rptr.2d 466, 4 P.3d 297.)

Section 25658(c) is punishable as a misdemeanor, not a felony. In general, punishment **918 for a misdemeanor cannot exceed confinement in a county jail for up to six months, a fine not to exceed $1,000, or both. (Pen.Code, § 19.) The maximum confinement for a misdemeanor is one year in jail. (*Id.*, § 19.2.) A violation of section 25658(c), though not a felony, provides for a punishment greater than that prescribed for the typical misdemeanor because a violator "shall be punished by imprisonment in a county jail *for a minimum term of *274 six months* not to exceed one year, by a fine not exceeding one thousand dollars ($1,000), or by both imprisonment and fine." (§ 25658, subd. (e)(3), italics added.)

Although the heightened penalty tends to distinguish section 25658(c) from the ordinary misdemeanor and suggests we should imply a mental element to this crime, a higher than normal penalty does not necessarily preclude a crime from being a public welfare offense; the severity of the punishment is, instead, a factor in the overall calculus in determining whether proof of a mental element must be implied. Here, the punishment falls somewhere in the middle, greater than that prescribed for the typical misdemeanor, but less than that for the typical wobbler or felony.

In addition to the potential length of possible incarceration, petitioner contends the reputational injury and personal disgrace he will suffer should his conviction for violating section 25658(c) be allowed to stand are factors relevant to determining the severity of the punishment. We agree. Discussing this issue, Justice Traynor opined for this court: "Under many statutes enacted for the protection of the public health and safety, e.g., traffic and food and drug regulations, criminal sanctions are relied upon even if there is no wrongful intent. *These offenses usually involve light penalties and no moral obloquy or damage to reputation.* Although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction. The offenses are not crimes in the orthodox sense, and wrongful intent is not required in the interest of

Copr. © Bancroft-Whitney and West Group 1998

enforcement." (*People v. Vogel* (1956) 46 Cal.2d 798, 801, fn. 2, 299 P.2d 850, italics added (*Vogel*), quoted in *Jorge M., supra,* 23 Cal.4th at p. 872, 98 Cal.Rptr.2d 466, 4 P.3d 297.) At issue in *Vogel* was the crime of bigamy. Justice Traynor further explained: "The severe penalty for bigamy [then up to a $5,000 fine, confinement in county jail, or in state prison for up to 10 years], *the serious loss of reputation conviction entails,* the infrequency of the offense, and the fact that it has been regarded for centuries as a crime involving moral turpitude, make it extremely unlikely that the Legislature meant to include the morally innocent to make sure the guilty did not escape." (*Vogel, supra,* at p. 804, 299 P.2d 850, fn. omitted, italics added.)

More recently, the Court of Appeal addressed the question whether the crime of misdemeanor animal cruelty (Pen.Code, § 597f, subd. (a)) required a showing of either civil or criminal negligence. (*People v. Speegle* (1997) 53 Cal.App.4th 1405, 62 Cal.Rptr.2d 384.) The court found the ***660 reputational injury associated with the criminal mistreatment and neglect of animals to justify the higher, criminal negligence standard. "In our society, those who mistreat animals are the deserved object of obloquy, and their conduct is wrongful of itself and not just as a matter of legislative declaration." (*Id.* at p. 1415, 62 Cal.Rptr.2d 384.)

*275 Like the bigamist in *Vogel, supra,* 46 Cal.2d 798, 299 P.2d 850, and the defendant who kept, neglected, and starved 200 poodles in *People v. Speegle, supra,* 53 Cal.App.4th 1405, 62 Cal.Rptr.2d 384, a person who purchases alcoholic beverages for an underage person, enabling that person to become intoxicated and to cause "great bodily injury or death," may expect severe censure from the general public. That drunk drivers, and especially underage drunk drivers, cause death and destruction on our highways is common knowledge, and anyone contributing to that societal tragedy would suffer significant reputational injury. Considering the heightened misdemeanor penalty together with the societal condemnation a violator of section 25658(c) would encounter, we conclude the severity of the punishment weighs in favor of requiring some intent element for section 25658(c).

The third factor we find particularly pertinent is the seriousness of the harm or injury **919 to the public. (*Jorge M., supra,* 23 Cal.4th at p. 873, 98 Cal.Rptr.2d 466, 4 P.3d 297.) The more serious and widespread the expected harm from the prohibited conduct, the more likely the Legislature intended to create a public welfare offense for which no proof of knowledge or intent is required. We explained the significance of this factor in *Jorge M.:* "The AWCA [Assault Weapons Control Act] is a remedial law aimed at protecting the public against a highly serious danger to life and safety. The Legislature presumably intended that the law be effectively enforceable, i.e., that its enforcement would actually result in restricting the number of assault weapons in the hands of criminals and the mentally ill. In interpreting the law to further the legislative intent, therefore, we should strive to avoid any construction that would significantly undermine its enforceability. This is not to suggest this court would or should read any element out of a criminal statute simply to ease the People's burden of proof. But, when a crime's statutory definition does not expressly include any scienter element, the fact the Legislature intended the law to remedy a serious and widespread public safety threat militates against the conclusion it also intended impliedly to include in the definition a scienter element especially burdensome to prove." (*Id.* at pp. 880-881, 98 Cal.Rptr.2d 466, 4 P.3d 297.)

The harm that section 25658(c) aims to avoid is the death and great bodily injury of underage drivers, their passengers and other collateral victims. Unlike section 25658(a), which criminalizes the mere furnishing, selling or giving of alcohol to an underage person, section 25658(c) includes two additional and significant elements: consumption of the beverage and serious injury or death. One may fairly conclude the law addresses a "serious and widespread public safety threat." (*Jorge M., supra,* 23 Cal.4th at p. 881, 98 Cal.Rptr.2d 466, 4 P.3d 297.) Implying an intent or knowledge requirement would necessarily undermine the statute's enforceability and reduce its effectiveness in reducing the *276 number of deaths and injuries associated with underage drinking. We conclude this factor militates against inferring an intent

Copr. © Bancroft-Whitney and West Group 1998

requirement for section 25658(c).

Considering these factors together, we find the legislative history of section 25658(c), its context, and the seriousness of ***661 the harm to the public particularly persuasive in demonstrating that no knowledge-of-age requirement should be imposed. Although the public obloquy for violation of the statute and the minimum of six months in jail for its violation result in a more severe penalty than normal for a misdemeanor offense, section 25658(c) remains a misdemeanor, not a felony nor even a wobbler. On balance, we are convinced the legislative history provides the strongest evidence of legislative intent. That history indicates the Legislature intended that a conviction of violating section 25658(c) does not require a showing the offender had knowledge of the imbiber's age or other criminal intent. Accordingly, although the People must prove an accused "purchas[ed]" an alcoholic beverage "for" an underage person, the People need not also prove the accused knew that person was under 21 years of age.

D. The Mistake of Fact as to Age Defense

[14] Although the People need not prove knowledge of age in order to establish a violation of section 25658(c), the question remains whether petitioner was entitled to raise a mistake of fact defense concerning Turpin's age. The Penal Code sets forth the broad outlines of the mistake of fact defense. Section 26 of that code provides: "All persons are capable of committing crimes except [¶] ... [¶] Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." Thus, for example, in a case where a defendant was convicted of murder for shooting his wife, but claimed he honestly believed the gun was not loaded, the trial court erred by refusing to instruct the jury that a person who entertains "an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act and omission lawful, is not guilty of a crime." **920(*People v. Goodman* (1970) 8 Cal.App.3d 705, 709, 87 Cal.Rptr. 665.) [FN10] Similarly, in a case where a defendant, charged with forcible rape and kidnapping, claimed a reasonable belief that the victim consented, we held the jury should have been instructed on a mistake of fact because if a reasonable yet mistaken belief in consent was proved, the accused would not "possess the wrongful intent that is a *277 prerequisite under Penal Code section 20 to a conviction of either kidnapping ... or rape by means of force or threat." (*People v. Mayberry* (1975) 15 Cal.3d 143, 155, 125 Cal.Rptr. 745, 542 P.2d 1337.)

FN10. *People v. Goodman, supra,* 8 Cal.App.3d 705, 87 Cal.Rptr. 665, was disapproved on another ground in *People v. Beagle* (1972) 6 Cal.3d 441, 451-452, 99 Cal.Rptr. 313, 492 P.2d 1.

[15] As a general matter, however, a mistake of fact defense is not available unless the mistake disproves an element of the offense. (*People v. Parker* (1985) 175 Cal.App.3d 818, 822, 223 Cal.Rptr. 284; 1 Witkin & Epstein, Cal.Criminal Law, *supra,* Defenses, § 39, p. 372.) Thus, in *Parker,* the defendant illegally entered a structure, allegedly believing it was a commercial building. Because the building was in fact a residence, he was charged with and convicted of first degree burglary. (Pen.Code, § 459.) On appeal, the appellate court rejected his argument that the trial court had erred by failing to instruct the jury that his mistaken belief the building was an uninhabited structure constituted an affirmative defense. (*Parker, supra,* at p. 821, 223 Cal.Rptr. 284.) The appellate court reasoned that because the prosecution was not required to prove a defendant knew the building entered was a residential one in order to convict of ***662 burglary, "ignorance concerning the residential nature of a building does not render a defendant's unlawful entry into it with a felonious intent innocent conduct." (*Id.* at pp. 822-823, 223 Cal.Rptr. 284.)

Of course, murder (*People v. Goodman, supra,* 8 Cal.App.3d 705, 87 Cal.Rptr. 665), rape (*People v. Mayberry, supra,* 15 Cal.3d 143, 125 Cal.Rptr. 745, 542 P.2d 1337) and burglary (*People v. Parker, supra,* 175 Cal.App.3d 818, 223 Cal.Rptr. 284) all require proof of criminal intent, whereas public

Copr. © Bancroft-Whitney and West Group 1998

welfare offenses such as a violation of section 25658(c) do not. We addressed the mistake of fact defense for public welfare offenses in *People v. McClennegen* (1925) 195 Cal. 445, 234 P. 91, which involved a joint prosecution of several defendants for violating the state's antisyndicalism statute. It was alleged the defendants conspired to effect a change in the "industrial ownership and control in the existing economic and social system" and to "effect political changes in this state and in the United States of America by means and methods denounced by [the antisyndicalism] act." (*Id.* at p. 448, 234 P. 91.) Although we ultimately found the antisyndicalism act did not establish a public welfare crime, we discussed the mental state required for such offenses, which we denoted "statutory crimes." "The commission of various acts are made punishable under our criminal procedure, even though the doer be ignorant of the fact that the doing of the act constitutes an offense. *A mistake of fact, or a want of intent, is not in every case a sufficient defense for the violation of a criminal statute.* Statutes enacted for the protection of public morals, public health, and the public peace and safety are apt illustrations of the rule just announced. [Citations.] ... [¶] '... [T]herefore if a criminal intent is not an essential element of a statutory ***278** crime, it is not necessary to prove any intent in order to justify a conviction. Whether a criminal intent or guilty knowledge is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute, in view of its manifest purpose and design. There are many instances in recent times where the Legislature in the exercise of the police power has prohibited, under penalty, the performance of a specific act. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted *and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt.* The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute.' " ****921**(*Id.* at pp. 469-470, 234 P. 91, italics added.) In other words, for public welfare offenses for which intent need not be proved, a mistake of fact defense was unavailable.

People v. Schwartz, supra, 70 P.2d 1017, 28 Cal.App.2d Supp. 775, illustrates the point. That case involved the sale of impure or adulterated food, a public welfare offense. The court there explained that the defendant "does not need to engage in that business; but if he does engage in that business the law will not permit him to evade his responsibility to the public, declared by law, *by pleading ignorance* of the quality or contents of that which he may lawfully sell only if it is pure." (*Id.* at p. 778, 70 P.2d 1017, italics added.) Similarly, in *People v. Bickerstaff* (1920) 46 Cal.App. 764, 190 P. 656, a case involving the sale of a beverage with greater than 1 percent alcohol, "it is not a defense for the defendant to prove that he did not know the liquor sold by him contained the prohibited *****663** amount of alcohol." (*Id.* at p. 771, 190 P. 656.)

Notwithstanding the foregoing, the modern trend is to require proof of some criminal intent or knowledge in order to secure a criminal conviction. (*People v. Simon, supra,* 9 Cal.4th at p. 521, 37 Cal.Rptr.2d 278, 886 P.2d 1271.) *Vogel, supra,* 46 Cal.2d 798, 299 P.2d 850, is illustrative. In *Vogel,* the defendant was charged with bigamy in violation of Penal Code section 281, which at that time provided that "[e]very person having a husband or wife living, who marries any other person ... is guilty of bigamy." The trial court rejected the defendant's proffered evidence that he reasonably believed his first wife had divorced him, citing *People v. Kelly* (1939) 32 Cal.App.2d 624, 625, 90 P.2d 605, which held that "[a] second marriage under an erroneous assumption that the first marriage has been annulled or dissolved is not a defense to a charge of bigamy."

The *Vogel* court agreed the People need not establish the defendant knew he was still married to his first wife, but need only prove he was in fact still ***279** married to her. Nevertheless, we concluded the defendant was entitled to raise a mistake of fact as an affirmative defense, explaining that he would not be "guilty of bigamy, if he had a bona fide and reasonable belief that facts existed

Copr. © Bancroft-Whitney and West Group 1998

that left him free to remarry." (*Vogel, supra,* 46 Cal.2d at p. 801, 299 P.2d 850; see also *People v. Stuart* (1956) 47 Cal.2d 167, 302 P.2d 5 [mistake of fact defense available to charge of selling adulterated drug]; *In re Marley, supra,* 29 Cal.2d at p. 530, 175 P.2d 832 [suggesting but not deciding mistake of fact defense available to charge of shortweighting].)

Most notable, perhaps, of this line of cases is *People v. Hernandez* (1964) 61 Cal.2d 529, 39 Cal.Rptr. 361, 393 P.2d 673. In that case, the defendant was charged with statutory rape (now called unlawful sexual intercourse; see Pen.Code, § 261.5), a crime that does not require proof the defendant knew the prosecutrix's age. The defendant claimed "he had in good faith a reasonable belief that the prosecutrix was 18 years or more of age" (*Hernandez, supra,* at p. 530, 39 Cal.Rptr. 361, 393 P.2d 673), whereas in fact she was 17 years nine months old. Since the 19th century the law had made the defense of mistake of fact as to age unavailable for this crime. (*People v. Ratz* (1896) 115 Cal. 132, 134-135, 46 P. 915.) In an example of an opinion's venerability offering it no protection, this court overruled *Ratz* and held the defendant was entitled to raise a defense of mistake of fact. Citing Penal Code section 20 and *Vogel, supra,* 46 Cal.2d 798, 299 P.2d 850, we stated: "We are persuaded that the reluctance to accord to a charge of statutory rape the defense of a lack of criminal intent has no greater justification than in the case of other statutory crimes, where the Legislature has made identical provision with respect to intent. ' "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense.... [I]t has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication." ' " (*Hernandez, supra,* at pp. 535-536, 39 Cal.Rptr. 361, 393 P.2d 673.)

These cases follow the modern trend away from imposing strict liability for criminal offenses and to require some showing of knowledge **922 or criminal intent, even if only criminal negligence. (See *Jorge M., supra,* 23 Cal.4th at p. 887, 98 Cal.Rptr.2d 466, 4 P.3d 297 ["the People bear the burden of proving the defendant *knew or should have known* the firearm ***664 possessed the characteristics bringing it within the" Assault Weapons Control Act].) In addition to interpreting statutory language to require some showing of criminal intent, as we did in *Jorge M.,* we may permit a conviction absent evidence of knowledge, but allow a defendant to raise a mistake of fact in his defense, as in *Vogel, supra,* 46 Cal.2d 798, 299 P.2d 850, and *People v. Hernandez, supra,* 61 Cal.2d 529, 39 Cal.Rptr. 361, 393 P.2d 673. Although by ***280** tradition (and due process) the People often have the burden to prove knowledge or intent, shifting the burden to the defendant to prove his lack of guilty or criminal intent is in some cases also permissible. Thus, for example, addressing the crime of bigamy in *Vogel,* we explained that "guilty knowledge" was " formerly a part of the definition of bigamy [but] was omitted from [Penal Code] section 281 *to reallocate the burden of proof on that issue* in a bigamy trial. Thus, the prosecution makes a prima facie case upon proof that the second marriage was entered into while the first spouse was still living [citations], and his bona fide and reasonable belief that facts existed that left the defendant free to remarry is a defense to be proved by the defendant." (*Vogel, supra,* at pp. 802-803, 299 P.2d 850, italics added, fn. omitted; see also *People v. Taylor* (2001) 93 Cal.App.4th 933, 952-953, 114 Cal.Rptr.2d 23 (conc. & dis. opn. of Morrison, J.) [suggesting the same reallocation of the burden of proving intent in a prosecution for possession of a cane sword in violation of Pen.Code, § 12020, subd. (a)(1)].)

As in *Vogel, supra,* 46 Cal.2d 798, 299 P.2d 850, we conclude that, although the prosecution need not prove an offender's knowledge of age in order to establish a violation of section 25658(c), petitioner was entitled to raise an affirmative defense, for which he would bear the burden of proof, that he honestly and reasonably believed Turpin was at least 21 years old. Recognizing the viability of a mistake of fact defense is consistent with the modern trend away from strict liability for criminal

Copr. © Bancroft-Whitney and West Group 1998

offenses as well as with Penal Code section 20 and the statutory scheme of which Business and Professions Code section 25658(c) is but a part. Article 3, chapter 16, division 9 of the Business and Professions Code contains both section 25658(c) and 25660, and the two statutes must be construed together. (*Renee J. v. Superior Court, supra,* 26 Cal.4th at p. 743, 110 Cal.Rptr.2d 828, 28 P.3d 876.) Section 25660, relating to licensees, provides in pertinent part: "Proof that the defendant-licensee, or his employee or agent, *demanded, was shown and acted in reliance upon such* [*described*] *bona fide evidence* [of majority and identity] in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 *shall be a defense* to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon." (Italics added.) Section 25660 thus specifically authorizes licensees to raise a mistake of fact defense as to the age of a customer to whom alcohol was sold or served. "Although a violation of section 25658 can occur despite the seller's lack of knowledge that the purchaser is under the age of 21, the seller's liability is not absolute because 'the Legislature has furnished a procedure whereby he may protect himself, namely, ... section 25660 [allowing the seller to rely on bona fide evidence of majority and identity].' " (*Provigo Corp. v. Alcoholic Beverage Control Appeals Bd., supra,* 7 Cal.4th at pp. 564-565, 28 Cal.Rptr.2d 638, 869 P.2d 1163.)

*281 Does section 25660 suggest the Legislature's intent to permit a similar defense to nonlicensees? We hold that it does. A contrary conclusion would lead to an absurd ***665 result (see, e.g., *In re J. W., supra,* 29 Cal.4th at p. 210, 126 Cal.Rptr.2d 897, 57 P.3d 363; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77, 124 Cal.Rptr.2d 519, 52 P.3d 695), to wit, while licensees, who may serve alcoholic beverages to dozens or even hundreds of customers in a single night, can demand, check and act in reliance on bona fide evidence of identity and age and thereby enter a safe harbor, protected from criminal liability, a nonlicensee who serves alcoholic beverages only occasionally and to just a few persons, and who similarly demands, checks **923 and acts in reliance on bona fide evidence of identity and age, and may honestly and reasonably believe the person for whom he or she purchased alcohol was over 21 years old, would absent a mistake of fact defense be subject to criminal liability, punishable by a minimum of six months in jail. (§§ 25658(c), 25658, subd. (e)(3).) The Legislature could not have intended this disparity of treatment.

We conclude the trial court erred in refusing petitioner's offer to prove he honestly and reasonably believed Turpin was over 21 years old.

CONCLUSION

We reach the following conclusions: (1) Section 25658(c) is not limited to the shoulder tap scenario, but applies whenever an offender *purchases* alcoholic beverages *for* an underage person; (2) section 25658(c) does not apply in the typical social party host situation, because the host does not purchase alcohol for any particular guest; (3) the prosecution need not prove an offender knew (or should have known) the age of the person to whom he or she furnished alcohol in order to prove a violation of section 25658(a); (4) the prosecution need not prove an offender knew (or should have known) the age of the person for whom he or she purchased alcohol in order to prove a violation of section 25658(c); and (5) a person charged with violating section 25658(c) may defend against the charge by claiming an honest and reasonable belief that the person for whom he or she purchased alcohol was 21 years of age or older. The defendant bears the burden of proof for this affirmative defense.

Because the trial court refused to admit evidence that petitioner believed Turpin was over 21 years old, it erred. The judgment of the Court of Appeal denying the petition for writ of habeas corpus is reversed and the cause remanded to that court. The Court of Appeal is directed to grant the petition for a writ of habeas corpus, vacate the judgment of the Sacramento County Superior Court in *People v. Michael Lee Jennings,* No. 00M07614, and remand the case to the superior court for further proceedings. The clerk of the *282 Court of

Copr. © Bancroft-Whitney and West Group 1998

Appeal is directed to remit a certified copy of this opinion to the superior court for filing, and respondent shall serve another copy thereof on the prosecuting attorney in conformity with Penal Code section 1382, subdivision (a)(2). (See *In re Gay* (1998) 19 Cal.4th 771, 830, 80 Cal.Rptr.2d 765, 968 P.2d 476.)

WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, CHIN, BROWN and MORENO, JJ.

34 Cal.4th 254, 95 P.3d 906, 17 Cal.Rptr.3d 645, 04 Cal. Daily Op. Serv. 7765, 2004 Daily Journal D.A.R. 10,456

Briefs and Other Related Documents (Back to top)

• 2003 WL 23873441 (Appellate Petition, Motion and Filing) Petitioner's Reply Brief on the Merits (Sep. 22, 2003)Original Image of this Document (PDF)

• S115009 (Docket) (Apr. 08, 2003)

END OF DOCUMENT

Copr. © Bancroft-Whitney and West Group 1998

DYNA-MED, INC., Plaintiff and Appellant,
v.
FAIR EMPLOYMENT AND HOUSING COMMISSION, Defendant and Respondent
L.A. No. 32145.

Supreme Court of California

Nov 2, 1987.

SUMMARY

The trial court denied an employer's petition for writ of mandate to direct the Fair Employment and Housing Commission to set aside its decision finding the employer had fired an employee in retaliation for her filing an employment discrimination complaint under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), and awarding lost wages plus punitive damages. The employee had initially filed a complaint alleging her employer discriminated with regard to wages and promotional opportunities on the basis of sex. The complaint was resolved by means of a written settlement agreement pursuant to which the employer agreed not to engage in retaliatory action against the employee for filing the complaint. Shortly after executing the agreement, the employer fired the employee. Thereafter, the employee filed a new complaint, alleging that she was fired in retaliation for her original complaint. (Superior Court of San Diego County, No. 501958, Sheridan E. Reed, Judge.) The Court of Appeal, Fourth Dist., Div. One, No. D001228, affirmed.

The Supreme Court, holding that the FEHA does not authorize the Fair Employment and Housing Commission to award punitive damages, reversed the judgment of the Court of Appeal with directions. The court noted that Gov. Code, § 12970, subd. (a) (scope of relief), provides that the commission may issue an order requiring a respondent to take such action, including but not limited to certain prescribed remedies, as in the judgment of the commission will effectuate the purposes of the FEHA. However, it held that such statutory language permits only additional corrective, nonpunitive remedies. Thus, the court held that it could not be inferred that the Legislature intended sub silentio to empower the commission to award punitive damages. (Opinion by Panelli, J., with Lucas, C. J., Mosk, Arguelles, Eagleson and Kaufman, JJ., concurring. Separate dissenting opinion by Broussard, J.) *1380

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d, 1e) Civil Rights § 3--Employment--Fair Employment and Housing Commission--Power to Award Punitive Damages.

