BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	Case No.: 15-TC-01
Government Code Sections 3505.4, 3505.5, and 3505.7;	*Local Agency Employee Organizations: Impasse Procedures*
Statutes 2011, Chapter 680 (AB 646)	DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.
Filed on June 2, 2016	(*Adopted January 27, 2017*)
By City of Glendora, Claimant	(*Served February 1, 2017*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on January 27, 2017. Melanie Chaney and Annette Chinn appeared on behalf of the City of Glendora. Danielle Brandon and Susan Geanacou appeared on behalf the Department of Finance (Finance), and Andy Nichols of Nichols Consulting appeared as an interested person.

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

The Commission adopted the Proposed Decision to deny the Test Claim by a vote of 4-1 with 2 abstentions, as follows:

Member	**Vote**
Richard Chivaro, Representative of the State Controller, Vice Chairperson	Yes
Mark Hariri, Representative of the State Treasurer	Abstain
Scott Morgan, Representative of the Director of the Office of Planning and Research	Yes
Sarah Olsen, Public Member	Yes
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	Yes
Carmen Ramirez, City Council Member	Abstain
Don Saylor, County Supervisor	No

Summary of the Findings

This Test Claim alleges reimbursable state-mandated activities arising from the enactment of amendments to the Meyers-Milias-Brown Act by Statutes 2011, chapter 680 (AB 646). For this Test Claim, the Commission's jurisdiction is limited to Statutes 2011, chapter 680, the only statute which the claimant specifically pled. The Commission finds that the test claim statute does not legally compel the City of Glendora (claimant) to engage in a collective bargaining procedure known as factfinding. In addition, the Commission finds no evidence in the record that the claimant or any other local agency was, as a practical matter, compelled to engage in factfinding. The test claim statute's requirement of a public hearing before the implementation of a last, best, and final offer does not legally compel local agencies to hold a public hearing, because the implementation of a last, best and final offer is a voluntary act. Therefore, the test claim statute does not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution. On these grounds, the Commission denies the Test Claim.

COMMISSION FINDINGS

I. Chronology

10/09/2011 The test claim statute, Statutes 2011, chapter 680, was enacted.

01/01/2012 Effective date of Statutes 2011, chapter 680.

06/16/2015 Claimant allegedly first incurred costs under Statutes 2011, chapter 680.[1]

06/02/2016 Claimant filed the Test Claim with Commission.[2]

07/25/2016 Department of Finance (Finance) filed comments on the Test Claim.[3]

08/24/2016 Nichols Consulting filed comments on the Test Claim.[4]

09/16/2016 Claimant filed rebuttal comments.[5]

11/16/2016 Commission staff issued the Draft Proposed Decision.[6]

12/07/2016 Claimant filed comments on the Draft Proposed Decision.[7]

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[1] Exhibit A, Test Claim, page 8.

[2] Exhibit A, Test Claim.

[3] Exhibit B, Department of Finance's Comments on Test Claim.

[4] Exhibit C, Nichols Consulting's Comments on the Test Claim. Nichols Consulting is an "interested person" under the Commission's regulations, defined as "any individual, local agency, school district, state agency, corporation, partnership, association, or other type of entity, having an interest in the activities of the Commission." (California Code of Regulations, title 2, section 1181.2(j).)

[5] Exhibit D, Claimant's Rebuttal Comments.

[6] Exhibit F, Draft Proposed Decision.

[7] Exhibit G, Claimant's Comments on the Draft Proposed Decision.

II. Background

This Test Claim addresses Statutes 2011, chapter 680, which amended the Meyers-Milias-Brown Act to add a factfinding procedure after a local agency and a union reach an impasse in negotiations. The test claim statute went into effect on January 1, 2012.

A. Prior Law

1. The General Provisions of the Meyers-Milias-Brown Act

The collective bargaining rights of many local agency employees are governed by the Meyers-Milias-Brown Act, which is codified at Government Code sections 3500 to 3511. Specifically, the Meyers-Milias-Brown Act (also referred to herein as the "MMBA" or the "Act") applies to employees of California cities, counties, and certain types of special districts.[8]

The Meyers-Milias-Brown Act obligates each local agency to meet with the relevant "recognized employee organization" — the Act's term for a labor union — and to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment.[9] The relevant provision of the Act, which was added in 1971 and has not been amended since, reads:

> The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
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> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or

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[8] The Meyers-Milias-Brown Act applies to each "public employee," which is defined as any person employed by a "public agency." Government Code section 3501(d). A "public agency" is then defined as "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not." Government Code section 3501(c).

[9] Government Code section 3505. See also Government Code section 3501(b) (definition of "recognized employee organization").