In a proceeding under the California Fair Employment and Housing Act, Gov. Code, § 12900 et seq., the Fair Employment and Housing Commission did not have authority to award punitive damages on behalf of an employee who had been fired by her employer five hours after the employer had agreed not to engage in retaliatory actions against the employee for filing a complaint with the commission. Although Gov. Code, § 12970, subd. (a) (scope of relief), provides that the commission may issue an order requiring a respondent to take such action, including but not limited to certain prescribed remedies, as in the judgment of the commission will effectuate the purposes of the act, such statutory language permits only additional corrective, nonpunitive remedies. Thus, the act does not authorize the commission to award punitive damages.

[Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions, note, 85 A.L.R.3d 351.]

(2) Statutes § 21--Construction--Legislative Intent--Purpose of Law.

A court's first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. Where uncertainty exists consideration should be given to the consequences

Copr. © Bancroft-Whitney and West Group 1998

that will flow from a particular interpretation.

(3) Statutes § 21--Construction--Legislative Intent--Legislative History.
Both the legislative history of a statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. A statute should be construed, whenever possible, so as to preserve its constitutionality.

(4) Words, Phrases, and Maxims--Remedy.
A remedy is something that corrects or counteracts an evil: corrective, counteractive, reparation. ***1381** It is the legal means to recover a right or to prevent or obtain redress for a wrong.

(5) Damages § 22--Exemplary or Punitive Damages--Purpose.
Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.

(6) Damages § 22.2--Exemplary or Punitive Damages--Availability--Enabling Statute.
The general rule is that where an enabling statute is essentially remedial, and does not carry a penal program declaring certain practices to be crimes or provide penalties or fines in vindication of public rights, an agency does not have discretion to devise punitive measures such as the prescription of penalties or fines. The statutory power to command affirmative action is remedial, not punitive.

(7) Statutes § 44--Construction--Aids--Contemporaneous Administrative Construction.
The contemporaneous construction of a new enactment by the administrative agency charged with its enforcement, although not controlling, is entitled to great weight. However, an administrative agency cannot by its own regulations create a remedy which the Legislature has withheld. Administrative regulations that alter or amend the statute or enlarge or impair its scope are void; courts not only may, but it is their obligation to strike down such regulations.

(8) Statutes § 34--Construction--Language--Words and Phrases--Ejusdem Generis (General Limited by Specific).
The doctrine of *ejusdem generis* states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense it would not have mentioned the particular things or classes of things which would in that event become mere surplusage.

(9) Statutes § 31--Construction--Language--Words and Phrases--Expressio Unius Est Exclusio Alterius (Exclusion of Other Things Not Expressed).
The doctrine of *expressio unius est exclusio alterius* means that the expression of certain things in a statute necessarily involves exclusion of other things not expressed.

(10) Statutes § 33--Construction--Language--Words and Phrases--Noscitur a Sociis (Meaning Derived From Context).
Under the rule ***1382** of *noscitur a sociis,* the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.

(11) Statutes § 29--Construction--Language--Legislative Intent--Canons of Construction.
Canons of statutory construction are mere guides and will not be applied so as to defeat the underlying legislative intent otherwise determined.

(12) Damages § 22--Exemplary or Punitive Damages--Caution in Granting.
Civ. Code, § 3294, subd. (a), allowing the award of exemplary damages only when the defendant has been guilty of oppression, fraud, or malice, codifies the universally recognized principle that the law does not favor punitive damages, and they should be granted with the greatest caution.

[See Cal.Jur.3d, Damages, § 116 et seq.; Am.Jur.2d, Damages, § 236 et seq.]

(13) Statutes § 22--Construction--Reasonableness.
Statutes are to be given a reasonable and commonsense interpretation consistent with the apparent legislative purpose and intent, and which, when applied, will result in wise policy rather than mischief or absurdity.

(14) Statutes § 42--Construction--Aids--Erroneous Administrative Construction.
An erroneous administrative construction does not govern the interpretation of a statute, even though the

Copr. © Bancroft-Whitney and West Group 1998

statute is subsequently reenacted without change.

(15) Statutes § 42--Construction--Aids--Unpassed Bills.
Unpassed bills, as evidences of legislative intent, have little value.

(16) Statutes § 51--Construction--Codes--Conflicting Provisions-- Surplusage.
Statutes must be harmonized, both internally and with each other, to the extent possible. Interpretive constructions which render some words surplusage are to be avoided.

COUNSEL

Mickeal Gehringer, Michael Wischkaemper, McDonald & Allen, Stephen P. McDonald and Rosemary A. Sullivan for Plaintiff and Appellant. ***1383**

Gibson, Dunn & Crutcher, Willard Z. Carr, Jr., Paula L. Hemminger, Jerome M. Behrens, Behrens & Viau, James C. Paras, Morrison & Foerster, Stephen A. Bokat, Paula J. Connelly, Michael D. Ott, County Counsel (Madera), and Greg Kamptner, Deputy County Counsel, as Amici Curiae on behalf of Plaintiff and Appellant.

John K. Van de Kamp, Attorney General, Andrea S. Ordin, Chief Assistant Attorney General, Beverly Tucker and Marian M. Johnston, Deputy Attorneys General, for Defendant and Respondent.

Joan M. Graff, Robert Barnes, Rebecca I. McKee, Patricia S. Mar, Martha J. Shaver, Feldman, Waldman & Kline, Judith E. Kurtz and Nancy L. Davis as Amici Curiae on behalf of Defendant and Respondent.

PANELLI, J.

In *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211 [185 Cal.Rptr. 270, 649 P.2d 912] (hereafter *Commodore Home*), we held that a court may award punitive damages in a civil suit for job discrimination pursuant to the California Fair Employment and Housing Act (FEHA or Act) (Gov. Code, § 12900 et seq.). [FN1] The issue in the present case is whether the FEHA authorizes the Fair Employment and Housing Commission (Commission or the commission) to impose punitive damages, a question left unresolved in *Commodore Home*. [FN2] (*Id.* at p. 220.) As will appear, we conclude that the FEHA does not authorize the commission to award punitive damages.

FN1 All further statutory references are to the Government Code unless otherwise indicated.

FN2 The majority in *Commodore Home* assumed for purposes of argument that punitive damages are not available from the commission. (32 Cal.3d at p. 218, fn. 7.) Justice Richardson, dissenting, joined by Justice Kaus, expressly concluded that the FEHA does not allow the commission to award exemplary damages. (32 Cal.3d at p. 228.)

I. Background

The California Fair Employment Practice Act (FEPA) was enacted in 1959 (former Lab. Code, § 1410 et seq.; see Stats. 1959, ch. 121, § 1, pp. 1999-2005) and recodified in 1980 as part of the FEHA (Stats. 1980, ch. 992, § 4, p. 3140 et seq.). "The law establishes that freedom from job discrimination on specified grounds, ... is a civil right. (§ 12921.) It declares that such discrimination is against public policy (§ 12920) and an unlawful employment practice (§ 12940). [Fn. omitted.]" (*Commodore Home, supra*, 32 Cal.3d at p. 213.) The statute creates two administrative bodies: the ***1384** Department of Fair Employment and Housing (the department) (§ 12901), whose function is to investigate, conciliate, and seek redress of claimed discrimination (§ 12930), and the commission, which performs adjudicatory and rulemaking functions (§ 12935; see also § 12903). An aggrieved person may file a complaint with the department (§ 12960), which must promptly investigate (§ 12963). If the department deems a claim valid it seeks to resolve the matter - in confidence - by conference, conciliation, and persuasion. (§ 12963.7.) If that fails or seems inappropriate, the department may issue an accusation to be heard by the commission. (§ § 12965, subd. (a), 12969.) The department acts as prosecutor on the accusation and argues the complainant's case before the commission. (*State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, 428 [217 Cal.Rptr. 16, 703 P.2d 354]; *Commodore Home, supra*, 32 Cal.3d at p. 213.)

If an accusation is not issued within 150 days after

Copr. © Bancroft-Whitney and West Group 1998

the filing of the complaint or if the department earlier determines not to prosecute the case and the matter is not otherwise resolved, the department must give the complainant a "right to sue" letter. The complainant may then bring a civil suit in superior court. (§ 12965, subd. (b); see *Commodore Home, supra*, 32 Cal.3d at pp. 213-214.)

In the instant case Linda Olander initially filed a complaint with the department alleging that Dyna-Med, Inc. (Dyna-Med) discriminated against her with regard to wages and promotional opportunities on the basis of sex in violation of the FEPA. The complaint was resolved by means of a written settlement agreement pursuant to which Dyna-Med agreed, inter alia, not to engage in retaliatory action against Olander for filing the complaint. [FN3] Approximately five hours after executing the agreement, Dyna-Med fired Olander. Olander filed a new complaint, alleging that she was fired in retaliation for her original complaint. Following a hearing, the commission issued its decision ordering Dyna-Med to pay Olander her lost wages, plus $7,500 in punitive damages. [FN4] The superior court denied Dyna-Med's *1385 petition for a writ of mandate. The Court of Appeal affirmed. We granted review.

FN3 Retaliation for filing a complaint was also prohibited by the FEPA. (Former Lab. Code, § 1420, subd. (e); see now Gov. Code, § 12940, subd. (f).)

FN4 The department did not initially ask for punitive damages, but did so only after the administrative law judge's proposed decision, whereupon the commission granted the department leave to amend its accusation to include a prayer for exemplary damages and ordered that the matter be reopened for the taking of additional evidence and argument on the issue. (See § § 11516, 11517, subd. (c).) Following the supplemental hearing, the administrative law judge (ALJ) denied the department's request on grounds that to impose liability on Dyna-Med for exemplary damages would be "fundamentally unfair" and in violation of its right to due process of law in that the amended accusation seeking such damages was based in part on evidence given by Dyna-Med in defense of the original accusation, at which time Dyna-Med had no notice of a possible later charge "in aggravation and substantially enhanced liability, without legal precedent."
In reversing the ALJ, the commission stated that the ALJ found that Dyna-Med's conduct "was sufficiently egregious to support an award" of such damages. The record, however, shows that the ALJ found *only* that the department had "adduced evidence" in support of its allegations that Dyna-Med's violations were particularly "deliberate, egregious or inexcusable" so as to support the award of such damages.

The sole issue before us is whether the FEHA grants the commission authority to award punitive damages. Resolution of this issue depends on the meaning of section 12970, subdivision (a), which sets forth the scope of relief available from the commission. That section provides: "If the commission finds that a respondent has engaged in any unlawful practice under this part, it shall state its findings of fact and determination and shall issue ... an order requiring such respondent to cease and desist from such unlawful practice and to take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part, and including a requirement for report of the manner of compliance."

Before addressing the parties' arguments we state briefly the basis for the Court of Appeal's determination that the commission is authorized to award punitive damages.

"It is undisputed," the Court of Appeal stated, "an administrative agency's power to award such damages must arise from express authorization. Here, the Legislature delegated broad authority to the Commission to fashion appropriate remedies for unlawful employment practices in section 12970, subdivision (a): [¶] 'If the commission finds that a respondent has engaged in any unlawful practice under this part, it ... shall issue and cause to be served on the parties an order requiring such respondent ... to take such action, *including, but not limited to*, hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, *as, in the judgment of the commission*, will effectuate the

Copr. © Bancroft-Whitney and West Group 1998

purposes of this part, and including a requirement for report of the manner of compliance.' ... [¶] Attempting to harmonize this specific provision in context of the entire statutory framework, we find in section 12920 the underlying purpose of the act is to provide effective remedies to eliminate discriminatory employment practices. Consequently, considering the legislative mandate to liberally construe the act to further these purposes (§ 12993), we conclude it has statutorily authorized the Commission to impose punitive damages where ***1386** necessary to effectively remedy and eliminate unlawful FEHA employment practices." (Italics in original.)

In the Court of Appeal's judgment, the facts of the instant case "prove ordinary restitutionary remedies are often ineffective in eliminating discriminatory practices." [FN5] The court thus determined that "in light of the limited remedial effect of [the] permissible compensatory remedies, the award of punitive damages may be the only method of fulfilling the purposes of the act, including encouraging plaintiffs to seek relief by increasing their potential recovery. ..."

FN5 The court stated that awards of back pay are frequently insignificant because interim earnings are deducted or offset; the value of reinstatement may be negligible because by the time employment discrimination cases are resolved, the plaintiff has had to find another job; and upgrading, back pay and reinstatement in cases of retaliation, as here, may not be effective deterrents or satisfactory remedies because the original work environment may no longer be conducive to the complainant's continued employment.

II. Discussion

(1a) Petitioner Dyna-Med and its amici [FN6] argue that although the Court of Appeal correctly recognized that the statutory language and legislative history of section 12970, subdivision (a) are determinative of the issue before us, the court misread the statute and misapplied common principles of statutory construction in concluding that the Legislature has authorized the commission to award punitive damages.

FN6 Amici appearing in support of Dyna-Med are the Chamber of Commerce of the United States, the California Chamber of Commerce, the Merchants and Manufacturers Association, the County of Madera, and Friendly Ford Peugeot. Arguments advanced by Dyna-Med and its supporting amici will hereafter be referred to as Dyna-Med's arguments.

Respondent Commission and its amici [FN7] maintain that the FEHA is unambiguous in authorizing broad relief limited only by the judgment of the commission as to what will effectuate the purposes of the Act, and that the commission has properly determined that the award of exemplary damages in appropriate cases is necessary to deter deliberate discrimination.

FN7 Amici appearing in support of the commission are the Employment Law Center of the Legal Aid Society of San Francisco and Equal Rights Advocates, Inc. Arguments advanced by the commission and its supporting amici will hereafter be referred to as Commission's arguments.

A. *Statutory Language*

(2) Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary ***1387** import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844 [157 Cal.Rptr. 676, 598 P.2d 836]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224], and cases cited; see also *Brown v. Superior Court* (1984) 37 Cal.3d 477, 484-485 [208 Cal.Rptr. 724, 691 P.2d 272].) Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. (*Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688 [104 Cal.Rptr. 110].) (3) Both the legislative history of the statute and the wider historical circumstances of its enactment may be

Copr. © Bancroft-Whitney and West Group 1998

considered in ascertaining the legislative intent. (*California Mfrs. Assn., supra*, 24 Cal.3d at p. 844; see also *Steilberg v. Lackner* (1977) 69 Cal.App.3d 780, 785 [138 Cal.Rptr. 378].) A statute should be construed whenever possible so as to preserve its constitutionality. (See *Department of Corrections v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 197, 207 [152 Cal.Rptr. 345, 589 P.2d 853]; *County of Los Angeles v. Riley* (1936) 6 Cal.2d 625, 628-629 [59 P.2d 139, 106 A.L.R. 903]; *County of Los Angeles v. Legg* (1936) 5 Cal.2d 349, 353 [55 P.2d 206].)

We consider, therefore, the statutory language in the context of the legislative purpose. The Legislature has declared that the purpose of the FEHA is to provide effective remedies which will eliminate discriminatory practices. (§ 12920.) (4) Webster's Dictionary defines a "remedy" in part as "something that corrects or counteracts an evil: corrective, counteractive, reparation .... [T]he legal means to recover a right or to prevent or obtain redress for a wrong. ..." (Webster's New Internat. Dict. (3d ed. 1961) p. 1920, col. 1.) Here the statutorily authorized remedies - hiring, reinstatement, upgrading with or without back pay, restoration to membership in a respondent labor organization - are exclusively corrective and equitable in kind. They relate to matters which serve to make the aggrieved employee whole in the context of the employment.

Punitive damages, by contrast, are neither equitable nor corrective; punitive damages serve but one purpose - to punish and through punishment, to deter. (5) "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." (*Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 266-267 [69 L.Ed.2d 616, 632, 101 S.Ct. 2748]; see ***1388***Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)

(6) The general rule is that "[w]here the enabling statute is essentially remedial, and does not carry a penal program declaring certain practices to be crimes or provide penalties or fines in vindication of public rights, an agency does not have discretion to devise punitive measures such as the prescription of penalties or fines. The statutory power to command affirmative action is remedial, not punitive." (Modjeska, Administrative Law Practice and Procedure (1982) Sanctions and Remedies, § 5.9, pp. 170-171, fns. omitted; see *Edison Co. v. Labor Board* (1938) 305 U.S. 197, 235-236 [83 L.Ed. 126, 143, 59 S.Ct. 206]; see also *Youst v. Longo* (1987) 43 Cal.3d 64, 82-83 [233 Cal.Rptr. 294, 729 P.2d 728] [where regulatory scheme provides for one kind of relief and is silent on another, it should be construed to exclude the latter].)

(1b) Commission acknowledges that punitive damages are different in kind from the enumerated remedies, but argues that in certain cases, as here, where there was "intentional egregious" discrimination and the make-whole remedies are inappropriate, [FN8] the imposition of exemplary damages is necessary as a deterrent to effectuate the purpose of the Act to eliminate employment discrimination. Citing the statutory directive that the provisions of the Act shall be liberally construed (§ 12993), Commission argues that the language empowering it to take such action "including, but not limited to," the specified actions, is sufficiently broad to authorize it to award punitive damages. By regulation since repealed and in its precedential decisions, the commission has itself so interpreted the statute. [FN9]

FN8 Olander did not seek reinstatement at Dyna-Med. See also footnote 5, *ante*.

FN9 In 1980 the commission promulgated a regulation which provided: "While normal monetary relief shall include relief in the nature of back pay, reasonable exemplary or compensatory damages may be awarded in situations involving violations which are particularly deliberate, egregious or inexcusable." (Former Cal. Admin. Code, tit. 2, § 7286.9, subd. (c), Cal. Admin. Notice Register, tit. 2, Register 80, No. 25-A - 6-21-80; see also *D.F.E.H.* v. *Ambylou Enterprises, Inc.* (1982) FEHC No. 82-06 [CEB precedential decisions 1982-1982, CEB 3].) This regulation was applied in the instant case. Although the regulation was repealed in 1985 (Cal. Admin. Notice Register, tit. 2, Register 85, No. 20 - 5-16-85), the commission continues to award exemplary as well as compensatory damages.
Neither the regulation nor the precedential decisions stating the commission's authority to award punitive damages was in effect at the time of Olander's discharge.

Copr. © Bancroft-Whitney and West Group 1998

(7) The contemporaneous construction of a new enactment by the administrative agency charged with its enforcement, although not controlling, is entitled to great weight. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281]; *People v. McGee* (1977) 19 Cal.3d 948, 961 [***1389**140 Cal.Rptr. 657, 568 P.2d 382]; *City of Los Angeles v. Rancho Homes, Inc.* (1953) 40 Cal.2d 764, 770-771 [256 P.2d 305].) The commission's interpretation of the Act as authorizing it to award punitive damages was not, however, "contemporaneous." Not until 1980 - more than 20 years after the Act's enactment - did the commission undertake to award damages. (See fn. 9, *ante*.) The final meaning of a statute, moreover, rests with the courts. An administrative agency cannot by its own regulations create a remedy which the Legislature has withheld. (*Commodore Home, supra*, 32 Cal.3d at p. 227 (dis. opn. of Richardson, J.); see *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 117 [172 Cal.Rptr. 194, 624 P.2d 244]; *J. R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 29 [160 Cal.Rptr. 710, 603 P.2d 1306]; *Morris v. Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689, 433 P.2d 697].) "'Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations.' [*Morris v. Williams, supra*, and cases cited.] And this is the rule even when, as here, 'the statute is subsequently reenacted without change.' [Citation.]" (*American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 618-619 [186 Cal.Rptr. 345, 651 P.2d 1151] (dis. opn. of Mosk, J.). See also *Nadler v. California Veterans Board* (1984) 152 Cal.App.3d 707, 718-719 [199 Cal.Rptr. 546].)

(1c) We take no issue with the premise that exemplary damages would serve to deter discrimination. Nor do we dispute that the phrase "including, but not limited to" is a phrase of enlargement. (See *American National Ins. Co. v. Employment & Housing Com., supra*, 32 Cal.3d at p. 611 (dis. opn. of Mosk, J.); *Fraser v. Bentel* (1911) 161 Cal. 390, 394 [119 P. 509]; 2A Sutherland, Statutory Construction (4th ed. 1984) § 47.07, p. 133 [hereafter Sutherland].) Nevertheless, given the extraordinary nature of punitive damages, these factors, in our view, are insufficient to support an inference that the Legislature intended sub silentio to empower the commission to impose punitive damages. Commission's argument, taken to its logical conclusion, would authorize every administrative agency granted remedial powers to impose punitive damages so long as the statute directs that its provisions are to be liberally construed to effectuate its purposes. [FN10]

> FN10 The Court of Appeal reached just this conclusion. According to the Court of Appeal: "If the Legislature gives an agency responsibility to protect the public and authorizes it to take the appropriate steps necessary to carry out the purposes of an act it enforces, then such an agency should be authorized to determine claims for punitive damages."

Seeking to alleviate concern that a "flood of agencies" would arrogate to themselves similar authority, Commission states that only four other agencies have been granted comparable statutory authority to order actions that will effectuate the purposes of the acts they enforce - the Agricultural Labor ***1390** Relations Board (ALRB) (Lab. Code, § 1160.3); the Public Employment Relations Board (PERB) (§ 3541.5); the State Personnel Board (§ 19702, subd. (e)); and the California Horse Racing Board (Bus. & Prof. Code, § 19440) - and none awards punitive damages.

That no similarly empowered agency awards punitive damages lends support, in our view, to the conclusion that the power to make punitive assessments will not be implied merely from a legislative directive that an act's remedial provisions are to be liberally construed to effectuate its purposes. Indeed, in *Youst v. Longo, supra*, 43 Cal.3d 64, we specifically determined that the broad powers the Legislature vested in the California Horse Racing Board do not include the power to award compensatory or punitive tort damages. "[T]he power to award compensatory and punitive tort damages to an injured party is a judicial function. Although the [Horse Racing] Board has very broad power to regulate and discipline wrongful conduct which involves horseracing in California, the relevant statutes do not authorize affirmative compensatory relief such as tort damages." (*Id.* at p. 80, italics omitted.)

As the United States Supreme Court stated in another context: "[I]t is not enough to justify the

Copr. © Bancroft-Whitney and West Group 1998

Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end. [¶] ... [A]ffirmative action to 'effectuate the policies of this Act' is action to achieve the remedial objectives which the Act sets forth." (Republic Steel Corp. v. Labor Board (1940) 311 U.S. 7, 12 [85 L.Ed. 6, 10, 61 S.Ct. 77]; accord, Carpenters Local v. Labor Board (1961) 365 U.S. 651, 655 [6 L.Ed.2d 1, 4, 81 S.Ct. 875]; see Laflin & Laflin v. Agricultural Labor Relations Bd. (1985) 166 Cal.App.3d 368, 380-381 [212 Cal.Rptr. 415].)

A more reasonable reading of the phrase "including, but not limited to," is that the Legislature intended to authorize the commission to take such other remedial action as in its judgment seems appropriate to redress a particular unlawful employment practice and to prevent its recurrence, thus eliminating the practice. [FN11] (8)**(See fn. 12.)** , (9)**(See fn. 13.)** , (10)**(See fn. 14.)** A reading of the phrase as permitting only additional corrective remedies ***1391** comports with the statutory construction doctrines of *ejusdem generis*, [FN12] *expressio unius est exclusio alterius* [FN13] and *noscitur a sociis*. [FN14] (See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, supra*, 25 Cal.3d at pp. 330-331 [applying *ejusdem generis*]; see also Richerson v. Jones (3d Cir. 1977) 551 F.2d 918, 927 [*ejusdem generis* invoked in concluding that the Federal Equal Employment Opportunity Act of 1972 does not authorize punitive assessments].) (11), (1d) Although these canons of construction are mere guides and will not be applied so as to defeat the underlying legislative intent otherwise determined (Cal. State Employees' Assn. v. Regents of University of California (1968) 267 Cal.App.2d 667, 670 [73 Cal.Rptr. 449]), their application here to limit the commission's authority to the ordering of corrective, nonpunitive action is consistent with both the remedial purpose of the Act and the ordinary import of the statutory language.

FN11 For example, in a recent age and race discrimination case involving the termination of a Black attorney, the negotiated settlement agreement provided for a year's severance pay and a special retirement plan, plus the company's informing all its supervisors that harassment is illegal and contrary to company policy. (*Arco Settles With Former Employee*, The Recorder (Mar. 10, 1987) p. 2, col. 4.)

FN12 "'[T]he doctrine of *ejusdem generis* ... states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage.'" (Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters (1979) 25 Cal.3d 317, 331, fn. 10 [158 Cal.Rptr. 370, 599 P.2d 676], quoting Scally v. Pacific Gas & Electric Co. (1972) 23 Cal.App.3d 806, 819 [100 Cal.Rptr. 501].)

FN13 *Expressio unius est exclusio alterius* means that "the expression of certain things in a statute necessarily involves exclusion of other things not expressed. ..." (Henderson v. Mann Theatres Corp. (1976) 65 Cal.App.3d 397, 403 [135 Cal.Rptr. 266].)

FN14 Under the rule of *noscitur a sociis*, "'the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.'" (People v. Stout (1971) 18 Cal.App.3d 172, 177 [95 Cal.Rptr. 593], quoting Vilardo v. County of Sacramento (1942) 54 Cal.App.2d 413, 420 [129 P.2d 165].)

This reading, moreover, harmonizes the various parts of the statute. Section 12964, referring to resolution of allegedly unlawful practices through conciliation, provides that "such resolutions may be in the nature of, but are not limited to, types of remedies that might be ordered after accusation and hearing," i.e., the section 12970 remedies. While the corrective remedies enumerated in section 12970 are appropriate to impose in the context of a resolution by conciliation, punitive damages are antithetical to the conciliation process and, as indicated, are not "in the nature of" the type of remedy authorized by section 12970.

Copr. © Bancroft-Whitney and West Group 1998

A construction of section 12970 that limits the commission to corrective, nonpunitive remedies also harmonizes the Act with the statutory provisions governing the award of punitive damages in civil actions. (12) Civil Code section 3294, subdivision (a) allows the award of exemplary damages only when the defendant has been guilty of "oppression, fraud, or malice." ***1392** This provision codifies the universally recognized principle that "[t]he law does not favor punitive damages and they should be granted with the greatest caution." (*Beck v. State Farm Mut. Auto. Ins. Co.* (1976) 54 Cal.App.3d 347, 355 [126 Cal.Rptr. 602].) Although the commission evidently has adopted the statutory standard, nothing in the FEHA requires it to do so or provides any guidelines for the award of punitive damages. [FN15]

> FN15 We observe that the standard initially adopted by the commission and applied in this case - authorizing the award of punitive damages in cases of violations that are "particularly deliberate, egregious or inexcusable" (see fn. 9, *ante*) - was not in conformity with the statutory standard.

Further, subdivision (b) of Civil Code section 3294 provides that in an action for the breach of an obligation not arising out of contract, an employer shall not be liable for exemplary damages based on the conduct of his employee unless "the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct ... or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." Because the FEHA contains no comparable limitation on an employer's liability for his employee's wrongful acts (see § § 12926, subd. (c), 12940, subd. (a)), interpreting the Act as authorizing the commission to award punitive damages would expose an employer in an administrative proceeding to greater derivative liability than in a judicial action.

Finally, Civil Code section 3295 precludes discovery of a defendant's financial condition in actions seeking exemplary damages until the plaintiff has established a prima facie entitlement thereto. (See generally *Rawnsley v. Superior Court* (1986) 183 Cal.App.3d 86, 90-91 [227 Cal.Rptr. 806].) This protection is inapplicable to administrative proceedings (see Code Civ. Proc., § 22 [defining "action"]) and no comparable provision appears in the FEHA.

(13) Statutes are to be given a reasonable and commonsense interpretation consistent with the apparent legislative purpose and intent "and which, when applied, will result in wise policy rather than mischief or absurdity." (*Honey Springs Homeowners Assn. v. Board of Supervisors* (1984) 157 Cal.App.3d 1122, 1136, fn. 11 [203 Cal.Rptr. 886].) Absent express language dictating otherwise, it will not be presumed that the Legislature intended to authorize an administrative agency - free of guidelines or limitation - to award punitive damages in proceedings lacking the protections mandated in a court of law. ***1393**

As we recognized in a related context, the Legislature's objective in providing for an administrative rather than a judicial resolution of discrimination complaints was to provide a "speedy and informal" process unburdened with "procedural technicalities." (*Stearns v. Fair Employment Practice Com.* (1971) 6 Cal.3d 205, 214 [98 Cal.Rptr. 467, 490 P.2d 1155] [concerning transfer to the Commission's predecessor of housing discrimination complaints].) "To achieve this end the [Fair Employment Practices Commission] established procedures that are as simple and uncomplicated as possible. Complaints are drafted by laymen; the commission informally attempts to eliminate discriminatory practices before instituting formal accusations; the commission, on a finding of discrimination, may fashion remedies both to correct unique cases of such practice as well as to curb its general incidence." (*Ibid.*) The award of punitive damages - "traditionally ... limited to the judicial forum with its more extensive procedural protections" (*Commodore Home, supra*, 32 Cal.3d at p. 217, fn. 6; see also *Curtis v. Loether* (1974) 415 U.S. 189, 196-197 [39 L.Ed.2d 260, 268, 94 S.Ct. 1005]) - has no place in this scheme.

(1e) In sum, we are of the view that the statutory language, given its ordinary import and construed in context of the purposes and objectives of the law, together with the Legislature's silence on the issue of punitive damages, compels the conclusion that the Legislature did not intend to grant the commission authority to award punitive damages. If, as

Copr. © Bancroft-Whitney and West Group 1998

Commission argues, the inability to award such damages deprives it of an effective means to redress and prevent unlawful discrimination, it is for the Legislature, rather than this court, to remedy this defect. We are not, however, convinced that the commission lacks sufficient means to redress and eliminate discrimination. The Act authorizes class actions and permits the director of the department to address systematic problems, such as pattern and practice matters, by bringing a complaint on his or her own motion. (§ § 12960, 12961; *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 867 [193 Cal.Rptr. 760].) The commission, in turn, has broad authority to fashion an appropriate remedy without resort to punitive damages. (See, e.g., fn. 11, *ante*; cf. *McDaniel v. Cory* (Alaska 1981) 631 P.2d 82, 88.) The statutory scheme provides for compliance review and judicial enforcement of commission orders (§ 12973) and makes it a misdemeanor offense for any person wilfully to violate an order of the commission (§ 12975).

Although we believe that statutory interpretation disposes of the issue, we nevertheless address the additional arguments advanced by the parties.

B. *Legislative History*

In support of their respective arguments, both parties cite the legislative history of the Act and the Legislature's failure since its enactment to modify it or adopt various proposed amendments. ***1394**

As indicated above, the FEPA was enacted in 1959 (former Lab. Code, § 1410 et seq.). That same year the Legislature also enacted the Hawkins Act (former Health & Saf. Code, § 35700 et seq., enacted by Stats. 1959, ch. 1681, § 1, pp. 4074-4077), prohibiting housing discrimination, and the Unruh Civil Rights Act (Civ. Code, § § 51-52, enacted by Stats. 1959, ch. 1866, § § 1-4, p. 4424, replacing former Civ. Code, § § 51-54, added by Stats. 1905, ch. 413, § § 1-4, pp. 553-554), prohibiting discrimination in business establishments. (See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 500 [86 Cal.Rptr. 88, 468 P.2d 216] [concurrent enactment of FEPA and Civil Rights Act evinced legislative intent to exclude employment discrimination from the latter act].) While both the Hawkins and Unruh Acts provided for judicial relief and authorized the award of damages, [FN16] the FEPA provided for administrative relief and made no mention of damages.

FN16 The Hawkins Act permitted complainants to sue for both equitable relief and damages in an amount of not less than $500. (Stats. 1959, ch. 1681, § 1, at p. 4076.) The Civil Rights Act authorized the award of actual damages, plus punitive damages in the amount of $250. (Stats. 1959, ch. 1866, § 2, p. 4424.)

In 1963 the Hawkins Act was replaced by the Rumford Fair Housing Act (former Health & Saf. Code, § 35700 et seq., enacted by Stats. 1963, ch. 1853, § § 1-4, pp. 3823-3830), which for the first time afforded an administrative remedy for housing discrimination. Although the Rumford Act retained language authorizing the award of damages, it transformed the statutory minimum recoverable in judicial proceedings (see fn. 16, *ante*) into a statutory maximum in administrative proceedings. [FN17] In 1980 the employment and housing statutory schemes were combined to form the FEHA, with enforcement of both sections of the Act vested in the commission. (Stats. 1980, ch. 992, § 4, pp. 3140-3142.)

FN17 The Rumford Act initially empowered the commission's predecessor, the Fair Employment Practices Commission (FEPC), if it determined that certain make-whole remedies were not available, to award damages in an amount not to exceed $500. (Stats. 1963, ch. 1853, § 2, pp. 3828-3829.) In 1975 the maximum damage award was increased to $1,000. (Stats. 1975, ch. 280, § 1, p. 701.) In 1977 the act was amended to authorize the FEPC to order payment of "actual and punitive" damages not exceeding $1,000. The 1977 amendment also for the first time described the FEPC's authority to require remedial action in housing discrimination cases as "including, but not limited to" the actions specified. (Stats. 1977, ch. 1187, § 10, p. 3893; ch. 1188, § 13.1, pp. 3905-3906.) In 1981 the statute was rewritten to remove the limit on the amount of compensatory damages, while retaining a $1,000 limit, adjusted for inflation, on punitive damages. (§ 12987, subd. (2), Stats. 1981, ch. 899, § 3, p. 3424.)

Dyna-Med argues that in light of the parallel development of legislation governing employment and housing discrimination and the ultimate union of

Copr. © Bancroft-Whitney and West Group 1998

the respective acts in one, with common enforcement procedures, it is significant that the Legislature, while authorizing the award of damages in housing cases, has never done so in employment cases. Had the Legislature intended to authorize the commission to award damages in employment *1395 cases, it knew how to do so, as it demonstrated in enacting the other civil rights statutes.

Commission, in turn, asserts that the separate origins of the housing and employment discrimination statutes explain why one explicitly allows damages and the other does not. Moreover, the remedy provisions in the housing section expressly note punitive damages only to limit their availability. (§ 12987, subd. (2).) [FN18] Consequently, the absence of any express reference to such damages within the employment context should be construed not as a lack of authority, but rather, as a lack of limitation on such damages.

FN18 As indicated, section 12987, as amended 1981, provides for the payment of punitive damages not to exceed $1,000, adjusted annually for inflation, and the payment of actual damages. Before its amendment, the section provided for the payment of actual and punitive damages not to exceed $1,000. (See fn. 17, *ante*.)

Commission's argument is unpersuasive. A review of the relevant statutes discloses that when the Legislature intends to authorize an agency to award damages for discrimination, it does so expressly (e.g., § 12987, subd. (2) [housing]; § 19702, subd. (e) [civil service]; cf. Civ. Code, § 52, subd. (a) [civil action against business establishments]), and when it authorizes the award of a penalty or punitive damages, it limits the amount (§ 12987, subd. (2) [$1,000]; cf. Civ. Code, § 52, subd. (a) [no more than three times actual damages]).

Commission observes that since 1980 when it first interpreted the FEHA as authorizing the award of punitive damages, the Legislature has amended the Act several times without addressing the remedy provisions. [FN19] This inaction, Commission argues, is an indication that its ruling was consistent with the Legislature's intent. (See *Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 922 [156 P.2d 1]; *Action Trailer Sales, Inc. v. State Bd. of Equalization* (1975) 54 Cal.App.3d 125, 133-134 [126 Cal.Rptr. 339].)

FN19 During the 1981-1982 legislative session, the Legislature twice declined to enact statutes (Sen. Bill No. 516; Assem. Bill No. 879) which, in part, would have prohibited the commission from awarding punitive damages. (See Sen. Final Hist. (1981-1982 Reg. Sess.) p. 339; 1 Assem. Final Hist. (1981-1982 Reg. Sess.) p. 647.)

Dyna-Med, by contrast, relies on a bill introduced but not enacted by the Legislature in 1976 (Assem. Bill No. 3124, 2 Assem. Final Hist. (1975-1976 Sess.) p. 1658), which would expressly have authorized the commission to award limited damages in employment discrimination cases, and on the provision of Senate Bill No. 2012, introduced in 1984, which would have amended section 12970, subdivision (a) to specifically authorize compensatory and punitive damages as "declaratory of existing law," but which was removed before the bill's enactment (see Stats. 1984, ch. 1754, § 3, p. 6406). *1396

We find the subsequent legislative history of the statute ambiguous and of little assistance in discerning its meaning. The Legislature's failure to modify the statute so as to require an interpretation contrary to the commission's construction is not determinative: (14) "[A]n erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change. [Citations.]" (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757-758 [151 P.2d 233, 155 A.L.R. 405].) Similarly inconclusive is the Legislature's rejection of specific provisions which would have expressly allowed the award of damages. (15) Unpassed bills, as evidences of legislative intent, have little value. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 735, fn. 7 [180 Cal.Rptr. 496, 640 P.2d 115, 30 A.L.R.4th 1161]; *Miles v. Workers' Comp. Appeals Bd.* (1977) 67 Cal.App.3d 243, 248, fn. 4 [136 Cal.Rptr. 508]; see also *United States v. Wise* (1962) 370 U.S. 405, 411 [8 L.Ed.2d 590, 594-595, 82 S.Ct. 1354]; 2A Sutherland, *supra*, § 49.10, pp. 407-408.) This is particularly true here, where the rejected provisions manifest conflicting legislative intents: the 1976 provision would have limited the amount of damages the commission could award; the 1981-1982 provisions would have prohibited the commission from awarding punitive damages (see fn. 19, *ante*); and the 1984 amendment would have authorized the

Copr. © Bancroft-Whitney and West Group 1998

award of compensatory and punitive damages "as declaratory of existing law." (See generally *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 58 [69 Cal.Rptr. 480].)

Were we, however, to consider unpassed legislation, we would find it significant that at the same time the Legislature rejected the provision declaring the commission's authority to award damages, it amended the Civil Service Act to grant the Personnel Board authority identical to the commission's, *plus* the power to award compensatory damages. (Stats. 1984, ch. 1754, § 6, pp. 6408-6409; see § 19702, subd. (e).) [FN20] Where the Legislature simultaneously empowers one agency to award damages and declines similarly to empower another, there is a strong inference of a legislative intent to withhold the authority from the nonempowered agency. (See *City of Port Hueneme v. City of Oxnard* (1959) 52 Cal.2d 385, 395 [341 P.2d 318].) ***1397**

FN20 Subdivision (e), enacted 1984, provides in relevant part: "If the board finds that discrimination has occurred ... the board shall issue ... an order requiring the appointing authority to cause the discrimination to cease and desist and to take such action, *including, but not limited to*, hiring, reinstatement or upgrading of employees, with or without back pay, *and compensatory damages*, which, in the judgment of the board, will effectuate the purposes of this part. Consistent with this authority, the board may establish rules governing the award of compensatory damages." (Italics added.)
Subdivision (a) of section 19702 was amended at the same time to provide that "discrimination" includes harassment and that this provision "is declaratory of existing law." (Stats. 1984, ch. 1754, § 6, p. 1173.)

Further, if, as Commission argues, the nonexhaustive language of section 12970 were sufficient to embrace the authority to award damages, the specific references to damages in both the Civil Service Act and the housing section of the FEHA [FN21] would be mere surplusage. (16) "[S]tatutes must be harmonized, both internally and with each other, to the extent possible. [Citations.] Interpretive constructions which render some words surplusage ... are to be avoided. [Citations.]" (*California Mfrs. Assn. v. Public Utilities Com., supra*, 24 Cal.3d at p. 844.)

FN21 Section 12987 provides in pertinent part that in housing discrimination cases the commission shall issue an order requiring the respondent to "cease and desist from such [discriminatory] practice and to take such actions, as, in the judgment of the commission, will effectuate the purpose of this part, *including, but not limited to*, any of the following: [¶] (1) The sale or rental of the housing accommodation ... or ... of a like housing accommodation, ... or the provision of financial assistance, ... [¶] (2) *The payment of punitive damages in an amount not to exceed one thousand dollars dollars ($1,000)*, adjusted annually in accordance with the Consumer Price Index, *and the payment of actual damages*. [¶] (3) Affirmative or prospective relief."

As Justice Richardson, dissenting in *Commodore Home*, stated: "The express provision for damages in this parallel statutory scheme [the housing section of the FEHA] - strongly suggests ... that the omission of [a punitive damages remedy] from the employment discrimination provisions was intentional. The Legislature has clearly demonstrated that it knows how to add a punitive remedy to this statute when it wishes to do so." (32 Cal.3d at p. 225.)

C. *Federal and Other State Legislation*

The remedy language of section 12970 bears a close resemblance to section 10(c) of the National Labor Relations Act (NLRA)(29 U.S.C.A. § 151 et seq., § 160(c)) relating to unfair labor practices, which authorizes the National Labor Relations Board (NLRB) to issue a cease and desist order and require the violator "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter ...." Federal courts have continually interpreted the NLRA as not allowing monetary remedies other than back pay. (See *Edison Co. v. Labor Board, supra*, 305 U.S. 197, 235-236 [83 L.Ed.2d 126, 143]; *Van Hoomissen v. Xerox Corporation* (N.D.Cal. 1973) 368 F.Supp. 829, 837; see also *Commodore Home, supra*, 32 Cal.3d at p. 224 (dis. opn. of Richardson, J.).) Title VII of the federal Civil Rights Act of 1964, relating to employment discrimination, in section 706(g) similarly authorizes the trial court to "order such affirmative action as may be appropriate, which

Copr. © Bancroft-Whitney and West Group 1998

may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..., or any other equitable relief as the court deems appropriate." (42 U.S.C.A. § 2000e-5(g).) This language, which was ***1398** modeled after the NLRA (*Richerson v. Jones, supra*, 551 F.2d 918, 927), also has been interpreted by the majority of federal courts as barring monetary remedies other than back pay (*Great American Fed. S. & L. Assn. v. Novotny* (1979) 442 U.S. 366, 374-375 [60 L.Ed.2d 957, 965-966, 99 S.Ct. 2345]; see, e.g., *Shah v. Mt. Zion Hospital & Medical Ctr.* (9th Cir. 1981) 642 F.2d 268, 272; *Richerson v. Jones, supra*, at pp. 926-927; *Van Hoomissen v. Xerox Corporation, supra*, 368 F.Supp. 829, 836-838; *Commodore Home, supra*, at p. 225 and cases cited (dis. opn. of Richardson, J.)).

Dyna-Med invokes the principle that the use of identical language in analogous statutes requires like interpretation. (*Belridge Farms v. Agriculture Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665].) Commission argues that the foregoing principle is inapposite because of the limiting reference in the NLRA to *affirmative* action and in title VII to *equitable* relief, as contrasted with section 12970's reference without modification to "action." Commission points further to the differing purposes of the NLRA and the FEPA: the first exists to promote industrial peace and stability through collective bargaining and to create a cooperative atmosphere of recognition between labor and management (*Carey v. Westinghouse Corp.* (1964) 375 U.S. 261, 271 [11 L.Ed.2d 320, 327-328, 84 S.Ct. 401]; *N.L.R.B. v. Pincus Bros., Inc.-Maxwell* (3rd Cir. 1980) 620 F.2d 367, 372-373; *Bloom v. N.L.R.B.* (D.C. Cir. 1979) 603 F.2d 1015, 1019), whereas the latter is designed to provide effective remedies to vindicate the individual's constitutional right to be free from employment discrimination and to eliminate discriminatory employment practices (*State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d at 432).

When first enacted, the FEPA, like the NLRA, combined the prosecutorial and adjudicative functions and provided only for administrative relief. [FN22] (Stats. 1959, ch. 121, § 1, pp. 1999-2005; see *Commodore Home, supra*, 32 Cal.3d at p. 218; cf. NLRA, § 10(b) & (c), 49 Stat. at pp. 453-454; *Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1, 24-25 [81 L.Ed. 893, 904- 905, 57 S.Ct. 615]; *Haleston Drug Stores v. National Labor Relations Bd., supra*, 187 F.2d 418, 421.) The FEPA also contained the identical "affirmative action" language as the NLRA. (Stats. 1959, *supra*, at p. 2004; *Commodore Home, supra*, 32 Cal.3d at p. 224 (dis. opn. of Richardson, J.).) In 1969 the Legislature amended Labor Code section 1426 to delete the word "affirmative." (Stats. 1969, ch. 526, § 1, p. 1142.) The legislative history ***1399** suggests that this amendment was passed not to expand the power of the FEPC, but rather, to avoid confusion with the newly acquired meaning of "affirmative action" that was embraced in a 1967 amendment authorizing the FEPC to engage in "affirmative actions" with employers, employment agencies, and labor organizations. [FN23] (See former Lab. Code, § § 1413, subd. (g), 1431, added by Stats. 1967, ch. 1506, § § 1-2, pp. 3573-3574; see now § § 12927, subd. (a), 12988 [concerning housing discrimination].) Both the Enrolled Bill Report of the Department of Industrial Relations and the Enrolled Bill Memorandum of the Governor's Legislative Secretary state that the aim of the amendment was to "clear up any ambiguities ... between the two sections of the law. In other words," according to the report and memo, "*Affirmative Action* in AB 544 [the 1967 amendment] was a little broader than Affirmative Action in Section 1426 of the Labor Code [the remedies provision]." (Italics in original; see also *Commodore Home, supra*, 32 Cal.3d at p. 224 (dis. opn. of Richardson, J.).) Deletion of the word "affirmative" thus is not dispositive of the Legislature's intent concerning application to the commission of federal precedent.

FN22 A 1947 amendment to the NLRA separated the prosecuting and adjudicating functions within the NLRB. (NLRA, § 3(d), 29 U.S.C.A. § 153(d); *Haleston Drug Stores v. National Labor Relations Bd.* (9th Cir. 1951) 187 F.2d 418, 421.) In 1977 the FEPA was amended to achieve a comparable separation within the department and to establish the private right of action when the department fails to act. (Stats. 1977, ch. 1188, § § 18-37, pp. 3906-3912.)