> ordinance, or when such procedures are utilized by mutual consent.[10]

Meeting and conferring is intended to result in a tentative agreement which, if adopted, is formalized into a Memorandum of Understanding (MOU).[11] From 1969 to 2013, the relevant provision of the Act, which was not amended by the test claim statute, read:

> If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination.[12]

2. <u>The Impasse Provisions of the Meyers-Milias-Brown Act Were Limited to Voluntary Mediation.</u>

An "impasse" occurs when "despite the parties best efforts to achieve an agreement, neither party is willing to move from its respective position."[13]

The Meyers-Milias-Brown Act contains several provisions regarding what happens when an impasse in negotiations is reached.

As quoted above, the provision of the Act which requires a local agency and a union to meet and confer in good faith also counsels the negotiating parties to allocate time for a potential impasse. Government Code section 3505 reads in relevant part, "The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent."

In addition, the Meyers-Milias-Brown Act recognizes the right of the negotiating parties to engage in voluntary mediation. Government Code section 3505.2 — which has not been amended since it was enacted in 1968 — reads:

> If after a reasonable period of time, representatives of the public agency and the

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[10] Government Code section 3505. See also Government Code section 3501(b) (definition of "recognized employee organization").

[11] Government Code section 3505.1.

[12] Government Code section 3505.1. The quoted language was in effect from 1969 to 2013. After the test claim statute was enacted, Statutes 2013, chapter 785, which was not pled and is not before the Commission, amended Government Code section 3505.1 to read:

> If a tentative agreement is reached by the authorized representatives of the public agency and a recognized employee organization or recognized employee organizations, the governing body shall vote to accept or reject the tentative agreement within 30 days of the date it is first considered at a duly noticed public meeting. A decision by the governing body to reject the tentative agreement shall not bar the filing of a charge of unfair practice for failure to meet and confer in good faith. If the governing body adopts the tentative agreement, the parties shall jointly prepare a written memorandum of understanding.

[13] *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 827.

> recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations.

The courts have concluded that mediation under the Meyers-Milias-Brown Act is voluntary. "In the event of a failure to reach agreement after good faith efforts over a reasonable time to do so, the parties may agree to place the disputed matters in the hands of a mediator, but are not required to do so."[14] "[S]ection 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator."[15] "We conclude, therefore, that there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."[16]

While other potential impasse procedures exist in the field of labor law (such as, for example, submission of the dispute to a form of binding arbitration named "interest arbitration" or to a factfinding panel), the Meyers-Milias-Brown Act (as it existed prior to enactment of the test claim statute) did not contain an impasse procedure other than voluntary mediation. Courts have stated: "Several California statutes applicable to different kinds of public employees contain mandatory procedures for identifying and resolving a bargaining impasse, usually requiring mediation. (Citations.) [¶] In contrast with those statutes, the applicable version of the MMBA did not mandate an impasse resolution procedure."[17] "Moreover, the Meyers-Milias-Brown Act provides for negotiation and permits the local agency and the employee organization to agree to mediation but not to fact-finding or binding arbitration."[18]

B. The Test Claim Statute: Statutes 2011, Chapter 680

1. <u>The Plain Language of the Test Claim Statute</u>

The test claim statute, Statutes 2011, chapter 680, effective January 1, 2012, contains four provisions.

In Section One, the test claim statute repeals the pre-existing version of Government Code section 3505.4.[19] The pre-existing version of Government Code section 3505.4 read:

> If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that

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[14] *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21.

[15] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034.

[16] *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

[17] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.

[18] *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25.

[19] Statutes 2011, chapter 680, section 1.

> is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.[20]

In Section Two, the test claim statute replaces Government Code Section 3505.4 to read:

> 3505.4. (a) If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' 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 Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.
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> (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.
>
> (c) 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 it deems 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. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, 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.
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> (d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:
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> (1) State and federal laws that are applicable to the employer.
>
> (2) Local rules, regulations, or ordinances.
>
> (3) Stipulations of the parties.
>
> (4) The interests and welfare of the public and the financial ability of the public agency.
>
> (5) 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 in comparable public agencies.

[20] Statutes 2000, chapter 316, section 1.

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

(7) 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.

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

In Section Three, the test claim statute adds to the Government Code a new Section 3505.5 which reads:

3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available 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 equally divided between the parties.

(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, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her 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 the 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 agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

In Section Four, the test claim statute adds to the Government Code a new Section 3505.7 which reads:

3505.7. After any applicable mediation and factfinding procedures have been

> exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

2. The Legislative History of the Test Claim Statute

The legislative history of AB 646 — the bill which became the test claim statute — includes evidence that the author intended to insert a new factfinding procedure into the Meyers-Milias-Brown Act which would have been made mandatory by the inclusion of mandatory mediation provisions. However, the author removed the mandatory mediation provisions from the bill when it was heard by the Assembly Committee on Public Employees, Retirement and Social Security.