FN23 The 1967 amendment authorized the Division of Fair Employment Practices to engage in "affirmative actions" with employers, employment agencies, and labor organizations, and defined "affirmative actions" as any educational activity for the purpose of securing greater employment opportunities for members of racial,

Copr. © Bancroft-Whitney and West Group 1998

religious, or nationality minority groups and any promotional activity designed to the same end on a voluntary basis. The amendment further provided that it should not be construed to promote employment on a preferential or quota basis. (Stats. 1967, ch. 1506, § § 1-5, pp. 3574-3575.)

In *Commodore Home*, in the context of a civil action for punitive damages, we stated that differences between the federal laws and the FEHA - the NLRA provides no right of civil action and title VII provides only for judicial handling of federal discrimination claims - "diminish the weight of the federal precedents." (32 Cal.3d at p. 217.) The NLRA, we observed, "specifies remedies the board may impose, and the cases hold merely that its language prevents *that agency* from assessing compensatory or punitive damages. [¶] Contrastingly, title VII ... expressly describes remedies that courts may assess. ... [¶] The FEHA, on the other hand, provides separate routes to resolution of claims; first, a complaint to the Department; second, if that agency fails to act, a private court action. The statute discusses remedies only in the first context; here we are concerned with those available in the second. Federal precedents do not address that problem. [Fn. omitted.]" (*Ibid.*, italics added.)

In the instant case, by contrast, the issue is the nature of administrative remedies - the only remedies provided by the NLRA and initially provided by the FEPA. In these circumstances federal precedent under the NLRA would seem to be apposite. Because the FEPA when first enacted had the ***1400** identical language and procedure as the NLRA, it can reasonably be presumed that the Legislature intended the state agency to have the same powers - and only those powers - as its federal counterpart. (See *Belridge Farms v. Agricultural Labor Relations Bd., supra*, 21 Cal.3d at p. 557; cf. *Van Hoomissen v. Xerox Corporation, supra*, 368 F.Supp. at p. 837 [interpreting title VII in light of NLRA].) This is true notwithstanding the differing intents of the two acts, particularly since the remedial portion of each is designed to protect an employee against discriminatory practices.[FN24]

FN24 Section 8(3) and (4) of the NLRA (29 U.S.C.A. § 158(a)(3) and (4)) makes it an unfair labor practice to discriminate against employees for union membership or charges filed under the NLRA. Section 10(a) (29 U.S.C.A. § 160(a)) authorizes the NLRB to prevent unfair labor practices. (See generally *Labor Board v. Jones & Laughlin, supra*, 301 U.S. at pp. 30, 32 [81 L.Ed.2d at pp. 907-908, 908-909].)

Although courts in other states are divided on the availability of compensatory damages under statutory schemes similar to the FEHA (see Annot. (1978) 85 A.L.R.3d 351, 356-357), we are unaware of any case upholding the award of punitive damages. Rather, the courts seem uniformly to hold that the authority of a state agency to assess exemplary damages must be express and will not be implied from a broad authority to implement the objectives of the fair employment statute. (E.g., *Woods v. Midwest Convevor Co., Inc.* (1982) 231 Kan. 763 [648 P.2d 234, 244-245]; *McDaniel v. Cory, supra*, 631 P.2d 82, 86-89; *Ohio Civil Rights Commission v. Lysyi* (1974) 38 Ohio St.2d 217 [67 Ohio Ops.2d 287, 313 N.E.2d 3, 6-7, 70 A.L.R.3d 1137]; see also *High v. Sperry Corp.* (S.D. Iowa 1984) 581 F.Supp. 1246, 1248; see Annot., *supra*, 85 A.L.R.3d at p. 357.)

D. *Equal Protection and Policy Considerations*

The FEHA, as indicated, provides two avenues for resolution of claims: "first, a complaint to the Department; second, if that agency fails to act, a private court action." (*Commodore Home, supra*, 32 Cal.3d at p. 217; see § § 12960, 12965, subd. (b).) Observing that punitive damages are available to persons who pursue court action (*Commodore Home, supra*, 32 Cal.3d at p. 221), Commission argues that the denial of such damages to administrative complainants will create a disparate situation that will undermine the administrative avenue and thwart the Act's primary objective of resolving discrimination complaints through the administrative procedure: complainants will be encouraged to bypass the administrative forum in favor of court action; the department will forego seeking administrative relief in the most egregious cases when punitive damages are appropriate and be unable to engage in effective "conference, conciliation and persuasion" efforts to resolve the dispute (§ 12963.7); and because complete administrative relief ***1401** will be unavailable, the victims of the most outrageous situations will be forced to await relief from our already overburdened courts.

Further, denying exemplary damages in the administrative adjudication, Commission asserts, will

Copr. © Bancroft-Whitney and West Group 1998

create two classes of complainants: those who can afford to hire a private attorney and file a civil action and those "equally or even more deserving victims who lack the resources to pursue litigation by themselves and rely, instead, on the administrative process." Because economic standing is often strongly correlated with race, sex and other forms of prohibited discrimination (see *Brown v. Superior Court, supra*, 37 Cal.3d 477, 486), denial of the opportunity to obtain a punitive damages award solely because of the complainant's economic or social circumstances is contrary to the Legislature's intent to eliminate discrimination and raises serious equal protection concerns.

Commission's policy and equal protection arguments rest on speculative and seemingly conflicting premises: on the one hand, that when a case is appropriate for punitive damages, complainants will bypass the administrative forum and the department will forego seeking administrative relief, thus defeating the Act's objective of administrative resolution; and, on the other hand, that given the substantial volume of complaints received, the department pursues only the most egregious cases, with the result that claimants with weaker cases who can afford to sue will have access to exemplary damages while the most worthy victims whose cases are heard by the commission will be denied such recompense. We are aware of no authority supportive of either premise. Although Justice Richardson, dissenting in *Commodore Home*, spoke of the anomaly of allowing punitive damages to "accusors who have been unsuccessful administratively before the commission, [while denying] such damages to those whose claims have been successfully established" (32 Cal.3d at p. 222), this comment mistakenly assumes that a civil action is open only to those whose complaints the commission has refused to prosecute and overlooks the department's evident policy to permit any complainant to sue who wishes to, as well as the unlikelihood in any event of judicial recovery by a litigant whose claim the department has in fact found unworthy.

Concerning department policy, a former counsel to the department states: "Some respondents have asserted that a private right of action cannot be pursued before 150 days have passed, but this argument has not been accepted by most courts to which it is addressed. Because the investigation process ... takes time, and because the Department, as a matter of sound administrative policy, handles employment cases on a first-in-first-out basis, it is virtually impossible for an accusation to issue in an employment case before 150 days have passed. Furthermore, because of the incredible volume ***1402** of cases handled by the Department - 8,105 in fiscal year 1982 - it would be a waste of resources to investigate a case the Department knows will be pursued in court. It is, therefore, the policy not to proceed on any case which will be pursued elsewhere. This decision is clearly within the Department's discretion. ..." (Gelb & Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination* (1983) 34 Hastings L.J. 1055, 1066, fn. 87; see *Commodore Home, supra*, 32 Cal.3d at p. 218, fn. 8; *Carter v. Smith Food King* (9th Cir. 1985) 765 F.2d 916, 922-923.)

Thus, while the department no doubt pursues only cases it deems meritorious (*State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d at p. 434, fn. 14; see *Mahdavi v. Fair Employment Practice Com.* (1977) 67 Cal.App.3d 326 [136 Cal.Rptr. 421]; *Marshall v. Fair Employment Practice Com.* (1971) 21 Cal.App.3d 680 [98 Cal.Rptr. 698]), because its case load precludes the pursuit of all such claims, any complainant who so wishes may bring a private court action. In these circumstance neither policy considerations nor equal protection concerns require that the administrative and judicial remedies be identical. To the contrary, the separate avenues justify different remedies. We recognized as much in *Commodore Home* where, having noted that "the FEHA leaves an aggrieved party on his own if the Department declines to pursue an administrative claim in his behalf," we stated that "[t]o limit the damages available in a lawsuit might substantially deter the pursuit of meritorious claims, ..." (32 Cal.3d at pp. 220-221.)

Nor is an indigent complainant denied an equal opportunity to go to court. An eligible plaintiff may sue in forma pauperis (§ 68511.3, subd. (b); Cal. Rules of Court, rule 985; *Isrin v. Superior Court* (1965) 63 Cal.2d 153 [45 Cal.Rptr. 320, 403 P.2d 728]) and a complainant whose case is appropriate for the award of punitive damages is unlikely to have difficulty finding an attorney willing to serve on a contingent fee basis. Further, the court has discretion to award litigation expenses to the successful employee. (§ 12965, subd. (b).)

One recognized purpose of punitive damages is to

Copr. © Bancroft-Whitney and West Group 1998

make a civil action economically feasible. As one commentator has stated: "All serious misdeeds cannot possibly be punished by government prosecution. ... [L]imited judicial and prosecutorial resources permit prosecution for only a fraction of the crimes and violations committed. For these reasons, individual members of society must play a significant role in instituting actions to impose sanctions for serious misconduct. Society's interest in bringing a wrongdoer to justice is especially strong where the wrongdoer's conduct exceeds all bounds of decency. [¶] The doctrine of punitive damages promotes this interest. By offering the potential for recovery in excess of actual *1403 damages, the doctrine encourages plaintiffs to bring such actions. This is particularly important where actual damages are minimal. ... Punitive damages thus can be characterized as a reward for the plaintiff's valuable role as a 'private attorney general.' Even where compensatory damages are substantial, an award of punitive damages helps to finance deserving claims by defraying the expenses of the action, such as attorneys' fees, that generally are not recoverable in American courts." (Mallor & Roberts, *Punitive Damages: Toward a Principled Approach* (1980) 31 Hastings L.J. 639, 649-650, fns. omitted.)

Moreover, in appropriate cases a complainant can seek punitive damages by filing an independent civil action alleging tort causes of action either with or without an FEHA count. (Commodore Home, supra, 32 Cal.3d at p. 220; see Brown v. Superior Court, supra, 37 Cal.3d at pp. 486-487; Agarwal v. Johnson (1979) 25 Cal.3d 932 [160 Cal.Rptr. 141, 603 P.2d 58]; cf. Alcorn v. Anbro Engineering, Inc., supra, 2 Cal.3d 493.) "The FEHA was meant to supplement, not supplant or be supplanted by, existing antidiscrimination remedies, in order to give employees the maximum opportunity to vindicate their civil rights against discrimination." (State Personnel Bd. v. Fair Employment & Housing Com., supra, 39 Cal.3d at p. 431, citing § 12993, subd. (a).)

Although Commission asserts that denying it authority to award punitive damages will impede the administrative resolution of cases, the converse may well be true. As we recognized in *Commodore Home*, "One basis for federal holdings under title VII is a fear that the availability of punitive damages might hamper the EEOC's efforts to resolve discrimination disputes by ' conference, conciliation, and persuasion.' [Citations.]" (32 Cal.3d at p. 217; cf. Naton v. Bank of California (9th Cir. 1981) 649 F.2d 691, 699 [same re pain and suffering damages under Federal Age Discrimination in Employment Act].) In Rogers v. Exxon Research & Engineering Co. (3d Cir. 1977) 550 F.2d 834, cited by the Ninth Circuit in *Naton, supra*, the court stated with respect to emotional distress damages: "While the existence of such an item of damages might strengthen the claimant's bargaining position with the employer, *it would also introduce an element of uncertainty which would impair the conciliatian process*. Haggling over an appropriate sum could become a three-sided conflict among the employer, the Secretary, and the claimant." (*Id.* at p. 841, italics added.) A fortiori the availability without limitation of punitive damages - usually a matter within the broad discretion of the jury after consideration of the defendant's wealth, the egregiousness of his conduct and the amount of the plaintiff's actual damages (see Wetherbee v. United Ins. Co. (1971) 18 Cal.App.3d 266, 270-272 [95 Cal.Rptr. 678]; BAJI No. 14.71 (7th ed. 1986); 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § § 867-869, pp. 3155-3158, ***1404** (1984 Supp.) § § 869A-869B, pp. 553-557) - would introduce an element of uncertainty detrimental to the conciliation process.

Nor does effective conciliation require that the administrative and judicial remedies be identical. Rejecting such a contention in *Commodore Home, supra*, we stated: "We are not persuaded. In the first place there is no right to sue, even after conciliation breaks down, unless the Department fails to file an accusation before the Commission. To that extent the availability of court remedies remains within the Department's control. More importantly, the compliance structure of the FEHA encourages cooperation in the administrative process. While that process continues the Department acts on the victim's behalf and absorbs costs of pursuing his claim. Court action inevitably is speculative, and the FEHA makes civil suit the claimant's sole responsibility. That helps deter strategies of 'holding out' for court damages in inappropriate cases. Further, the possibility that an action might lead to punitive damages may enhance the willingness of persons charged with violations to offer fair settlements during the conciliation process. [Fn. omitted.]" (32 Cal.3d at p. 218.)

In short, Commission's policy and equal protection arguments are fallacious. If a complainant wants relatively prompt restitutionary redress free of personal financial risk he or she can elect the administrative avenue of relief, with all expenses

Copr. © Bancroft-Whitney and West Group 1998

paid by the department. (*State Personnel Bd. v. Fair Employment Housing & Com., supra*, 39 Cal.3d at p. 432.) If, however, the complainant prefers to seek the potentially more lucrative redress of punitive damages, he or she can go to court like any other litigant.

III. Conclusion

In view of the foregoing, we conclude that the commission is not authorized to award punitive damages. [FN25] The Court of Appeal therefore erred in affirming the judgment of the trial court.

FN25 Because our disposition rests on statutory interpretation, we need not now address whether the power to award unlimited punitive damages could be lodged in an administrative tribunal and we express no opinion concerning the validity of legislation seeking to grant such authority.

The judgment of the Court of Appeal is reversed. The Court of Appeal is directed to enter judgment reversing the trial court and directing it to issue a writ of mandate commanding Commission to vacate and set aside that part of its decision awarding Olander punitive damages and thereafter to take such further action not inconsistent with this opinion as it deems appropriate.

Lucas, C. J., Mosk, J., Arguelles, J., Eagleson, J., and Kaufman, J., concurred. *1405

BROUSSARD, J.

I dissent. I adopt part III of the well-reasoned opinion of the Court of Appeal (prepared by Justice Work and concurred in by Acting Presiding Justice Staniforth and Justice Wiener) as my own opinion, with a few alterations. [FN1]

FN1 Brackets together, in this manner [] *without enclosing material*, are used to indicate deletions from the opinion of the Court of Appeal; brackets *enclosing material* (other than editor's added parallel citations) are, unless otherwise indicated, used to denote insertions or additions by this court. We thus avoid the extension of quotation marks within quotation marks, which would be incident to the use of such conventional punctuation, and at the same time accurately indicate the matter quoted. Footnotes in the Court of Appeal opinion have been renumbered sequentially.

Dyna-Med, [Inc. (Dyna-Med),] supported by amici[i] Merchants and Manufacturers Association (MMA) [and others], [FN2] set forth multiple challenges to the [Fair Employment and Housing] Commission's [(Commission)] authority to award punitive damages. In essence, they contend [the Fair Employment and Housing Act's (]FEHA [or act)] language and legislative history preclude awarding punitive damages at the agency level. They stress the statutory language, construed according to settled rules of statutory construction, does not empower the Commission to award punitive damages but limits it to remedial action designed to effectuate the underlying purposes of the act. Absent express legislative authorization, they argue it is the settled rule an administrative agency may not lawfully impose a penalty, whether civil or criminal in character.

FN2 Future referrals to Dyna-Med's arguments in this opinion also include those of amici[i].

Moreover, emphasizing the similarity between the language of title VII of the Federal Civil Rights Act of 1964 (title VII) and the FEHA, Dyna-Med relies on federal court precedent holding punitive damages are not available. Additionally, noting the housing discrimination provisions of the FEHA specifically authorize the Commission to order the payment of "punitive damages in an amount not to exceed one thousand dollars ($1,000)" ([Gov. Code,] § 12987, subd. (2) [all further statutory references are to the Government Code unless otherwise indicated]), it argues the express provision for such punitive damages in a parallel statutory scheme strongly suggests the omission of this remedy from the employment discrimination provisions was intentional. (See *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 225 (dis. [opn.]) [185 Cal.Rptr. 270, 649 P.2d 912].) Consequently, [Dyna-Med] contends that had the Legislature intended to allow recovery of extraordinary remedies such as punitive damages within the employment context, it could and would have expressly so provided. Dyna-Med asserts its construction is compelled by public policy, claiming injecting punitive damages within this administrative context furthers neither the general principle of equal employment opportunity, nor voluntary resolution

Copr. © Bancroft-Whitney and West Group 1998

and conciliation. Finally, [Dyna-Med] stress[es] that procedures ***1406** of administrative agencies often disregard traditional rules of evidence, severely limit discovery and are unfettered by safeguards insuring due process to litigants in the courts.

Applying the rules of construction summarized in *Honey Springs Homeowners Assn. v. Board of Supervisors* (1984) 157 Cal.App.3d 1122, 1136 [1137], fn. 11 [203 Cal.Rptr. 886], we [must] interpret the FEHA to ascertain and effectuate the purpose of the law, attempting to give effect to the usual and ordinary import of the statutory language; harmonizing any provision within the context of the statutory framework as a whole; seeking a reasonable and commonsense interpretation consistent with the apparent legislative purpose and intent, practical rather than technical in character and upon application resultant of wise policy rather than absurdity; and, considering generally the context, the object in view, the evils to be remedied, the history of the times, legislation upon the same subject, public policy and contemporaneous construction.

The [Fair Employment Practice Act (]FEPA[)] was enacted in 1959 and recodified in 1980 as part of the FEHA. The FEHA sets forth a comprehensive scheme for combating employment discrimination, recognizing "the need to protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination. (§ 12920.)" (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 485 [208 Cal.Rptr. 724, 691 P.2d 272].) The act declares that freedom from discriminatory practices in seeking, obtaining, and holding employment is a civil right. (§ 12921.) In fact, section 12920 recognizes "the practice of denying employment opportunity and discriminating [in] the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." Such discrimination is contrary to public policy (§ 12920) and is an unlawful employment practice (§ 12940). The express underlying purpose of the act is "to provide effective remedies which will eliminate such discriminatory practices." (§ 12920.) The Legislature has directed that the FEHA is to be construed "liberally" to accomplish its underlying purposes. (§ 12993.) [FN3]

FN3 Generally, "[t]he purpose of the FEHA is to provide effective remedies for the vindication of constitutionally recognized civil rights, and to eliminate discriminatory practices on the basis of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex and age. (See § § 12920, 12921; Cal. Const., art. I, § 8.)" *State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, 432 [217 Cal.Rptr. 16, 703 P.2d 354].)

The FEHA establishes the Department [of Fair Employment and Housing (the Department)] (§ 12901) to investigate, conciliate, and seek redress of claimed discrimination (§ 12930). Complaints (§ 12960) must be promptly ***1407** investigated (§ 12963). If it deems a claim valid, then it seeks to resolve the matter - in confidence - by conference, conciliation, and persuasion. (§ 12963.7.) If that fails or seems inappropriate the Department may issue an accusation to be heard by the Commission. (§ § 12965, subd. (a), 12969; see too § 12930.) The Commission then determines whether an accused employer, union, or employment agency has violated the act. If it finds a violation it must "issue ... an order requiring such [violator] to cease and desist from such unlawful practice and to take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part. ..." (§ 12970, subd. (a).) If the Department fails to issue an accusation within 150 days after the filing of the complaint and the matter is not otherwise resolved, it must give complainant a right-to-sue letter. Only then may that person sue in the superior court under the FEHA (§ 12965, subd. (b)). [FN4] (See *Commodore Home Systems, Inc. v. Superior Court, supra*, 32 Cal.3d 211, 213-214; *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 865-868 [193 Cal.Rptr. 760]; see also *State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d 422, 432 [433].) [FN5]

FN4 However, the court in *Commodore Home Systems, Inc. v. Superior Court, supra*, noted: "Declarations by the Director and the general counsel of the Department advise that right-to-sue letters are the rule, not the exception, because the Department rarely is able to complete investigations,

Copr. © Bancroft-Whitney and West Group 1998

pursue conciliation, and issue accusations within the 150- day period. For that reason, a right-to-sue letter is issued, even in advance of 150 days, to any person who states in writing that he wants to withdraw his complaint and file a civil action. We express no opinion on the propriety of that practice. ..." (32 Cal.3d at p. 218, fn. 8.)

FN5 In 1980, the Commission adopted a regulation providing that "[w]hile normal monetary relief shall include relief in the nature of back pay, reasonable exemplary or compensatory damages may be awarded in situations involving violations which are particularly deliberate, egregious or inexcusable." (Cal. Admin. Code, tit. 2, § 7286.9, subd. (c).) The Commission clarified the meaning of this regulation in its precedential decision, *D.F.E.H. v. Ambylou Enterprises* (1982) F.E.H.C. Dec. No. 82-06 at pages 8, 9-17, where it adopted the standards normally applied by the courts in assessing exemplary and compensatory damages. It was, however, repealed on May 16, 1985 (effective 30th day thereafter, Cal. Admin. Register 85, No. 20) to eliminate the articulated "incorrect" legal standard for awarding exemplary or compensatory damages. The repeal was not intended to affect the Commission's authority to award such relief in appropriate cases as derived from the FEHA. (Cal. Admin. Code, tit. 2, § 7286.9, Cal. Admin. Code. Supp., Register 85, No. 20, p. 134.)

[My] conclusion [that] the Commission is empowered to award punitive damages arises from the statutory authority summarized above. It is undisputed an administrative agency's power to award such damages must arise from express statutory authorization. Here, the Legislature delegated broad authority to the Commission to fashion appropriate remedies for unlawful employment practices in section 12970, subdivision (a): "If the commission finds that a respondent has engaged in any unlawful practice under this ***1408** part, it ... shall issue and cause to be served on the parties an order requiring such respondent ... to take such action, *including, but not limited to*, hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, *as, in the judgment of the commission, will effectuate the purposes of this part*, and including a requirement for report of the manner of compliance." (Italics added.) Attempting to harmonize this specific provision in context of the entire statutory framework, [I] find in section 12920 the underlying purpose of the act is to provide effective remedies to eliminate discriminatory employment practices. Consequently, considering the legislative mandate to liberally construe the act to further these purposes (§ 12993), [I] conclude it has statutorily authorized the Commission to impose punitive damages where necessary to effectively remedy and eliminate unlawful FEHA employment practices. For, the Commission "may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers. [Citations.]"' (*Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 617 [200 Cal.Rptr. 575] [quoting *Dickey v. Raisin Proration Zone No. 1* (1944) 24 Cal.2d 796, 810 (151 P.2d 505, 157 A.L.R. 324)].)

Contrary to Dyna-Med's assertions, imposing punitive damages for deliberate violations is designed to effectively eliminate discriminatory employment practices. Potential liability for punitive damages is a substantial incentive for employers to eliminate, or refrain from committing, unlawful employment practices. Further, the possibility of "punitive damages may enhance the willingness of persons charged with violations to offer fair settlements during the conciliation process. [Fn. omitted.]" (*Commodore Home Systems, Inc. v. Superior Court, supra*, 32 Cal.3d 211, 218.) Moreover, such damages are designed not only to punish the wrongdoer, but also to set an example to deter others from similar conduct.

The facts of this case prove ordinary restitutionary remedies are often ineffective in eliminating discriminatory practices. Awards of back pay are frequently insignificant because interim earnings are deducted or offset. Also, the value of reinstatement may be negligible because by the time employment discrimination cases are resolved, the plaintiff has had to find another job. Upgrading, back pay and reinstatement in cases of retaliation may not be effective deterrents or satisfactory remedies for complainants because the original work environment may no longer be conducive to continued employment. Consequently, in light of the limited

Copr. © Bancroft-Whitney and West Group 1998

remedial effect of these permissible compensatory remedies, the award of punitive damages may be the only method of fulfilling the purposes of the act, including encouraging plaintiffs to seek relief by increasing their potential recovery ***1409** (see Claiborne v. Illinois Central Railroad (E.D.La. 1975) 401 F.Supp. 1022, 1026, affd. in part and vacated in part (5th Cir. 1978) 583 F.2d 143).

Although the language of section 12970, subdivision (a) is broad enough to encompass the award of punitive damages, Dyna-Med challenges this construction, claiming the statutory construction doctrines of *ejusdem generis*, [FN6] *expressio unius est exclusio alterius*, [FN7] and *noscitur a sociis* [FN8] compel a narrow interpretation limiting the Commission to ordering only affirmative, equitable, remedial relief.

FN6 "'[T]he doctrine of *ejusdem generis* ... states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage.'" (*Sears*[,] *Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317, 331, fn. 10 [158 Cal.Rptr. 370, 599 P.2d 676], quoting *Scally* v. *Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 819 [100 Cal.Rptr. 501].)

FN7 *Expressio unius est exclusio alterius* means that "the expression of certain things in a statute necessarily involves exclusion of other things not expressed. ..." (*Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397, 403 [135 Cal.Rptr. 266].)

FN8 Under the rule of *noscitur a sociis*, "'the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.'" (*People v. Stout* (1971) 18 Cal.App.3d 172, 177 [95 Cal.Rptr. 593], quoting Vilardo v. County of Sacramento (1942) 54 Cal.App.2d 413, 420 [129 P.2d 165].)

Dyna-Med argues applying the doctrine of *ejusdem generis* to section 12970, subdivision (a) requires the authorizing language to be viewed in the light of the limited nature of the remedies specifically listed before the general language. In other words, because the only remedy enumerated involving the award of monetary or legal relief is the awarding of backpay [*sic*], it concludes the general remedy language may not be construed to expand the authorized remedies to embrace punitive damages, because the phrase is limited by specific examples of the relief available, all of which are traditional "make-whole" remedies. It asserts the same result is arrived at by employing the other cited rules of statutory construction, because the Legislature demonstrated an intent not to authorize the exercise of any additional power unequivocally empowering the Commission to take affirmative action and then listing examples of such affirmative "make-whole" relief.

Properly analyzed, these rules do not sustain Dyna-Med's proffered statutory construction. These principles are mere guides to determining legislative intent and will not be applied to defeat the underlying legislative intent. (*Cal. State Employees' Assn. v. Regents of University of California* (1968) 267 Cal.App.2d 667, 670 [73 Cal.Rptr. 449]; *Claiborne v. Illinois Central Railroad, supra*, 401 F.Supp. 1022, 1026.) Moreover, in evaluating legislative ***1410** intent from first gleaning the language of the statute, we should seek to avoid making any language mere surplusage and thus rendered useless. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224]; *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297, 305 [193 Cal.Rptr. 343].) Applying the proffered rules of statutory construction effectively deprives the phrase "including but not limited to" of any meaning, when in fact it evinces clear legislative intent to expand, not limit, the list of remedies. (See *America National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 611 [186 Cal.Rptr. 345, 651 P.2d 115] (dis. opn.); *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1977) 69 Cal.App.3d 884, 890 [138 Cal.Rptr. 509].)

Dyna-Med next argues the underlying legislative history of the FEHA, and specifically section 12970, shows the Commission did not intend to allow punitive damages. It argues the FEHA was modeled

Copr. © Bancroft-Whitney and West Group 1998

after the remedy language of the National Labor Relations Act (NLRA) which has been interpreted as not permitting punitive damages; the FEHA authorizes "affirmative action including (but not limited to)" similar to the NLRA which has been construed by the courts as authorizing only remedial relief; and the Legislature's enactment of a parallel statutory scheme relating to housing discrimination expressly providing for punitive damages suggests the omission of this remedy from the employment discrimination provisions was intentional.

The cited language of subdivision (a) of section 12970 appeared originally in former Labor Code section 1426, adopted in 1959 as part of the FEPA, which was later recodified and substantially reenacted in section 12970, subdivision (a). Without question, the phrase in dispute resembles section 10(c) of the NLRA (29 U.S.C.A. § 151 et seq., § 160(c)), which directs the National Labor Relations Board (NLRB) upon a finding of an unfair labor practice to issue a cease and desist order requiring the violator to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]. ..." This language in 1938 was interpreted by the United States Supreme Court as not allowing punitive damages. (*Edison Co. v. Labor Board* (1938) 305 U.S. 197, 235-236 [83 L.Ed. 126, 143, 59 S.Ct. 206, 219-220].) [FN9] ***1411**

FN9 In *Edison* the Supreme Court stated: "That section [29 U.S.C. § 160(c)] authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' [] We think that this authority to order affirmative action does not go so far as to confer punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board [] be of the opinion that the policies of the Act might be effectuated by such an order.
"The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." (305 U.S. 197, 235-236 [83 L.Ed. 126, 143]; *Commodore Home Systems, Inc. v. Superior Court, supra*, 32 Cal.3d 211, 224 (dis. opn.).)

In 1969, the word "affirmative" preceding the word "action" was removed from section 12970, subdivision (a). (Stats. 1969, ch. 526, § 1, p. 1142.) [FN10] Because this language was not otherwise modified in any relevant manner by the Legislature, Dyna-Med relies on federal precedent construing the NLRA as well as title VII of the Federal Civil Rights Act of 1964 which contains similar language within section 706(g), authorizing the trial court to enjoin intentional violations of the Civil Rights Act and to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate. ..." (42 U.S.C. § 2000e-5(g).) [FN11] Its reliance on federal precedent is misplaced. [FN12]

FN10 The Attorney General notes the apparent reason for this change was to distinguish the "action" which the Commission could order from the narrow definition of "affirmative actions" as educational and promotional activities which was added to FEHA's predecessor statute in 1967. (See former Lab. Code, § 1413, subd. (g), added by § 5 of Stats. 1967, ch. 1506, § 1, at p. 3573.) This construction is also proffered by Dyna-Med and amicus MMA. Because [I] do not rely on that legislative modification, [I] do not comment on the correctness of that assertion.

FN11 "The authority of courts to grant relief in actions brought under the Equal Employment Opportunity Act of 1972 is governed by the same statutory provision which applies in actions under Title VII of the Civil Rights Act of 1964 [()42 U.S.C. § 2000e-5(g).())] [Fn. omitted.] [That section] authorizes courts to order 'such affirmative action as may be necessary' to remedy unlawful employment practices." (*Richerson v. Jones* (3d Cir. 1977) 551 F.2d 918, 923.)

FN12 [I am] aware the majority in

Copr. © Bancroft-Whitney and West Group 1998

> *Commodore Home Systems, Inc. v. Superior Court, supra*, 32 Cal.3d 211, 217, when determining that the FEHA does not limit the relief a court may grant in a statutory suit charging employment discrimination and that all relief generally available in noncontractual actions, including punitive damages may be obtained in such a civil action under the FEHA, noted differences between the NLRA as well as section 706(g)of title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(g)) which diminish the weight of federal precedent interpreting the federal statutes as not authorizing awards of either general compensatory or punitive damages. However, because [I] believe the [distinctions] in *Commodore* rested substantially on the precise context of the issue the court was reviewing (i.e., the separate and distinct route to resolution of claims through private court action, and not administrative relief), [I] do not rely on [them] here.

Critical differences between the NLRA and the FEHA convince [me] the federal precedent is not apposite. (See, e.g., *Edison Co. v. Labor Board, supra*, 305 U.S. 197, 235-236 [83 L.Ed. 126 [143, 59 S.Ct. 206, 219-220]]; see also *Pearson v. Western Elec. Co., etc.* (10th Cir. 1976) 542 F.2d 1150, 1152; *Van Hoomissen v. Xerox Corporation* (N.D.Cal. 1973) 368 F.Supp. 829, 837.) Granted, "[w]hen legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would ***1412** be given a like interpretation. This rule is applicable to state statutes which are patterned after the federal statutes. [Citations.]" (*Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665], quoting *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960) 54 Cal.2d 684, 688-689 [8 Cal.Rptr. 1, 355 P.2d 905]; *Union Oil Associates v. Johnson* (1935) 2 Cal.2d 727, 734-735 [43 P.2d 291, 98 A.L.R. 1499].) However, this recognized principle of statutory construction rests upon the predicate the latter statute involved the same or an analogous subject which has similar [or] identical language. Here, the subjects are not analogous. The underlying purposes of the NLRA and the FEHA (or FEPA) differ. The former exists to prevent industrial unrest and strife or, in other words, to promote industrial peace (*Carey v. Westinghouse Corp.* (1964) 375 U.S. 261, 271 [11 L.Ed.2d 320, 328, 84 S.Ct. 401]), while the latter exists to eliminate specific discriminatory practices (*State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d 422, 432). More specifically, the NLRA regulates and encourages collective bargaining between employers and employees (*Carey v. Westinghouse Corp., supra*, 375 U.S. at p. 271 [11 L.Ed.2d at p. 328, 84 S.Ct. at p. 409]; *N.L.R.B. v. Pincus Bros., Inc.-Maxwell* (3d Cir. 1980) 620 F.2d 367, 376; *Bloom v. N.L.R.B.* (D.C. Cir. 1979) 603 F.2d 1015, 1019), while the FEHA makes employment discrimination against certain enumerated groups illegal. The former is designed to protect the rights of workers to organize into bargaining units and to create a cooperative atmosphere of recognition between labor and management. (See *N.L.R.B. v. Knuth Bros., Inc.* (7th Cir. 1976) 537 F.2d 950, 957.) On the other hand, the latter is designed to protect the individual's constitutional right to be free from discrimination within the employment setting (*State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d at p. 432), not to create a spirit of cooperation between labor and management. Instead, the FEHA was designed to provide an efficient administrative remedy to enforce an employee's right to be treated equally and to insure employers refrain from committing discriminating employment practices. Moreover, the NLRA does not provide a claimant with an analogous right to independently pursue an unfair labor practices claim in the courts upon administrative default or issuance of a right-to-sue letter, while the FEHA provides both judicial and administrative remedial procedures, requiring sensitivity to consistency in available relief. [FN13] ***1413**

> FN13 While comparing the NLRA with title VII, the court in *Claiborne v. Illinois Central Railroad, supra*, 401 F.Supp. 1022, 1024-1025, aptly explained: "Moreover, the aim of the N.L.R.A. was to establish a framework within which management and labor could resolve their conflicts, whether by collective bargaining or economic warfare, *e.g.*, strikes and lockouts. The N.L.R.A. was not meant to be outcome determinative, *i.e.*, it was not to ensure that management or labor wins every conflict. It

Copr. © Bancroft-Whitney and West Group 1998

simply defined permissible methods of engaging in industrial conflict and sought to channel labor/management conflict into peaceful negotiations. Title VII is radically different. It seeks to end all employment discrimination. It does not define permissible methods of discrimination nor does it establish a framework allowing for employment discrimination. Its aim is to be outcome determinative and to see that employees who are discriminated against win every conflict.

"Punitive damages under the N.L.R.A. are inappropriate because they would only serve to exacerbate conflict between management and labor within the permissible sphere of industrial conflict, *i.e.*, strikes and lock-outs. The party assessed punitive damages could seek revenge in the next strike or be recalcitrant at the bargaining table. This would undermine the spirit of cooperation that is necessary for good-faith collective bargaining and the peaceful resolution of industrial conflicts. Such revenge seeking would be almost impossible to prove unless the party accused of it stated this was a reason for its action. Punitive damages might also create a sense of moral superiority in the side receiving them, discouraging that side from negotiating and avoiding strikes because it felt it was 'right.' Furthermore, punitive damages might permit the N.L.R.B. to destroy the equality of power between management and labor that Congress intended to create by the N.L.R.A. [()Note, Tort Remedies for Employment Discrimination Under Title VII, 54 Va.L.Rev. 491, 502 (1968).[)]

"No such dangers exist under Title VII. Employment discrimination is not negotiable so there is no negotiating process to undermine. Where there is employment discrimination, there is no equality of power to be maintained, since employment discrimination is absolutely prohibited. Finally, there is no permissible area of conflict where revenge for punitive damages might be sought. Indeed, the possibility of punitive damages under Title VII should encourage an end to employment discrimination [...]. Accordingly, the profoundly different aims of Title VII and the N.L.R.A. should lead to a different, not similar, decision on punitive damages."

Upon reviewing the *Claiborne* court's decision, the Fifth Circuit stated: "Without approving or disapproving the lower court's resolution of the Title VII issue, its discussion of Title VII and the different purposes of the Civil Rights Act as compared to the [NLRA] ... is fully persuasive that an award of punitive damages does not so conflict with the purpose embodied in Title VII that it should be disallowed in a combined [Title VII and 42 United States Code section 1981] suit." (*Claiborne v. Illinois Cent. R.R.* (5th Cir. 1978) 583 F.2d 143, 154.)

Dyna-Med's reliance on title VII cases is similarly misplaced. (See, e.g., *Shah v. Mt. Zion Hospital & Medical Ctr.* (9th Cir. 1981) 642 F.2d 268, 272; *DeGrace v. Rumsfeld* (1st Cir. 1980) 614 F.2d 796, 808; *Richerson v. Jones, supra*, 551 F.2d 918, 926; *Pearson v. Western Electric Co., supra*, 42 F.2d 1150, 1152.) 42 United States Code section 2000e-5(g) of title VII significantly provides: "[T]he court may ... order such affirmative action as may be appropriate, which may include, but is not limited to, ... *or any equitable relief* as the court deems appropriate." (Italics added.) Several decisions have focused on this phrase "any other equitable relief" in determining that punitive damages are not awardable, for they are traditionally not available in equity. (See *Shah v. Mt. Zion Hospital & Medical Ctr., supra*, 642 F.2d 268, 272.; *Miller v. Texas State Bd. of Barber Examiners* (5th Cir. 1980) 615 F.2d 650, 654; *Richerson v. Jones, supra*, 551 F.2d 918, 927.) Consequently, these courts have understandably held the explicit reference to *equitable*, and the silence with regard to *legal*, relief suggests the unavailability of punitive damages under title VII. In contrast, the FEHA expressly empowers the Commission to take whatever *action* is necessary to effectuate its policies, without an express limitation to equitable relief or complete silence as to legal relief. The absence of such qualifying language ***1414** and complete silence regarding legal damages in the FEHA further dissuades [me] from following the cited federal precedent. [FN14]

FN14 Amicus MMA contends the title VII cases are not distinguishable here because of the inclusion of the term "equitable" in the remedies section of the statute, citing the remedy language contained in the Federal

Copr. © Bancroft-Whitney and West Group 1998

Age Discrimination [in] Employment Act (ADEA) (29 U.S.C. § 621 et seq.). 29 United States Code section 626(b) pertinently provides: "In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. ..."

MMA notes that every circuit court which has considered the issue of whether the ADEA permits the disposition of punitive and pain and suffering damages has held in the negative. (See *Slatin v. Stanford Research Institute* (4th Cir. 1979) 590 F.2d 1292; *Vazquez v. Eastern Air Lines, Inc.* (1st Cir. 1978) 579 F.2d 107; *Dean v. American Sec. Ins. Co.* (5th Cir. 1977) 559 F.2d 1036; *Rogers v. Exxon Research & Engineering Co.* (3d Cir. 1977) 550 F.2d 834; *Naton v. Bank of California* (9th Cir. 1981) 649 F.2d 691.) In deciding pain and suffering or punitive damages are not necessary to effectuate the purposes of the ADEA, the *Dean* and *Rogers v. Exxon* cases rely heavily on the provision for liquidated damages in cases of willful violations of the ADEA. (*Rogers v. Exxon, supra*, at p. 840; *Dean v. American Sec. Ins. Co., supra*, at p. 1039.) After reviewing the legislative history, *Dean* states the sponsor of the bill "held the view that [] liquidated damages could effectively supply the deterrent and punitive damages which both criminal penalties and punitive damages normally serve. [Fn. omitted.]" (*Id.*, at p. 1040.) There is no analogous provision specifying the type of damages that can be awarded in cases of willful violations in the FEHA, and thus we do not find the ADEA cases controlling. I note that although three of the courts (*Rogers, supra*, at [p. 841]; *Naton, supra*, at p. 699, and *Slatin, supra*, at p. 1296) expressed concern that pain and suffering damages would negatively impact the conciliation process, the court in *Vazquez, supra*, 579 F.2d 107, expressly rejected the proposition, concluding that a contrary result might be so logically reached (i.e., the employer might be less likely to compromise a claim if he knows no pain and suffering damages can be awarded against him). (*Id.*, at p. 111.)

[][T]he FEHA provides alternative avenues of relief through either the administrative or the judicial process. As already explained, both procedures commence with the filing of a complaint with the Department. (§ 12960.) Under the judicial route, a complainant receives a right-to-sue notice and files an action in court. (§ 12965, subd. (b).) Under the administrative route, the Department investigates the complaint (§ 12963), conducts discovery (§ § 12963.1-12963.5), attempts conciliation (§ 12963.7), files an accusation with the Commission (§ 12965, subd. (a)), and presents the case to the Commission (§ 12969). The decision, however, whether to go to court does not rest with the claimant. Rather, the Department has exclusive jurisdiction over the case for 150 days (§ § 12960, 12965, subd. (b)), and must give a right-to-sue letter to the claimant if an accusation is not issued within the time period before the claimant may file a court action. However, although this private right of action under section 12965, subdivision (b), appears to be contingent upon the Department's decision not to prosecute or the lapse of 150 days, "[a]s a practical matter ... parties who intend to pursue their case in court are given 'right to sue' letters in every case, even ***1415** in advance of the 150-day limit." (*State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d 422, 433, fn. 11.) Where the Department decides to administratively handle the case, the complainant may not pursue a civil action. (See generally *Snipes v. City of Bakersfield, supra*, 145 Cal.App.3d 861, 865-868.) In essence, this administrative process was designed to be supported completely by the Department's own staff of investigators, attorneys and other personnel to prosecute the alleged violation rather than bestowing that responsibility upon a complainant. (See [*State Personnel Bd., supra*], at p. 432.) In fact, the [L]egislature originally provided for only the administrative route and later added the judicial avenue of relief, but retained the former apparently to highlight its intent the administrative process was designed to handle the bulk of the cases and its belief the administrative process would operate effectively to eliminate employment discrimination. Indeed, "[t]he FEPC has been entrusted with the duty of effectuating the declared policy of the state to protect and safeguard the rights and opportunities of all

Copr. © Bancroft-Whitney and West Group 1998

persons to seek, obtain and hold employment without discrimination." (*Northern Inyo Hosp. v. Fair Emp. Practice [] Com.* (1974) 38 Cal.App.3d 14, 25 [112 Cal.Rptr. 872].)

In *Commodore Home Systems, Inc. v. Superior Court, supra*, 32 Cal.3d 211, 221, this [] Court held compensatory and punitive damages are available to persons who "elect" the judicial avenue of relief under the FEHA. [FN15] Thus, an anomaly arises if punitive damages are not likewise available within the administrative avenue of relief. As Justice Richardson pointed out in his dissent in *Commodore, supra*, at pages 222-223, "it would be wholly anomalous to allow punitive damages to accusors [*sic*] who have been unsuccessful administratively before the commission, but to deny such damages to those whose claims have been successfully established. The result of any such disparity of remedy would be to encourage [claimants to file insufficient or inadequate] complaints with the commission in order to avoid or circumvent administrative proceedings in the hope of obtaining punitive damages in subsequent civil actions. Such a consequence would be contrary to FEHA's policy of eliminating employment discrimination through administrative 'conference, conciliation, and persuasion.' (Gov. Code, § 12963.7, subd. (a).)" Moreover, given the substantial volume of complaints received by the Department, if it pursued only the strongest cases with the most egregious FEHA violations, then ironically claimants with weaker cases who could afford to pursue judicial action would have access to compensatory and exemplary damages while stronger cases heard by the Commission would not. A construction permitting this would defeat ***1416** an underlying purpose for administrative relief, to wit, to provide an administrative scheme and forum for complainants to vindicate their employment rights, regardless of economic status. Indeed, public policy prohibiting employment discrimination practices cannot permit an individual claimant's affluence to determine whether he/she is entitled to effective relief. Absent the availability of similar relief, it is inevitable that equal protection violations will occur. [FN16]

FN15 The question whether the Commission can award compensatory and punitive damages was expressly reserved[.] [] (*Commodore Home Systems Inc. v. Superior Court, supra*, 32 Cal.3d 211, [215, 220]; *State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d 422, 429, 434, fn. 12.)

FN16 The depth of the impact of the possibility of disparity in available remedies is far greater than initially meets the eye with regard to the indigent or less sophisticated claimants who cannot mount or sustain a lengthy civil action. Those individuals will be denied an opportunity to obtain an award of punitive damages solely because of their economic or social circumstances. Not only is this distinction among claimants irrelevant, but it is contrary to the Legislature's intent to eliminate employment discrimination, and violates the basic principles of equal protection. Unfortunately, economic status is often strongly correlated to race, sex, and various other forms of discrimination prohibited by the FEHA. If such victims of employment discrimination, often unemployed at the time they seek relief, cannot obtain full relief through the administrative proceedings made available to them, then in essence the FEHA will foster discrimination rather than eliminate it as judicial relief to this class is not economically feasible. The Legislature intended to create an expeditious, complete, administrative remedy, not an inferior mode of relief occasionally available to the unfortunate.

Moreover, if the Commission is prohibited from awarding punitive damages while courts are free to do so, the underlying purposes of the administrative avenue of adjudication will be undermined. The Commission was created to interpret and implement the act and concomitantly to develop expertise in employment discrimination practices in California. (See § 12935; see generally *State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d 422, 432.) By establishing an administrative avenue of relief in the Commission with such expertise, the FEHA is designed to promote efficient resolution of discrimination complaints while removing additional pressure from the state's overburdened judicial system. In fact, if the Commission was prohibited from awarding punitive damages while the courts were free to do so, the Department might forego seeking administrative relief, thus delaying any relief and embroiling the discriminated person in unwanted courtroom proceedings. Further, this affects the

Copr. © Bancroft-Whitney and West Group 1998

fulfillment of the Department's role in that particular case with regard to conference, conciliation and persuasion efforts to resolve the dispute. [I] believe [this] construction [] provides "a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity." (*Honey Springs Homeowners Assn.[, Inc.] v. Board of Supervisors, supra*, 157 Cal.App.3d 1122, 1136, fn. 11; *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 170 [154 Cal.Rptr. 263].)