The Assembly Committee on Public Employees, Retirement and Social Security bill analysis on the test claim statute quotes the bill's author Assemblywoman Toni G. Atkins (D-San Diego), who recognized that the Meyers-Milias-Brown Act, in its then-current form, did not mandate factfinding or any other form of impasse procedure: "Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed," the Assemblywoman stated.[21]

However, although Assemblywoman Atkins argued in favor of the perceived benefits of *mandatory* impasse procedures stating that "[t]he creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful,"[22] and "[f]act-finding panels can also help facilitate agreement, by making objective, factual determinations that can help the parties engage in productive discussions and reach reasonable decisions,"[23] opponents of AB 646 argued that "requiring mediation and factfinding prior to imposing a last, best and final offer would simply

[21] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 20 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2).

[22] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 20 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2).

[23] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 20 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2).

add costs and be unhelpful to both the employer and the employees."[24]

The author agreed to a series of amendments, which the Committee memorialized as follows:

> 1) *Remove all of the provisions related to mediation*, making no changes to existing law.
>
> 2) *Remove the requirements that an employer and employee organization submit their differences to a fact-finding panel* and instead provides employees organizations with the *option* to participate in the fact-finding process established in Government Section 3505.4 which is added by this measure.
>
> 3) Clarify the existing requirement for a public employer to conduct a public impasse hearing prior to imposing its last, best, and final offer.[25]

After the amendments were made, the Senate Floor Analysis stated that AB 646:

> 1. Allows an employee organization to request fact-finding when a mediator has been unsuccessful at effectuating a resolution to a labor dispute within 30 days of appointment. . . . .
>
> 3. Requires the fact-finding panel to meet with the parties within 10 days after appointment, and take other steps it deems appropriate. . . . .
>
> 5. Requires state and local public agencies, if requested by the panel, to furnish the panel with all records, papers and information in their possession relating to any matter under investigation by the panel. . . . .
>
> 7. Requires the fact-finding panel to make findings of fact and recommend terms of a settlement if the dispute is not settled within 30 days. . . . .
>
> 8. Requires the costs of the chairperson of the fact-finding panel to be paid for by both parties whether or not PERB selected the chairperson."[26]

3. <u>Questions About the Language of the Test Claim Statute</u>

Almost immediately after passage, the test claim statute was criticized on the grounds that, while the author's intent had been to make factfinding mandatory under the Meyers-Milias-Brown Act, the test claim statute as enacted merely made factfinding voluntary, not mandatory.

AB 646, as enacted, stated that mediation was a pre-requisite to factfinding. Since mediation under the Meyers-Milias-Brown Act is voluntary, and AB 646 as enacted did not include provisions to make it mandatory, this drafting rendered factfinding voluntary as well.

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[24] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 21 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, page 3).

[25] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 21 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, page 3, emphasis added).

[26] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 24-25 (Senate Rules Committee, Floor Analysis of AB 646, as amended on June 22, 2011, pages 2-3).

Specifically, the first sentence of newly added Section 3505.4 was drafted to read, "If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel."

Commentators and practitioners promptly criticized the language. Twelve days after the Governor signed AB 646, the employment law firm of Littler Mendelson P.C. posted the following analysis to its web site:

> It is questionable whether this new law actually fulfills the bill sponsor's apparent intent of requiring an employer to submit to factfinding before implementing its last, best and final offer in *all* cases where the union has requested factfinding. The bill sponsor's comments regarding AB 646 reference "the creation of *mandatory* impasse procedures," giving the impression of an intent to require these impasse procedures (e.g., factfinding and a public hearing) in all cases where a union requests them.
>
> However, the law, as written, arguably does not achieve this goal. AB 646 specifically states that "*[i]f the mediator is unable to effect settlement* of the controversy within 30 days after his or her appointment, the employee organization may request . . . factfinding . . . ." Because mediation is not required under the current version of the MMBA and, importantly, AB 646 did not change the voluntariness of mediation under the statute, it appears the union may not be able to insist on factfinding in the absence of a failed attempt at settling the dispute before a mediator. If true, it is possible that an employer can avoid the costs and delays associated with factfinding by declining to participate in mediation and, thereafter, implementing its last, best and final offer. Indeed, new Government Code section 3505.7, which was added by AB 646 and permits implementation of the last, best and final offer "[a]fter any applicable mediation and factfinding procedures have been exhausted," lends some support to this interpretation of the new law because it opens the door to the possibility that such procedures are permissive, but not necessarily required.[27]