Further, the Commission is authorized to interpret the FEHA both by regulation (§ 12935, subd. (a)(1)) and a system of precedential opinions **1417 (§ 12935, subd. (h)). Although the ultimate interpretation of a statute rests with the courts, consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect and enforcing it, is entitled to great weight and will be followed unless clearly erroneous. (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 491 [156 Cal.Rptr. 14, 595 P.2d 592]; *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 668 [150 Cal.Rptr. 250, 586 P.2d 564]; *DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18 [194 Cal.Rptr. 722].) [] [I]n 1980, the Commission promulgated title 2, California Administrative Code section 7286.9, subdivision (c) providing: "While normal monetary relief shall include relief in the nature of back pay, reasonable exemplary or compensatory damages may be awarded in situations involving violations which are particularly deliberate, egregious or inexcusable." Although this regulation was repealed in 1985 as setting forth an incorrect and misleading standard, the Commission held in *D.F.E.H. v. Ambylou Enterprises, Inc.* (1982) F.E.H.C. Dec. No. 82-06), compensatory and punitive damages are available under the FEHA (*id.*, at p. 8); punitive damages are designed to punish a wrongdoer and provide an example to deter others from similar conduct as are permissible in a court of law (*id.*, at p. 13); and the availability of such damages is governed by Civil Code section 3294. (*Id.*, at p. 13.) In *D.F.E.H. v. Fresno Hilton Hotel* (1984) F.E.H.C. Dec. No. 84-03, app[eal] pending[], the Commission held that under section 12970, subdivision (a), it could award both compensatory (*id.*, at pp. 34-36) and punitive (*id.*, at pp. 36-40) damages. The Commission declared: "The purpose of awarding punitive damages is to punish or [] make an example of respondent, when it [has] engaged in, condoned, or ratified conduct which is oppressive, fraudulent or malicious. (Civ. Code, § 3294)" (*Id.*, at p. 37; see also *D.F.E.H. v. Donald Schriver, Inc.* (1984) F.E.H.C. Dec. No. 84-07, app. pending, declaring the Commission is authorized to award punitive damages (*id.*, at [p.] 18) [] follow[ing] the judicial standard set forth in Civ. Code, § 3294 (*id.*, at pp. 18-22).)

Since the Commission first interpreted section 12970, subdivision (a) in 1980, the Legislature has amended the FEHA on numerous occasions without addressing the language in dispute regarding the Commission's authority to award appropriate effective relief. "[W]here the Legislature has failed to modify the statute so as to require an interpretation contrary to the regulation, that fact may be considered to be an indication that the ruling was consistent with the Legislature's intent." (*Action Trailer Sales, Inc. v. State Bd. of Equalization* (1975) 54 Cal.App.3d 125, 133-13[4] [126 Cal.Rptr. 339]; see also *Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 922 [156 P.2d 1].) **1418

Dyna-Med relies upon a bill introduced but not enacted by the Legislature in 1976 (Assem. Bill No. 3124) (2 Assem. Final Hist. (1975-1976 Reg. Sess.) p. 1658) which would have expressly authorized the Commission to award damages in employment discrimination cases in an amount not to exceed $500. [FN17] [Dyna-Med's] reliance on proposed, but unpassed legislation is misplaced. (*National Elevator Services, Inc. v. Department of Industrial Relations* (1982) 136 Cal.App.3d 131, 141 [186 Cal.Rptr. 165]; *Miles v. Workers' Comp. Appeals Bd.* (1977) 67 Cal.App.3d 243, 248, fn. 4 [136 Cal.Rptr. 508]; *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 58 [69 Cal.Rptr. 480]; see *United States v. Wise* (1962) 370 U.S. 405, 411 [8 L.Ed.2d 590, 594-595, 82 S.Ct. 1354].)

FN17 The Legislature attempted in 1983-1984 to amend section 12970, subdivision (a) to specifically authorize compensatory and punitive damages as "declaratory of existing law" in Senate Bill No. 2012; however, this language was removed before its enactment. (Stats. 1984, ch. 1754, § 3, p. 6406.)
During the 1981-1982 legislative session,

Copr. © Bancroft-Whitney and West Group 1998

the Legislature twice declined to enact statutes which would have prohibited the Commission from awarding punitive damages in Senate Bill No. 516 and Assembly Bill No. 879.

Dyna-Med next argues the express authorization in section 12987, subdivision (2) for the Commission to award actual and punitive damages up to $1,000 in housing discrimination cases and the omission of a similar provision in the employment discrimination provisions of the FEHA, suggests the Legislature did not intend punitive damages be available to remedy discriminatory employment practices. It further notes this distinction exists between the federal fair housing and fair employment statutes causing the courts to hold a specific punitive damage provision in the former implies punitive damages are not available under the employment provisions. (See tit. VIII of the Civil Rights Act, 42 U.S.C. § 3612(c), relating to fair housing which specifically permits recovery up to $1,000 in punitive damages in comparison to the absence of any corresponding authorization for punitive damages in tit. VII; see, e.g., *Richerson v. Jones, supra*, 551 F.2d 918, 927-928.) Accordingly, it contends that had the Legislature intended to empower the Commission to award punitive damages, it would have [] so [provided as] it had [] in parallel legislation. Again, [I am] unpersuaded.

In 1959, when the FEPA was enacted, the Legislature also enacted the Hawkins Act (former Health & Saf. Code, § 35700 et seq., enacted by Stats. 1959, ch. 1681, § 1, p. 4074), prohibiting housing discrimination [in publicly assisted housing], and the Unruh Civil Rights Act (enacted by Stats. 1959, ch. 1866, § § 1-4, p. 4424; Civ. Code, § 51 et seq.), prohibiting discrimination in business establishments. In 1963, the Hawkins Act was replaced by the Rumford Fair Housing Act (former Health & Saf. Code, § 35700 et seq., enacted by Stats. 1963, ch. 1853, § § 1-2, p. 3823). The Hawkins Act originally permitted complainants to sue for the award of damages of not *1419 less than $500. (Former Health & Saf. Code, § 35730.) However, in 1963 when the Hawkins Act was replaced by the Rumford Act (Stats. 1963, ch. 1853, § 2, p. 3823 et seq.), the Commission was empowered to order a violator to pay damages (not exceeding $500) if the Commission determined certain other delineated remedies were not available (*id.*, at pp. 3828-3829). In 1975, the maximum damage award was increased to $1,000. (Stats. 1975, ch. 280, § 1, p. 701.) In 1977, the Commission was authorized to order such action by a violator as deemed appropriate to serve the law, including, but not limited to the sale or rental of the same or similar housing, the provision of nondiscriminatory purchase, rental and financing terms, and "[t]he payment of actual and punitive damages" not exceeding $1,000 (Stats. 1977, ch. 1187, § 10, p. 3893; ch. 1188, § 13.1, pp. 3905-3906). Essentially, this statutory scheme was then carried into the FEHA when the employment and housing statutory schemes were combined.

As the foregoing history illustrates, although both the housing and employment discrimination statutes are now contained within a single act, the FEHA, they followed different legislative routes of treatment resulting in totally separate, original enactments. The Legislature has consistently placed limitations on remedies available in the housing context while at the same time granting the Commission broad discretion to fashion appropriate awards in the employment context. Consequently, because the limitation on recovery within the housing context in section 12987, subdivision (2) expressly notes punitive damages only to limit the availability of such damages, the absence of any express reference to such damages in section 12970, subdivision (a) within the employment context should not be construed as a lack of authority, but rather a lack of statutory limitation on such damages.

Further, [this] construction of the FEHA coincides with public policy. The public commitment to eliminate discrimination as explicitly set forth in section 12920 and characterized as a civil right in section 12921, is constitutionally guaranteed by article I, section 8 of the California Constitution. Section 8 provides: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." "The right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness." (*Sail'er Inn [, Inc.] v. Kirby* (1971) 5 Cal.3d 1, 17 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351].)

Dyna-Med next contends the absence of procedural safeguards existing within the judicial system requires a conclusion punitive damages not be available in administrative proceedings. [I] recognize there may be differences in general procedure, rules

Copr. © Bancroft-Whitney and West Group 1998

of evidence, discovery, etc. However, the Commission is expressly permitted to award punitive damages in housing *1420 discrimination cases. Moreover, both the Administrative Procedure Act (APA) (§ 11500 et seq.) and Code of Civil Procedure section 1094.5 provide procedural protections to insure due process concerns are satisfied. [] ([See] *American National Ins. Co. v. Fair Employment & Housing Com., supra*, 32 Cal.3d 603, 607 [substantial evidence review by superior court]; [see also] *State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d 422, 433, and *Kerrigan v. Fair Employment Practice Com.* (1979) 91 Cal.App.3d 43, 51 [154 Cal.Rptr. 29] [] [independent judgment review] [].) In any event, "[Commission] hearings are always full evidentiary proceedings governed by the California rules of evidence and conducted in accordance with the California Administrative Procedure Act. (§ § 11500 et seq., 12972.) A record is preserved to facilitate judicial review, and the [Commission] is required to issue a decision setting forth findings of fact and conclusions of law in every contested case. (§ § 11517, subd. (b), 11518.) Cross-examination is, of course, permitted. ..." (*State Personnel Bd. v. Fair Employment & Housing Com., supra*, 39 Cal.3d 422, 433.)

Finally, Dyna-Med direly predicts giving the Commission authority to award punitive damages will open a Pandora's Box concerning the authority of administrative agencies generally to award punitive damages. However, although many administrative agencies are governed by the APA, it is the FEHA, not the APA, which gives the Commission the authority to order "such action ... as, in the judgment of the commission [,] will effectuate the purposes" of the FEHA (§ 12970, subd. (a)). If the Legislature gives an agency responsibility to protect the public and authorizes it to take the appropriate steps necessary to carry out the purposes of an act it enforces, then such an agency should be authorized to determine claims for punitive damages. Whether other administrative agencies have, or will be given, such authorization can only be determined upon a review of those agencies own statutory authority, a review not necessary to this appeal. *1421

Cal.,1987.

Dyna-Med, Inc. v. Fair Employment and Housing Com'n

END OF DOCUMENT

Copr. © Bancroft-Whitney and West Group 1998

TOPANGA ASSOCIATION FOR A SCENIC COMMUNITY, Plaintiff and Appellant,
v.
COUNTY OF LOS ANGELES et al., Defendants and Respondents; JAMES WARREN BASSLER et al., Real Parties in Interest and Respondents
L.A. No. 30139.

Supreme Court of California

May 17, 1974.

SUMMARY

In administrative mandamus proceedings, the trial court refused to disturb a variance granted by a county agency permitting a mobile home park on about 28 acres of an area zoned for light agriculture and single family residences. (Superior Court of Los Angeles County, No. C-7268, Robert A. Wenke, Judge.)

The Supreme Court reversed and remanded the cause to the trial court with directions to issue a writ of mandamus requiring the county board of supervisors to vacate the order awarding a variance. The trial court was also directed to grant any further, appropriate relief. It was expressly held that regardless of the terms of a local zoning ordinance, the governing administrative agency, in adjudicating an application for a variance, must make findings such as will enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise the court of the basis of the agency's action. Also, it was held that as a prerequisite to sustaining a variance, the court must determine that substantial evidence supports the agency's findings and that they support the agency's decision. It was pointed out that Gov. Code, § 65906, outlining the circumstances under which a variance may be properly granted, emphasizes disparities between properties, rather than the treatment of the subject property's characteristics in the abstract. The court noted that the agency's report focussed almost exclusively on the qualities of the subject property and failed to provide comparative information on the surrounding properties, with the result that the agency's summary of "factual ***507** data," on which its decision apparently rested, did not include facts sufficient to satisfy the Government Code provision.

In Bank. (Opinion by Tobriner, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Zoning and Planning § 4--Variances--Findings.
Regardless of whether the local zoning ordinance commands that the variance board set forth findings, that body must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis of the board's action.

(2) Zoning and Planning § 4--Variances--Judicial Review.
Before sustaining a zoning variance, a reviewing court must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision. And in making these determinations, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision.

(3) Zoning and Planning § 4--Variances--Administrative Mandamus.
Code Civ. Proc., § 1094.5, governing judicial review of administrative agencies' adjudicatory decisions by mandamus, applies to the review of zoning variances awarded by bodies such as the Los Angeles County Regional Planning Commission.

(4) Administrative Law § 139--Administrative Mandamus--Court's Duties.
Code Civ. Proc., § 1094.5, relating to administrative mandamus, contemplates that, at a minimum, the reviewing court must determine both whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision.

(5) Administrative Law § 143--Administrative Mandamus--Record of Administrative Proceeding.
Implicit in Code Civ. Proc., § 1094.5, relating to administrative mandamus, is a requirement that the administrative agency which renders the challenged decision set forth findings ***508** to bridge the

Copr. © Bancroft-Whitney and West Group 1998

analytic gap between the raw evidence and the ultimate decision or order.

[See **Cal.Jur.2d,** Zoning, § 209; **Am.Jur.,** Zoning (1st ed § 225).]

(6) Zoning and Planning § 4--Findings--Contents.
Although a zoning variance board's findings need not be stated with the formality required in judicial proceedings, they must expose the board's mode of analysis to an extent sufficient to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action. (Not approving the language in *Kappadahl v. Alcan Pacific Co.* (1963) 222 Cal.App.2d 626, 639 [35 Cal.Rptr. 354]; *Ames v. City of Pasadena* (1959) 167 Cal.App.2d 510, 516 [334 P.2d 653], which endorses the practice of setting forth findings solely in the language of the applicable legislation.)

(7) Zoning and Planning § 4--Granting of Variance as Quasi-judicial Administrative Function.
Although the adoption of zoning regulations is a legislative function, the granting of variances is a quasi-judicial, administrative function.

(8) Zoning and Planning § 6(1)--Contractual Nature of Zoning Scheme.
A zoning scheme is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted. The rationale is that such mutual restriction can enhance total community welfare.

(9) Zoning and Planning § 4--Variances--Need for Compliance With All Legislative Requirements.
Inasmuch as a zoning variance may be sustained only if all applicable legislative requirements have been satisfied, the question whether a particular variance which had been granted by a county agency conformed to the criteria set forth in an applicable county ordinance became immaterial in the Supreme Court's administrative mandamus review of the variance once that court had concluded that the criteria set forth in Gov. Code, § 65906, for the granting of a variance had not been met.

(10) Zoning and Planning § 4--Variances--Statutory Criteria.
Gov. Code, § 65906, setting forth criteria for the granting of a zoning variance, emphasizes disparities between properties, not treatment of the subject property's ***509** characteristics in the abstract, and contemplates that, at best, only a small fraction of any one zone can qualify for a variance.

(11) Zoning and Planning § 4--Variances--Applicant's Burdens.
Speculation about land neighboring on land for which a zoning variance is sought will not support the award of a variance. The party seeking the variance must shoulder the burden of demonstrating to the applicable agency that the subject property satisfies the requirements for the variance sought. Neither the agency nor the reviewing court may assume without evidentiary basis that the character of neighboring property is different from that of the property for which the variance is sought.

(12) Zoning and Planning § 4--Limitations on Granting of Variances.
Radical alteration of the nature of an entire zone is a proper subject for legislation but not for piecemeal adjudication by an administrative agency through the granting of variances for large parcels.

(13) Zoning and Planning § 4--Prohibition of Variance Granting "Special Privilege."
In the absence of an affirmative showing that a particular parcel in a certain zone differed substantially and in relevant aspects from other parcels therein, a variance granted with respect to that parcel amounted to the kind of "special privilege" explicitly prohibited by Gov. Code, § 65906, establishing criteria for granting variances.

COUNSEL

Amdur, Bryson, Caplan & Morton and David L. Caplan for Plaintiff and Appellant.

John D. Maharg, County Counsel, Joe Ben Hudgens, John W. Whitsett and David H. Breier, Deputy County Counsel, for Defendants and Respondents.

Arnold J. Provisor for Real Parties in Interest.

TOBRINER, J.

We examine, in this case, aspects of the functions served by administrative agencies in the granting of zoning variances and of courts in reviewing these proceedings by means of administrative mandamus. We ***510** conclude that variance boards like the ones involved in the present case must render findings to support their ultimate rulings. We also conclude that when called upon to scrutinize a grant of a variance, a reviewing court must determine whether substantial

Copr. © Bancroft-Whitney and West Group 1998

evidence supports the findings of the administrative board and whether the findings support the board's action. [FN1] We determine in the present case that the last of these requisites has not been fulfilled.

FN1 We recently held in Strumsky v. San Diego County Employees Retirement Association (1974) 11 Cal.3d 28 [112 Cal.Rptr. 805, 520 P.2d 29], that if the order or decision of a local administrative agency substantially affects a "fundamental vested right," a court to which a petition for a writ of mandamus has been addressed upon the ground that the evidence does not support the findings must exercise its independent judgment in reviewing the evidence and must find abuse of discretion if the weight of the evidence fails to support the findings. Petitioner does not suggest, nor do we find, that the present case touches upon any fundamental vested right. (See generally Bixby v. Pierno (1971) 4 Cal.3d 130, 144-147 [93 Cal.Rptr. 234, 481 P.2d 242]; Temescal Water Co. v. Dept. Public Works (1955) 44 Cal.2d 90, 103 [280 P.2d 1].)

The parties in this action dispute the future of approximately 28 acres in Topanga Canyon located in the Santa Barbara Mountains region of Los Angeles County. A county ordinance zones the property for light agriculture and single family residences; [FN2] it also prescribes a one-acre minimum lot size. Upon recommendation of its zoning board and despite the opposition of appellant-petitioner - an incorporated nonprofit organization composed of taxpayers and owners of real property in the canyon - the Los Angeles County Regional Planning Commission granted to the Topanga Canyon Investment Company a variance to establish a 93-space mobile home park on this acreage. [FN3] Petitioner appealed without success to the county board of supervisors, thereby exhausting its administrative remedies. Petitioner then sought relief by means of administrative mandamus, again unsuccessfully, in Los Angeles County Superior Court and the Court of Appeal for the Second District.

FN2 Los Angeles County Zoning Ordinance No. 7276.

FN3 Originally the real party in interest, the Topanga Canyon Investment Company has been replaced by a group of successoral real parties in interest. We focus our analysis on the building plans of the original real party in interest since it was upon the basis of these plans that the zoning authorities granted the variance challenged by petitioner.

In reviewing the denial of mandamus below, we first consider the proper role of agency and reviewing court with respect to the grant of variances. We then apply the proper standard of review to the facts of the case in order to determine whether we should sustain the action of the Los Angeles County Regional Planning Commission. ***511**

1. *An administrative grant of a variance must be accompanied by administrative findings. A court reviewing that grant must determine whether substantial evidence supports the findings and whether the findings support the conclusion that all applicable legislative requirements for a variance have been satisfied.*

A comprehensive zoning plan could affect owners of some parcels unfairly if no means were provided to permit flexibility. Accordingly, in an effort to achieve substantial parity and perhaps also in order to insulate zoning schemes from constitutional attack, [FN4] our Legislature laid a foundation for the granting of variances. Enacted in 1965, section 65906 of the Government Code establishes criteria for these grants; it provides: "Variances from the terms of the zoning ordinance shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification [¶] Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated." [FN5]

FN4 1 Appendix to Journal of the Senate (1970 Reg. Sess.) Final Report of the Joint Committee on Open Space Land (1970) pages 94-95; Bowden, *Article XVIII - Opening the Door to Open Space Control* (1970) 1 Pacific L.J. 461, 506. See Metcalf v. County of Los Angeles (1944) 24 Cal.2d 267, 270-271 [148 P.2d 645]; Gaylord, *Zoning: Variances, Exceptions and*

Copr. © Bancroft-Whitney and West Group 1998

Conditional Use Permits in California (1958) 5 U.C.L.A. L.Rev. 179; Comment, *The General Welfare, Welfare Economics, and Zoning Variances* (1965) 38 So.Cal.L.Rev. 548, 573. See generally Note, Administrative Discretion in Zoning (1969) 82 Harv.L.Rev. 668, 671. The primary constitutional concern is that as applied to a particular land parcel, a zoning regulation might constitute a compensable "taking" of property.

FN5 A third paragraph added to section 65906 declares: "A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property." This paragraph serves to preclude "use" variances, but apparently does not prohibit so-called "bulk" variances, those which prescribe setbacks, building heights, and the like. The paragraph became effective on November 23, 1970, 19 days after the Los Angeles County Regional Planning Commission granted the variance here at issue. Petitioner does not contend that the paragraph is applicable to the present case.

Applicable to all zoning jurisdictions except chartered cities (Gov. Code, § 65803), section 65906 may be supplemented by harmonious local legislation. [FN6] We note that Los Angeles County has enacted an ordinance which, *512 if harmonious with section 65906, would govern the Topanga Canyon property here under consideration. Los Angeles County's Zoning Ordinance No. 1494, section 522, provides: [FN7] "An exception [variance] may ... be granted where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance, and in the granting of such exception the spirit of the ordinance will be observed, public safety secured, and substantial justice done."

FN6 Government Code section 65800 declares that the code chapter of which section 65906 is a part is intended to provide minimum limitations within which counties and cities can exercise maximum control over local zoning matters. Article XI, section 11 of the California Constitution declares that "[a]ny county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

FN7 This section recently was repealed but was in force when the zoning agencies rendered their decisions in the present case. For purposes of more succinct presentation, we refer in text to the section in the present tense.

Both state and local laws thus were designed to establish requirements which had to be satisfied before the Topanga Canyon Investment Company should have been granted its variance. Although the cases have held that substantial evidence must support the award of a variance in order to insure that such legislative requirements have been satisfied [FN8] (see, e.g., *Siller v. Board of Supervisors* (1962) 58 Cal.2d 479, 482 [25 Cal.Rptr. 73, 375 P.2d 41]; *Bradbeer v. England* (1951) 104 Cal.App.2d 704, 707 [232 P.2d 308]), they have failed to clarify whether the administrative agency must always set forth findings and have not illuminated the proper relationship between the evidence, findings, and ultimate agency action. [FN9]

FN8 The rule stated finds its source in authorities holding that all adjudicatory determinations of local agencies are entitled to no more than substantial evidence review. As indicated above (fn. 1, *ante*) those authorities no longer state the law with respect to adjudicatory determinations of such agencies which affect fundamental vested rights. Since no such right is involved in this case, however, the substantial evidence standard remains applicable. We note by way of caution, however, that merely because a case is said to involve a "variance" does not necessarily dictate a conclusion that no fundamental vested right is involved. The term "variance" is sometimes used, for example, to refer to permits for nonconforming uses which predate a zoning scheme. (See Hagman, Larson, & Martin, Cal. Zoning Practice (Cont. Ed. Bar) pp. 383-384.)

FN9 For descriptions of the history of judicial action in this state with respect to zoning variance grants, see Bowden, *Article XVIII - Opening the Door to Open Space Control* (1970) 1 Pacific L.J. 461, 507-509; 1 Appendix to Journal of the Senate (1970 Reg. Sess.) Final Report of the Joint

Copr. © Bancroft-Whitney and West Group 1998

Committee on Open Space Land (1970) pages 95-98; Hagman, Larson, & Martin, Cal. Zoning Practice, *supra*, pages 287-291.

One of the first decisions to emphasize the importance of judicial scrutiny of the record in order to determine whether substantial evidence supported administrative findings that the property in question met the legislative variance requirements was that penned by Justice Molinari in ***513** *Cow Hollow Improvement Club v. Board of Permit Appeals* (1966) 245 Cal.App.2d 160 [53 Cal.Rptr. 610]. Less than one year later, we followed the approach of that case in *Broadway, Laguna etc. Assn. v. Board of Permit Appeals* (1967) 66 Cal.2d 767 [59 Cal.Rptr. 146, 427 P.2d 810], and ordered that a zoning board's grant of a variance be set aside because the party seeking the variance had failed to adduce sufficient evidence to support administrative findings that the evidence satisfied the requisites for a variance set forth in the same San Francisco ordinance.

Understandably, however, the impact of these opinions remained uncertain. The San Francisco ordinance applicable in *Cow Hollow* and *Broadway* explicitly required the zoning board to specify its subsidiary findings and ultimate conclusions; this circumstance raised the question whether a court should require findings and examine their sufficiency in a case in which the applicable local legislation did not explicitly command the administrative body to set forth findings. Indeed language in *Broadway* intimated that such a case was distinguishable. (*Broadway, Laguna etc. Assn.* v. *Board of Permit Appeals, supra*, at pp. 772-773. See also *Stoddard v. Edelman* (1970) 4 Cal.App.3d 544, 549 [84 Cal.Rptr. 443]. Cf. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 270 [104 Cal.Rptr. 761, 502 P.2d 1049].) Further, neither *Cow Hollow* nor *Broadway* confronted Government Code section 65906, since both cases concerned a chartered city. [FN10] There thus also remained uncertainty with respect to cases involving zoning jurisdictions other than chartered cities.

FN10 See page 511, *ante*.

Nevertheless, in an opinion subsequent to *Broadway*, *Hamilton v. Board of Supervisors* (1969) 269 Cal.App.2d 64 [75 Cal.Rptr. 106], a Court of Appeal set aside the grant of a variance by a planning commission under circumstances different from those in *Broadway* and *Cow Hollow*. The zoning jurisdiction involved in that controversy was a county, not a chartered city, and the court's opinion did not suggest that any applicable ordinance required administrative findings. Deeming Government Code section 65906 "concededly controlling," (*Hamilton v. Board of Supervisors, supra*, at p. 67), the court undertook the task of squaring the findings announced by the commission with the commission's grant of the variance and concluded that the findings were insufficient to sustain the variance.

(1) Consistent with the reasoning underlying these cases, we hold that ***514** regardless of whether the local ordinance commands that the variance board set forth findings, [FN11] that body must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action. (2) We hold further that a reviewing court, before sustaining the grant of a variance, must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision. In making these determinations, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision.

FN11 We note the apparent applicability of section 639 of the Los Angeles County Zoning Ordinance which was in effect at the time respondent granted the variance. That section provided: "After a hearing by a zoning board the said zoning board shall report to the commission its findings and recommend the action which it concludes the commission should take." As explained in text, however, we rest our ruling upon Code of Civil Procedure section 1094.5.

Our analysis begins with consideration of Code of Civil Procedure section 1094.5, the state's administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. (3) Without doubt, this provision applies to the review of variances awarded by bodies such as the Los Angeles County zoning agencies that participated in the present case. [FN12] (4) Section 1094.5 clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the administrative ***515** agency's findings and whether the findings support the agency's decision. Subdivision (b) of section 1094.5 prescribes that when petitioned for a writ of mandamus, a court's inquiry should extend, among other issues, to

Copr. © Bancroft-Whitney and West Group 1998

whether "there was any prejudicial abuse of discretion." Subdivision (b) then defines "abuse of discretion" to include instances in which the administrative order or decision "is not supported by the findings, *or* the findings are not supported by the evidence." (Italics added.) Subdivision (c) declares that "*in all ... cases*" (italics added) other than those in which the reviewing court is authorized by law to judge the evidence independently, [FN13] "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (See Zakessian v. City of Sausalito (1972) 28 Cal.App.3d 794, 798 [105 Cal.Rptr. 105].)

FN12 Allen v. Humboldt County Board of Supervisors (1963) 220 Cal.App.2d 877, 882 [34 Cal.Rptr. 232]. See also Siller v. Board of Supervisors (1962) 58 Cal.2d 479, 481 [25 Cal.Rptr. 73, 375 P.2d 41]. The California Judicial Council's report reflects a clear desire that section 1094.5 apply to all agencies, regardless of whether they are subject to the Administrative Procedure Act and regardless of their state or local character. (See Judicial Council of Cal., 10th Biennial Rep. (1944) pp. 26, 45. See also Temescal Water Co. v. Dept. Public Works (1955) 44 Cal.2d 90, 101 [280 P.2d 1]; Deering, Cal. Administrative Mandamus (1966) p. 7.) "In the absence of compelling language in [a] statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report." (Hohreiter v. Garrison (1947) 81 Cal.App.2d 384, 397 [184 P.2d 323].) Section 1094.5 makes administrative mandamus available for review of "any final administrative order or decision made as the result of a proceeding in which *by law* a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer." (Italics added.) Government Code section 65901 satisfies these requisites with respect to variances granted by jurisdictions other than chartered cities such as Los Angeles County's zoning agencies. Section 65901 provides, in part: "The board of zoning adjustment or zoning administrator shall hear and decide applications for conditional uses or other permits when the zoning ordinance provides therefor and establishes criteria for determining such matters, and applications for variances from the terms of the zoning ordinance."

FN13 See footnote 1, *supra*.

(5) We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. If the Legislature had desired otherwise, it could have declared as a possible basis for issuing mandamus the absence of substantial evidence to support the administrative agency's action. By focusing, instead, upon the relationships between evidence and findings and between findings and ultimate action, the Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action. In so doing, we believe that the Legislature must have contemplated that the agency would reveal this route. Reference, in section 1094.5, to the reviewing court's duty to compare the evidence and ultimate decision to "*the* findings" (italics added) we believe leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as to the administrative agency's basis for decision.

Our ruling in this regard finds support in persuasive policy considerations. (See generally 2 Davis, Administrative Law Treatise (1958) § 16.05, pp. 444- 449; Forkosch, A Treatise on Administrative Law (1956) § 253, pp. 458-464.) According to Professor Kenneth Culp Davis, the requirement that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-made law (see, e.g., Zieky v. Town Plan and Zon. Com'n of Town of Bloomfield (1963) 151 Conn. 265 [196 A.2d 758]; Stoll v. Gulf Oil Corp. (1958) 79 Ohio L.Abs. 145 [155 N.E.2d 83]), and is "remarkably uniform in both federal and state ***516** courts." As stated by the United States Supreme Court, the "accepted ideal ... is that 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.' (S.E.C. v. Chenery Corp. (1943) 318 U.S. 80, 94.)" (2 Davis, *supra*, § 16.01, pp. 435-436. See also Saginaw Broadcasting Co. v. Federal C. Com'n (1938) 96 F.2d 554, 559 [68 App.D.C. 282].)

Among other functions, a findings requirement serves to conduce the administrative body to draw

Copr. © Bancroft-Whitney and West Group 1998

legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. (See 2 Cooper, State Administrative Law (1965) pp. 467-468; Feller, *Prospectus for the Further Study of Federal Administrative Law* (1938) 47 Yale L.J. 647, 666. Cf. Comment, *Judicial Control Over Zoning Boards of Appeal: Suggestions for Reform* (1965) 12 U.C.L.A. L.Rev. 937, 952.) [FN14] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. (See California Motor Transport Co. v. Public Utilities Com. (1963) 59 Cal.2d 270, 274 [28 Cal.Rptr. 868, 379 P.2d 324]; Swars v. Council of City of Vallejo (1949) 33 Cal.2d 867, 871 [206 P.2d 355].)

FN14 Although at first blush, judicial enforcement of a findings requirement would appear to constrict the role of administrative agencies, in reality, the effect could be to the contrary. Because, notes Judge Bazelon, it provides a framework for principled decision-making, a findings requirement serves to "diminish the importance of judicial review by enhancing the integrity of the administrative process." (Environmental Defense Fund, Inc. v. Ruckelshaus (D.C.Cir. 1971) 439 F.2d 584, 598.) By exposing the administrative agency's mode of analysis, findings help to constrict and define the scope of the judicial function. "We must know what [an administrative] decision means," observed Mr. Justice Cardozo, "before the duty becomes ours to say whether it is right or wrong." (United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co. (1935) 294 U.S. 499, 511 [79 L.Ed. 1023, 1032, 55 S.Ct. 462].)

Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. [FN15] (6)**(See fn. 16.)** Moreover, *517 properly constituted findings [FN16] enable the parties to the agency proceeding to determine whether and on what basis they should seek review. (See *In re Sturm* (1974) *ante*, pp. 258, 267 [113 Cal.Rptr. 361, 521 P.2d 97]; Swars v. Council of City of Vallejo, supra, at p. 871.) They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable.

FN15 "Given express findings, the court can determine whether the findings are supported by substantial evidence, and whether the findings warrant the decision of the board. If no findings are made, and if the court elects not to remand, its clumsy alternative is to read the record, speculate upon the portions which probably were believed by the board, guess at the conclusions drawn from credited portions, construct a basis for decision, and try to determine whether a decision thus arrived at should be sustained. In the process, the court is required to do much that is assigned to the board. ..." (3 Anderson, American Law of Zoning (1968) § 16.41, p. 242.)

FN16 Although a variance board's findings "need not be stated with the formality required in judicial proceedings" (Swars v. Council of City of Vallejo, supra, at p. 872), they nevertheless must expose the board's mode of analysis to an extent sufficient to serve the purposes stated herein. We do not approve of the language in Kappadahl v. Alcan Pacific Co. (1963) 222 Cal.App.2d 626, 639 [35 Cal.Rptr. 354], and Ames v. City of Pasadena (1959) 167 Cal.App.2d 510, 516 [334 P.2d 653], which endorses the practice of setting forth findings solely in the language of the applicable legislation.

By setting forth a reasonable requirement for findings and clarifying the standard of judicial review, we believe we promote the achievement of the intended scheme of land use control. Vigorous and meaningful judicial review facilitates, among other factors, the intended division of decision-making labor. (7) Whereas the adoption of zoning regulations is a legislative function (Gov. Code, § 65850), the granting of variances is a quasi-judicial, administrative one. (See Johnston v. Board of Supervisors (1947) 31 Cal.2d 66, 74 [187 P.2d 686]; Kappadahl v. Alcan Pacific Co. (1963) 222 Cal.App.2d 626, 634 [35 Cal.Rptr. 354].) If the judiciary were to review grants of variances superficially, administrative boards could subvert this intended decision-making structure. (See 1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) pp. 102-103.) They could "[amend] ... the zoning code in the

Copr. © Bancroft-Whitney and West Group 1998

guise of a variance" (*Cow Hollow Improvement Club v. Board of Permit Appeals, supra,* at p. 181), and render meaningless, applicable state and local legislation prescribing variance requirements.

Moreover, courts must meaningfully review grants of variances in order to protect the interests of those who hold rights in property nearby the parcel for which a variance is sought. (8) A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare. (See, e.g., 1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) p. 91; Bowden, *Article XXVIII - Opening the Door to Open Space Control* (1970) 1 Pacific L.J. 461, 501.) If the interest of ***518** these parties in preventing unjustified variance awards for neighboring land is not sufficiently protected, the consequence will be subversion of the critical reciprocity upon which zoning regulation rests.

Abdication by the judiciary of its responsibility to examine variance board decision-making when called upon to do so could very well lead to such subversion. [FN17] Significantly, many zoning boards employ adjudicatory procedures that may be characterized as casual. (See Comment, *Judicial Control over Zoning Boards of Appeal: Suggestions for Reform* (1965) 12 U.C.L.A. L.Rev. 937, 950. Cf. *Bradbeer v. England* (1951) 104 Cal.App.2d 704, 710 [232 P.2d 308].) The availability of careful judicial review may help conduce these boards to insure that all parties have an opportunity fully to present their evidence and arguments. Further, although we emphasize that we have no reason to believe that such a circumstance exists in the case at bar, the membership of some zoning boards may be inadequately insulated from the interests whose advocates most frequently seek variances. (See e.g., 1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) p. 100.) Vigorous judicial review thus can serve to mitigate the effects of insufficiently independent decision-making.

FN17 See generally Comment, *Zoning: Variance Administration in Alameda County* (1962) 50 Cal.L.Rev. 101, 107 and footnote 42. See also Note, *Administrative Discretion in Zoning* (1969) 82 Harv.L.Rev. 668, 672 and sources cited therein.

2. The planning commission's summary of "factual data" - its apparent "findings" - does not include facts sufficient to satisfy the variance requirements of Government Code section 65906.

As we have mentioned, at least two sets of legislative criteria appear applicable to the variance awarded: Government Code section 65906 and Los Angeles County Zoning Ordinance No. 1494, section 522. (9) The variance can be sustained only if *all* applicable legislative requirements have been satisfied. Since we conclude that the requirements of section 65906 have not been met, the question whether the variance conforms with the criteria set forth in Los Angeles County Zoning Ordinance No. 1494, section 522 becomes immaterial. [FN18] ***519**

FN18 We focus on the statewide requirements because they are of more general application. If we were to decide that the criteria of section 65906 had been satisfied, we would then be called upon to determine whether the requirements set forth in the county ordinance are consistent with those in section 65906 and, if so, whether these local criteria also had been satisfied.
The local criteria need be squared with the state criteria since the section 65906 requirements prevail over any inconsistent requirements in the county ordinance. The stated purpose of title 7, chapter 4, of the Government Code, which includes section 65906, is to provide limitations - albeit minimal ones - on the adoption and administration of zoning laws, ordinances, and regulations by counties and nonchartered cities. (See fn. 6, *ante.*) Section 65802 of the code declares that "[n]o provisions of [the Government Code], other than the provisions of [chapter 4], and no provisions of any other code or statute shall restrict or limit the procedures provided in [chapter 4] by which the legislative body of any county or city enacts, amends, administers, or provides for the administration of any zoning law, ordinance, rule or regulation." The clear implication is that chapter 4 does restrict or limit these procedures. (See also Cal. Const., art. XI, § 11.)
If local ordinances were allowed to set a lesser standard for the grant of variances than those provided in section 65906, a county or city could escape the prohibition

Copr. © Bancroft-Whitney and West Group 1998

against granting use variances added to section 65906 in 1970 (see fn. 5, *ante*) merely by enacting an ordinance which would permit the grant of use variances. Clearly the Legislature did not intend that cities and counties to which the provisions of chapter 4 apply should have such unfettered discretion.

We summarize the principal factual data contained in the Los Angeles County Regional Planning Commission's report, which data the commission apparently relied on to award the variance. [FN19] The acreage upon which the original real party in interest [FN20] sought to establish a mobile home park consists of 28 acres; it is a hilly and in places steep parcel of land. At the time the variance was granted, the property contained one single-family residence. Except for a contiguous area immediately to the southeast which included an old and flood-damaged subdivision and a few commercial structures, the surrounding properties were devoted exclusively to scattered single-family residences.

FN19 We confine our analysis to the relationship between the commission's fact summary and its ultimate decision; we do not consider the testimonial evidence directly. To sustain the grant of the variance of course would require that we conclude that substantial evidence supports the findings and that the findings support the variance award. Since we decide below, however, that the commission's fact summary does not include sufficient data to satisfy the section 65906 requirements, we need not take the further step of comparing the transcript to the fact summary. Our basis for so proceeding lies in Code of Civil Procedure section 1094.5, which defines "abuse of discretion," one of several possible grounds for issuance of a writ of mandamus, to include instances in which "the order or decision [of the administrative agency] is not supported by the findings, *or* the findings are not supported by the evidence." (Italics added.)

FN20 See footnote 3, *ante*.

The proposed mobile home park would leave 30 percent of the acreage in its natural state. An additional 25 percent would be landscaped and terraced to blend in with the natural surroundings. Save in places where a wall would be incompatible with the terrain, the plan contemplated enclosure of the park with a wall; it further called for rechanneling a portion of Topanga Canyon Creek and anticipated that the developers would be required to dedicate an 80-foot-wide strip of the property for a proposed realignment of Topanga Creek Boulevard. ***520**

The development apparently would partially satisfy a growing demand for new, low cost housing in the area. Additionally, the project might serve to attract further investment to the region and could provide a much needed fire break. Several data indicate that construction on the property of single-family residences in conformance with the zoning classification would generate significantly smaller profits than would development of the mobile home park. Single-family structures apparently would necessitate costly grading, and the proposed highway realignment would require a fill 78 feet high, thereby rendering the property unattractive for conventional residential development. Moreover, the acreage is said not to be considered attractive to parties interested in single-family residences due, in the words of the report's summary of the testimony, to "the nature of the inhabitants" in the vicinity and also because of local flood problems.

These data, we conclude, do not constitute a sufficient showing to satisfy the section 65906 variance requirements. That section permits variances "*only* when, because of *special* circumstances applicable to the property, ... the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification." (Italics added.) (10) This language emphasizes *disparities* between properties, not treatment of the subject property's characteristics in the abstract. (See *Minney v. City of Azusa* (1958) 164 Cal.App.2d 12, 31 [330 P.2d 255]; cf. *In re Michener's Appeal* (1955) 382 Pa. 401 [115 A.2d 367, 371]; *Beirn v. Morris* (1954) 14 N.J. 529 [103 A.2d 361, 364]; Note, *Administrative Discretion in Zoning* (1969) 82 Harv. L.Rev. 668, 671-672.) It also contemplates that at best, only a small fraction of any one zone can qualify for a variance. (See generally 3 Anderson, American Law of Zoning (1968) § 14.69, pp. 62-65.)

The data contained in the planning commission's report focus almost exclusively on the qualities of the property for which the variance was sought. In the absence of comparative information about surrounding properties, these data lack legal significance. Thus knowledge that the property has rugged features tells us nothing about whether the

Copr. © Bancroft-Whitney and West Group 1998

original real party in interest faced difficulties different from those confronted on neighboring land. [FN21] Its assurances that it would landscape and terrace parts of the property and leave others in their natural state are all well and good, but they bear not at all on the critical issue whether a variance ***521** was necessary to bring the original real party in interest into substantial parity with other parties holding property interests in the zone. (See *Hamilton v. Board of Supervisors, supra*, at p. 66.)

FN21 Indeed, the General Plan for Topanga Canyon suggests that the subject property is not uniquely surfaced; it states that the entire area is characterized by "mountainous terrain, steep slopes and deep canyons interspersed with limited areas of relatively flat or rolling land."

The claim that the development would probably serve various community needs may be highly desirable, but it too does not bear on the issue at hand. Likewise, without more, the data suggesting that development of the property in conformance with the general zoning classification could require substantial expenditures are not relevant to the issue whether the variance was properly granted. Even assuming for the sake of argument that if confined to the subject parcel and no more than a few others in the zone, such a burden could support a variance under section 65906, for all we know from the record, conforming development of other property in the area would entail a similar burden. Were that the case, a frontal attack on the present ordinance or a legislative proceeding to determine whether the area should be rezoned might be proper, but a variance would not. (1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) p. 95; Bowden, *Article XVIII - Opening the Door to Open Space Control* (1970) 1 Pacific L.J. 461, 506.)

Although they dispute that section 65906 requires a showing that the characteristics of the subject property are exceptional, the current real parties in interest would nevertheless have us speculate that the property is unlike neighboring parcels. They point out that the plot has rugged terrain and three stream beds [FN22] and that the Topanga Creek Boulevard realignment would bisect the property. (11) Speculation about neighboring land, however, will not support the award of a variance. The party seeking the variance must shoulder the burden of demonstrating before the zoning agency that the subject property satisfies the requirements therefor. (*Tustin Heights Association v. Board of Supervisors* (1959) 170 Cal.App.2d 619, 627 [339 P.2d 914].) Thus neither an administrative agency nor a reviewing court may assume without evidentiary basis that the character of neighboring property is different from that of the land for which the variance is sought. [FN23] ***522**

FN22 Interestingly, since the witnesses who testified in favor of the variance never mentioned the stream beds, the original real party in interest apparently did not regard the beds as disadvantageous. Rather, a witness who opposed the variance offhandedly mentioned the beds as illustrative of the scenic beauty of the area. The trial court seized upon this testimony and used it in justifying the variance award.

FN23 In fact, other parcels in the zone may well have the features that the successoral real parties in interest speculate are confined to the subject property. Rugged terrain apparently is ubiquitous in the area (see fn. 21, *ante*), and because the stream beds and highway must enter and exit the subject property somewhere, they may all traverse one or more neighboring parcels. Further, for all we know from the commission's findings, stream beds may traverse most parcels in the canyon.

(12) Moreover, the grant of a variance for nonconforming development of a 28-acre parcel in the instant case is suspect. Although we do not categorically preclude a tract of that size from eligibility for a variance, we note that in the absence of unusual circumstances, so large a parcel may not be sufficiently unrepresentative of the realty in a zone to merit special treatment. By granting variances for tracts of this size, a variance board begins radically to alter the nature of the entire zone. Such change is a proper subject for legislation, not piecemeal administrative adjudication. (See *Sinclair Pipe Line Co. v. Village of Richton Park* (1960) 19 Ill.2d 370 [167 N.E.2d 406]; *Appeal of the Catholic Cemeteries Association* (1954) 379 Pa. 516 [109 A.2d 537]; *Civil City of Indianapolis v. Ostrom R. & Construction Co.* (1931) 95 Ind.App. 376 [176 N.E. 246].) (13) Since there has been no affirmative showing that the subject property differs substantially and in relevant aspects from other parcels in the zone, we conclude that the variance granted amounts to the kind of "special privilege" explicitly prohibited by Government Code section 65906.

Copr. © Bancroft-Whitney and West Group 1998

We submit, in summary, that this case illumines two important legal principles. First, by requiring that administrative findings must support a variance, we emphasize the need for orderly legal process and the desirability of forcing administrative agencies to express their grounds for decision so that reviewing courts can intelligently examine the validity of administrative action. Second, by abrogating an unsupported exception to a zoning plan, we conduce orderly and planned utilization of the environment.

We reverse the judgment and remand the cause to the superior court with directions to issue a writ of mandamus requiring the Los Angeles Board of Supervisors to vacate its order awarding a variance. We also direct the superior court to grant any further relief that should prove appropriate.

Wright, C. J., McComb, J., Mosk, J., Burke, J., Sullivan, J., and Clark, J., concurred. *523

Cal.,1974.

Topanga Ass'n For A Scenic Community v. Los Angeles County

END OF DOCUMENT

Copr. © Bancroft-Whitney and West Group 1998

WILLIAM DESMOND et al., Plaintiffs and Appellants,
v.
COUNTY OF CONTRA COSTA, Defendant and Respondent.
No. A061677.

Court of Appeal, First District, Division 3, California.

Dec 23, 1993.

SUMMARY

In mandamus proceedings to review a decision of county supervisors denying an application for a land use permit for a residential second unit, the trial court denied plaintiffs' petition on the ground that they had failed to establish either that the board of supervisors' finding of unsuitability to the character of the surrounding neighborhood was not supported by substantial evidence in the record, or that this finding was legally irrelevant to the denial of the request for a land use permit. Neighbors had complained that because of the nature of the cul-de-sac on which plaintiffs' primary residence was located, an additional living unit on the street would create traffic, parking, safety, noise, and nuisance problems. (Superior Court of Contra Costa County, No. C92-04871, Ellen Sickles James, Judge.)

The Court of Appeal affirmed, holding that the fact that plaintiffs' proposed second unit would be the first such unit in the neighborhood did not render irrelevant, as a matter of law, the board's finding of unsuitability to the character of the surrounding neighborhood. There was ample evidence of community concern with the impact of a residential second rental unit on the general aesthetic character of the neighborhood, as well as on traffic, safety, and protection of property values. The court held that the standards imposed by the applicable county ordinances did not exceed the maximum standards set by Gov. Code, § 65852.2, for second units in residential zones. (Opinion by Merrill, J., with White P. J., and Werdegar, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Administrative Law § 131--Judicial Review and Relief--Scope and Extent of Review--Evidence--Substantial Evidence Rule.

Under current interpretations of the substantial evidence test as applied in review of administrative agency action, an appellate court must examine all relevant evidence in the entire record, considering both the*331 evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by "substantial evidence." For this purpose, substantial evidence has been defined in two ways: first, as evidence of ponderable legal significance, reasonable in nature, credible, and of solid value, and second, as relevant evidence that a reasonable mind might accept as adequate to support a conclusion. At the trial court level and on appeal, the petitioner in an administrative mandamus proceeding has the burden of proving that the agency's decision was invalid and should be set aside, because it is presumed that the agency regularly performed its official duty.

(2) Zoning and Planning § 30--Conditional Uses; Permits and Certificates-- Judicial Review--Residential Second Unit.

On review of a decision of county supervisors denying an application for a land use permit, the trial court did not err in concluding that the administrative findings of the board of supervisors were supported by substantial evidence. Plaintiffs submitted an application for a land use permit for a residential second unit. Neighbors gave ample testimony that because of the nature of the cul-de-sac on which the primary residence was located, an additional living unit on the street would create traffic, parking, safety, noise, and nuisance problems. The fact that plaintiffs' proposed second unit would be the first such unit in the neighborhood did not render irrelevant, as a matter of law, the board's finding of unsuitability to the character of the surrounding neighborhood. There was ample evidence of community concern with the impact of a residential second rental unit on the general aesthetic character of the neighborhood, as well as on traffic, safety, and protection of property values.

[See 8 **Witkin**, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § § 835, 855.]

(3) Zoning and Planning § 26--Conditional Uses; Permits and Certificates-- Proceedings to Procure--

Copr. © Bancroft-Whitney and West Group 1998

Residential Second Unit.

On review of a decision of county supervisors denying an application for a land use permit, the trial court did not err in concluding that the administrative findings of the board of supervisors were supported by substantial evidence. The standards imposed by the applicable county ordinances did not exceed the maximum standards set by Gov. Code, § 65852.2, for second units in residential zones. The statute was adopted to encourage local governments to enact their own ordinances allowing and regulating so-called "granny flat" residential second units *332 in single-family and multi-family zones where they would otherwise be prohibited. The county's second unit ordinance complied with Gov. Code, § 65852.2, subd. (a), which gives local agencies discretion in the specific criteria they may adopt for approving second units. The "maximum standards" set forth in Gov. Code, § 65852.2, subd. (b), are not relevant when a local government has adopted an appropriate ordinance governing second units.

COUNSEL

William G. Segesta for Plaintiffs and Appellants.

Victor J. Westman, County Counsel, and Diana J. Silver, Deputy County Counsel, for Defendant and Respondent.

MERRILL, J.

William and Tanya Desmond appeal from a judgment denying their petition for writ of administrative mandate. That petition sought to set aside the decision of the Board of Supervisors (Board) of the County of Contra Costa (County) denying their application for a land use permit. Appellants contend that the administrative findings of the Board are not supported by substantial evidence, and that the standards imposed by the applicable County ordinances exceed the maximum standards set by Government Code section 65852.2 for second units in residential zones. We disagree and therefore affirm the judgment.

I. Factual And Procedural Background

The subject property, which is located at 8 Golden Hill Court in Walnut Creek, is zoned R-15, single-family residential district. Appellants sought and received issuance of a building permit to construct an addition to their single-family home. The addition consisted of a new two-car garage and second-level bedroom addition with a separate foundation detached from the principal structure. The new unit was attached to the existing single-family home by means of second-story decking. The building permit contained a provision that no kitchen facilities could be included in the new unit unless appellants first obtained a land use permit to allow construction of a residential second unit at that location. Appellants then submitted an application for a land use permit for a residential second unit.

Relying on alleged statements by unnamed County employees that issuance of a use permit would be "pro forma," appellants did not wait to obtain*333 the permit before commencing construction of the new unit. When a hearing was held on appellants' application for a permit to establish a residential second unit the County zoning administrator approved it. Thereafter, a group of neighbors filed an appeal to the County Planning Commission from the zoning administrator's approval of the issuance of the land use permit. County staff recommended that the planning commission uphold the decision of the zoning administrator, but following a public hearing and review of the matter, the planning commission voted unanimously to uphold the neighbors' appeal and deny the application, on the grounds that the proposed second residential unit was not architecturally compatible with the overall character of the neighborhood, and that development of the second unit would present a threat to public health, safety and welfare.

Appellants appealed the decision of the planning commission to the County Board, which held a public hearing on the matter. At the close of the hearing, the Board declared its intent to deny the appeal and the application, and directed the staff to prepare findings to support its decision. By a vote of three to two, the Board affirmed its earlier expressed intent, denied the appeal and the application, and adopted the staff findings.

In its findings, the Board stated that the property was currently designated in the County general plan as single-family residential, low density. The Board found that the proposed residential second unit was "architecturally incompatible with the overall neighborhood character and the primary residence in terms of scale, colors, materials and designs for trims, windows, roof, roof pitch and other exterior physical features" (finding No. 7); that development of the second unit would "present a threat to the public health, safety and welfare in that the second unit would result in excessive neighborhood noise and would create traffic and parking problems" (finding No. 8); that "[s]pecial conditions or unique

Copr. © Bancroft-Whitney and West Group 1998

characteristics of the subject property and its location or surroundings are not established" (finding No. 9); and that "[a] second unit is not suitable in this location, is out of character with the surrounding neighborhood and would be an intrusion into the neighborhood" (finding No. 10). In support of these findings, the Board cited the administrative record on appellants' application for a land use permit, County Ordinance Code sections 82-24.1002 and 26-2.2008, and the "on-site observations and comments" by a member of the Board at the public hearing.

Appellants filed a petition for writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5, asking the court for a writ of mandate and injunctive relief ordering the County and the Board to vacate the decision denying appellants' application and to issue a land use permit for the residential second unit. The trial court denied appellants' petition onthe *334 ground that appellants had failed to establish either that finding No. 10 was not supported by substantial evidence in the record, or that that finding was legally irrelevant to the denial of the request for a land use permit.

In its decision, the trial court stated: "Specifically, [appellants] do not point to evidence that a [residential] second unit is not out of character with the surrounding neighborhood. There is substantial evidence in the record that the second residential unit would be out of character because the surrounding streets at the moment contain only single-family dwellings.

"[Appellants'] argument that Finding No. 10 is irrelavant [*sic*] is not raised in the petition and is not supported by any authority.

"Finding No. 10 supports Finding No. 8: development of the second unit will present a threat to public health, safety, and welfare contrary to one of the requirements for a land use permit (C.C.C. Ord. Code § 82-24.1002(13)). It was within the discretion of the [Board and the County] to take the concerns of the neighbors into account and to decide that the public welfare would be served by denying the permit; that ... Finding No. 10 ... is sufficient to support the denial of [appellants'] application for a land use permit."

On this basis, the trial court denied appellant's petition for writ of mandate and entered judgment for the County. This appeal followed.

II. Standard of Review

In bringing their petition for writ of administrative mandamus, appellants argued that the County Board prejudicially abused its discretion. Under Code of Civil Procedure section 1094.5, subdivision (b), "[a]buse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." Both in the trial court and on appeal, appellants have conceded that this is not a case in which the trial court is authorized by law to exercise its independent judgment on the evidence, and thus that abuse of discretion is established only upon a determination that the findings of the administrative body were not supported by substantial evidence in the light of the whole record. (Code Civ. Proc., § 1094.5, subd. (c); *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32 [112 Cal.Rptr. 805, 520 P.2d 29] [substantial evidence standard used when no fundamental vested right involved].)

The scope of our review of the subject administrative agency action in this case is identical with that of the superior court. The same substantialevidence *335 standard applies, and the issue is whether the findings of the County Board were based on substantial evidence in light of the entire administrative record. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 149, fn. 22 [93 Cal.Rptr. 234, 481 P.2d 242]; *Zuniga v. County of San Mateo Dept. of Health Services* (1990) 218 Cal.App.3d 1521, 1530-1531 [267 Cal.Rptr. 755]; *County of San Diego v. Assessment Appeals Bd. No. 2* (1983) 148 Cal.App.3d 548, 554-555 [195 Cal.Rptr. 895].) Moreover, because the trial court did not exercise its independent judgment in reviewing the Board decision, but instead applied the substantial evidence test, we must examine the findings made by the Board itself to determine whether they were supported by substantial evidence, rather than limiting ourselves to a review of the findings made by the trial court. (*Stearns v. Fair Employment Practice Com.* (1971) 6 Cal.3d 205, 211 [98 Cal.Rptr. 467, 490 P.2d 1155]; *Bixby v. Pierno, supra*, 4 Cal.3d at pp. 143-144, fn. 10; Cal. Administrative Mandamus (Cont.Ed.Bar 1989) § § 4.162-4.163, 14.27, pp. 205-207, 463-464.)

(1) Under current interpretations of the substantial evidence test as applied in review of administrative agency action, we must examine all relevant evidence in the entire record, considering both the evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by "substantial evidence." (*Universal Camera Corp. v. Labor Bd.*

Copr. © Bancroft-Whitney and West Group 1998

(1951) 340 U.S. 474, 488-490 [95 L.Ed. 456, 467-468, 71 S.Ct. 456]; *Bixby v. Pierno, supra*, 4 Cal.3d at p. 149, fn. 22; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 635-639, fn. 22 [83 Cal.Rptr. 208, 463 P.2d 432]; *Zuniga v. County of San Mateo Dept. of Health Services, supra*, 218 Cal.App.3d at pp. 1530-1531; *County of San Diego v. Assessment Appeals Bd. No. 2, supra*, 148 Cal.App.3d at pp. 554-555.) For this purpose, "... substantial evidence has been defined in two ways: first, as evidence of ' " 'ponderable legal significance ... reasonable in nature, credible, and of solid value' " ' (*Ofsevit v. Trustees of Cal. State University & Colleges* (1978) 21 Cal.3d 763, 773, fn. 9 [148 Cal.Rptr. 1, 582 P.2d 88]); and second, as ' "relevant evidence that a reasonable mind might accept as adequate to support a conclusion" ' (*Hosford v. State Personnel Bd.* (1977) 74 Cal.App.3d 302, 307 [141 Cal.Rptr. 354])." (*County of San Diego v. Assessment Appeals Bd. No. 2, supra*, 148 Cal.App.3d at p. 555.)

At the trial court level, the petitioner in an administrative mandamus proceeding has the burden of proving that the agency's decision was invalid and should be set aside, because it is presumed that the agency regularly performed its official duty. When the standard of review is the substantial evidence test, as it is here, it is presumed that the findings and actions of the administrative agency were supported by substantial evidence. (*336*Caveness v. State Personnel Bd.* (1980) 113 Cal.App.3d 617, 630 [170 Cal.Rptr. 54]; *Barnes v. Personnel Department* (1978) 87 Cal.App.3d 502, 505 [151 Cal.Rptr. 94].) Thus, since the same standard of review applies now on appeal as did in the trial court, the burden is on appellant to show there is no substantial evidence whatsoever to support the findings of the Board. (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970 [191 Cal.Rptr. 415].)

III. Sufficiency of the Evidence to Support Findings

(2) Applying this standard of review to the decision of the County Board in this case, we are of the opinion that the administrative record does contain substantial evidence to support the Board's affirmance of the denial of appellant's application for a land use permit for the purpose of establishing a second residential unit.

Under the applicable County ordinances, of which we take judicial notice (Evid. Code, § § 452, subd. (b), 459; *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 24 [157 Cal.Rptr. 706, 598 P.2d 866]), the County planning agency division "shall make" certain findings before granting a land use permit for a residential second unit. (Contra Costa County [hereafter C.C.C.] Ord. Code, § 82-24.1002.) Among these findings are that "[t]he second unit is architecturally compatible with overall neighborhood character and the primary residence in terms of scale, colors, materials and design for trim, windows, roof, roof pitch and other exterior physical features"; "[t]he second unit does not result in excessive neighborhood noise, traffic, or parking problems"; and "[d]evelopment of the second unit does not present a threat to public health, safety or welfare." (C.C.C. Ord. Code, § 82-24.1002, subds. (8), (11), (13).)

In addition, the provision on granting land use permits for residential second units specifically requires that the agency must make findings in accordance with the separate ordinance dealing with variance, conditional use and special permits found at article 26-2.20 of the County Ordinance Codes. The findings that must be made prior to granting a conditional use permit include that the proposed land use "shall not adversely affect the preservation of property values"; "shall not create a nuisance and/or enforcement problem within the neighborhood"; and "shall not encourage marginal development within the neighborhood." (C.C.C. Ord. Code, § § 26-2.2008, subds. (3), (5), (6); 82- 24.1002.)

Failure to make any one of these findings must result in denial of the application for a land use permit. (C.C.C. Ord. Code, § § 26-2.2008, 82- 24.1002.) Because we are reviewing a *denial* of a requested land use permit, *337 it is not necessary to determine that *each* finding by the Board was supported by substantial evidence. As long as the Board made a finding that any one of the necessary elements enumerated in the ordinances was lacking, and this finding was itself supported by substantial evidence, the Board's denial of appellant's application must be upheld.

Finding No. 8, stating that the development of a residential second unit would present a threat to public health, safety and welfare by resulting in excessive neighborhood noise, traffic and parking problems, negates two of the necessary elements for granting a land use permit for a second unit, as enumerated in County Ordinance Code section 82-24.1002, subdivisions (11) and (13). Neighbors of the proposed second residential unit gave ample testimony that because of the nature of the cul-de-sac on which the primary residence is located, an additional living unit on the street would create traffic, parking, safety, noise and nuisance problems. Contrary to appellants' position, expert testimony on

Copr. © Bancroft-Whitney and West Group 1998

these issues is not necessary. It is appropriate and even necessary for the County to consider the interests of neighboring property owners in reaching a decision whether to grant or deny a land use entitlement, and the opinions of neighbors may constitute substantial evidence on this issue. (*Smith v. County of Los Angeles* (1989) 211 Cal.App.3d 188, 201-204 [259 Cal.Rptr. 231]; *Nelson v. City of Selma* (9th Cir. 1989) 881 F.2d 836, 840.)

Finding No. 10, stating that "[a] second unit is not suitable in this location, is out of character with the surrounding neighborhood and would be an intrusion into the neighborhood," is related to several of the enumerated requirements for issuance of a residential second unit land use permit. Provisions in the County ordinances relevant to this finding include that the second unit be "architecturally compatible with overall neighborhood character" (C.C.C. Ord. Code, § 82-24.1002, subd. (9)); that it not "adversely affect the preservation of property values" (C.C.C. Ord. Code, § 26-2.2008, subd. (3)); that it not create "a nuisance and/or enforcement problem within the neighborhood or community" (C.C.C. Ord. Code, § 26-2.2008, subd. (5)); that it not "encourage marginal development within the neighborhood" (C.C.C. Ord. Code, § 26-2.2008, subd. (6)); and, generally, that it not be detrimental to health, safety and general welfare (C.C.C. Ord. Code, § § 26-2.2008, subd. (1); 82-24.1002, subd. (13)).

These provisions in the County Ordinance Code give the County and its planning agencies the authority to consider the effect of proposed projects on the character of the surrounding neighborhood. It is well established that the concept of public welfare encompasses a broad range of factors, including aesthetic values as well as monetary and physical ones, and that a concern*338 for aesthetics and "character" is a legitimate governmental objective. (*Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, 502 [69 L.Ed.2d 800, 811-812, 101 S.Ct. 2882]; *Berman v. Parker* (1954) 348 U.S. 26, 33 [99 L.Ed. 27, 37-38, 75 S.Ct. 98]; *Guinnane v. San Francisco City Planning Com.* (1989) 209 Cal.App.3d 732, 741 [257 Cal.Rptr. 742]; *Novi v. City of Pacifica* (1985) 169 Cal.App.3d 678, 682 [215 Cal.Rptr. 439].) Other "concerns that fall well within the domain of the public interest and welfare" include parking, traffic and visual impact. (*Guinnane v. San Francisco City Planning Com., supra*, 209 Cal.App.3d at p. 743.)

Thus, although finding No. 10 does not expressly restate any particular one of the several relevant ordinance requirements, it is actually a summation of several of them. It articulates various significant elements necessarily included in the general concept of public welfare but not expressly enumerated in the County Ordinance Code. It is therefore directly related to finding No. 8, stating that the development of the proposed second residential unit would present a threat to public health, safety and welfare. This finding of unsuitability to the character of the surrounding neighborhood is sufficient by itself to support the denial of appellants' application for a land use permit. (*Guinnane v. San Francisco City Planning Com., supra*, 209 Cal.App.3d at pp. 740-743 [local agency denied permit on basis of finding that large size of house was "not in character" with surrounding neighborhood even though in technical compliance with zoning and building codes; upheld].)

Contrary to appellants' position, the fact that their proposed second unit would be the first such unit in the neighborhood does not render finding No. 10 irrelevant as a matter of law. There are many reasons why a residential second unit might be unsuitable for a particular location and "out of character" with a neighborhood, aside from the fact that it is the first such unit in that location. Such a unit might be perfectly suitable in a different neighborhood with different conditions, even though it was the first such unit in that neighborhood. The kinds of houses in this neighborhood, the street configurations (mostly cul-de-sacs), the traffic patterns, and the lot sizes, are all significant factors to be considered in making this determination. It is clear from the record that these considerations were taken into account by the Board in this case.

Moreover, the County Ordinance Code specifically *requires* a consideration of the effect of a proposed use on neighboring property values. The fact that a second unit would be the first such development in a given neighborhood may well be relevant to a determination of the effect of the unit on local property values. *339

Finding No. 10 is supported by substantial evidence in the administrative record. In the first place, the same evidence supporting finding No. 8 also supports finding No. 10. To the extent the proposed residential second unit would result in excessive neighborhood noise, traffic, or parking problems, it would clearly be "an intrusion into the neighborhood" and "not suitable to this location."

There was ample evidence of community concern with the impact of a residential second rental unit on the general aesthetic character of the neighborhood,

Copr. © Bancroft-Whitney and West Group 1998

as well as on traffic, safety, and protection of property values. These concerns were repeatedly expressed by neighbors opposing the application. In addition, one member of the Board testified to his personal observations of the proposed residential second unit and the surrounding neighborhood, and stated his opinion that it was not in character with the area. The Board properly took these opinions into account in making its determination, and they constitute substantial evidence to support the discretionary finding that the proposed second residential unit was intrusive and not suitable to the character of the surrounding neighborhood. (*Smith v. County of Los Angeles, supra,* 211 Cal.App.3d at pp. 201-204.)

Thus, at least two of the Board's findings (findings No. 8 and 10) were supported by substantial evidence in the administrative record. Each of these findings was contrary to the requirements for issuance of a land use permit; either one was sufficient to support the denial of appellants' application.

IV. Legal Relevance of the Board's Findings

(3) Much of appellants' argument on appeal concerns their position that the Board's findings were impermissible under the maximum standards for residential second units purportedly set by Government Code section 65852.2. [FN1] This contention is without merit.

FN1 Unless otherwise indicated, all further statutory references are to the Government Code.

Section 65852.2 was adopted to encourage local governments to enact their own ordinances allowing and regulating so-called "granny flat" residential second units in single-family and multi-family zones where they would otherwise be prohibited. (*Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 545-546 [7 Cal.Rptr.2d 848].) The statute sets up a three-option approach under which a local government may choose to ban all residential second units on condition of making certain findings that such units would have specific adverse impacts on public health, safety and welfare (§ 65852.2, subd. (c)); adopt its own ordinance providing for the creation of second units and establishing various criteria for approving them *340 (§ 65852.2, subd. (a)); or do neither and follow a state-prescribed procedure for approving or disapproving applications for creation of second units (§ 65852.2, subd. (b)). (*Wilson v. City of Laguna Beach, supra,* 6 Cal.App.4th at p. 553.)

Under section 65852.2, subdivision (a), any local agency may adopt an ordinance providing for the creation of second units, consistent with a list of six provisions. These provisions are phrased in permissive terms stating that local standards for second units "may include, but are not limited to" various criteria. In contrast, under section 65852.2, subdivision (b), every local agency which *fails* to adopt an ordinance governing second units in accordance with subdivisions (a) or (c) "*shall* grant a special use or a conditional use permit for the creation of a second unit if the second unit complies" with an enumerated list of nine specific requirements. (Italics added.) Unlike the provisions in subdivision (a), those contained in subdivision (b) do not use permissive or discretionary terms, but are mandatory.

At the end of this list of requirements, subdivision (b) states: "No other local ordinance, policy, or regulation shall be the basis for the denial of a building permit or a use permit under this subdivision.

"This subdivision establishes the maximum standards that local agencies shall use to evaluate proposed second units on lots zoned for residential use which contain an existing single-family dwelling. No additional standards, other than those provided in this subdivision or subdivision (a), shall be utilized or imposed, except that a local agency may require an applicant for a permit issued pursuant to this subdivision to be an owner-occupant.

"This section does not limit the authority of local agencies to adopt less restrictive requirements for the creation of second units." (§ 65852.2, subd. (b).)

Appellants concede that because the County has adopted an ordinance regulating the creation of residential second units, it is governed by section 65852.2, subdivision (a). However, they contend that the language in subdivision (b) stating that "[t]his subdivision establishes the maximum standards that local agencies shall use to evaluate proposed second units" applies equally to an ordinance drafted under subdivision (a), and thus, an ordinance enacted pursuant to subdivision (a) may not impose standards which exceed those enumerated in subdivision (b). In support of this contention, appellants argue that the intent of the statute is to encourage the creation of residential second units by barring undue local restrictions on their creation.

This argument ignores the broadly permissive

Copr. © Bancroft-Whitney and West Group 1998

language contained in section 65852.2, subdivision (a), giving local agencies discretion in thespecific ***341** criteria they may adopt for approving second units. For example, subdivision (a)(1) states that "[a]reas *may* be designated within the jurisdiction of the local agency where second units *may* be permitted." (Italics added.) The necessary implication of this provision is that a local agency may forbid the creation of second units in other areas. Subdivision (a)(3) states: "Standards *may* be imposed on second units which *include, but are not limited to*, parking, height, setback, lot coverage, architectural review, and maximum size of a unit." (Italics added.) This language clearly contemplates that local agencies may impose *additional* standards on the creation of residential second units. Similarly, subdivision (a)(4) states that a local agency "*may* find that second units do not exceed the allowable density for the lot upon which the second unit is located, and that second units are a residential use that is consistent with the existing general plan and zoning designation for the lot." (Italics added.) The implication of this language is that a local agency may also decline to make such a determination, in its discretion.

In short, section 65852.2, subdivision (a), which applies to local agencies that have adopted ordinances providing for the creation of second units, contains broadly permissive language on the standards that a local government may impose on applications for such units. The "maximum standards" set forth in subdivision (b), by their own terms, apply only to *that* subdivision, and are not relevant when a local government has adopted an appropriate ordinance governing second units.

The County's second unit ordinance complies with section 65852.2, subdivision (a). There is nothing in the standards and criteria set forth in the County's ordinance that conflicts with anything in subdivision (a), or with the legislative intent of that statute. To the contrary, the provisions of the ordinance are consistent with the suggested standards set forth in subdivision (a), and are in accord with the kinds of land use regulations that have been consistently upheld in this state. (*Guinnane v. San Francisco City Planning Com., supra*, 209 Cal.App.3d at pp. 736-743.)

The judgment is affirmed.

White, P. J., and Werdegar, J., concurred.

Cal.App.1.Dist.,1993.

Desmond v. County of Contra Costa

END OF DOCUMENT

Copr. © Bancroft-Whitney and West Group 1998