Other commentators shared the concern. "[T]he statute's vague and inconsistent language leaves many questions unanswered as to how this new process will really work. . . . . We believe the legislative history clearly shows that AB 646 does not require mediation. However, without mediation, there is no clear trigger for fact-finding."[28] "Without mediation — voluntary or

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[27] Exhibit H, pages 2-3 (Edward Ellis and Jill Albrecht, "California Governor Signs New Collective Bargaining Law Requiring Factfinding Procedures for Impasse Resolution for Public Sector Employers Covered by the MMBA" dated October 21, 2011 [emphases in original], pages 2-3, http://www.littler.com/california-governor-signs-new-collective-bargaining-law-requiring-factfinding-procedures-impasse, accessed November 9, 2016).

[28] Exhibit H, pages 8, 15 (Renne Sloan Holtzman Sakai LP, Navigating the Mandatory Fact-Finding Process Under AB 646 [November 2011], pages 4, 11, http://www.pccfacultyassociation.org/wp-content/uploads/2012/09/fact_finding.pdf, accessed November 9, 2016).

mandatory — there is no explicit trigger for fact-finding, and opinions as to whether fact-finding is truly mandatory are already split."[29] "Can factfinding be avoided by not agreeing to mediation?"[30] "The question 'Is mediation required before the union can request factfinding?' may be the most obvious point of confusion created by the statute, but others exist."[31]

C. The Subsequent Adoption of Regulations and Statutes 2012, Chapter 314 (AB 1606)

After the enactment of the test claim statute, the Public Employment Relations Board (PERB) adopted emergency regulations and the Legislature enacted a subsequent statute in 2012 to address whether the factfinding process was required if the parties had not gone through mediation. The claimant did not plead the PERB regulations or the subsequent statute in its Test Claim, and, consequently, the Commission is not herein rendering a ruling upon these laws.[32] However, they are included in the Background for history and context.

1. PERB Regulation 32802

Within two months of the Governor's signing of AB 646, PERB, which has administered the Meyers-Milias-Brown Act since July 2001,[33] adopted emergency regulations.[34] PERB filed the emergency rulemaking package with the Office of Administrative Law (OAL) on

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[29] Exhibit H, page 26 (Emily Prescott, *Mandatory Fact-Finding Under the Meyers-Milias-Brown Act*, California Labor & Employment Law Review, Vol. 26 No. 1 [January 2012], page 2, http://www.publiclawgroup.com/wp-content/uploads/2012/01/Mandatory-Fact-Finding-Under-Meyers-Milias-Brown-Act-by-Emily-Prescott-Cal-Labor-and-Employment-Law-Review.pdf, accessed November 9, 2016).

[30] Exhibit H, page 35 (Best Best & Krieger LLP, *AB 646's Impact On Impasse Procedures Under the MMBA (Mandated Factfinding)*, dated December 2011, page 6, http://www.bbklaw.com/88E17A/assets/files/News/MMBA-Impasse%20Procedures%20After%20AB%20646.pdf, accessed November 9, 2016).

[31] Exhibit H, page 55 (Stefanie Kalmin, *A.B. 646 Raises Many Questions*, U.C. Berkeley Institute for Research on Labor and Employment, page 1, http://cper.berkeley.edu/journal/online/?p=952, accessed November 9, 2016).

[32] See Section IV.A. for detailed discussion.

[33] Government Code section 3509; see also Statutes 2000, chapter 901.

[34] The emergency regulations amended or added PERB Regulations 32380, 32603, 32604, 32802 and 32804. See Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 178-181 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 5-8). In response to a Commission request, PERB provided 503 pages of underlying rulemaking documents. See Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, filed August 26, 2016.

December 19, 2011.[35] The emergency regulations became operative on January 1, 2012[36] — the same date that the test claim statute became effective. The emergency regulations became permanent after PERB transmitted a Certificate of Compliance to the OAL on or about June 22, 2012.[37]

One section of these emergency regulations — codified at California Code of Regulations, title 8, section 32802 (section 32802) — sought to implement, interpret, or make specific the provisions of the test claim statute.[38] Section 32802 of the emergency regulations read:

> 32802. Request for Factfinding Under the MMBA.
>
> (a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
>
> > (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or
> >
> > (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.
>
> (b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.
>
> (c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.
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> (d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are

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[35] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 38 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606, as introduced February 7, 2012, page 2). This analysis erroneously bears a "2011" date of hearing.

[36] See History at the bottom of Code of California Regulations, title 8, section 32802. See also Register 2011, No. 52.

[37] See History at the bottom of Code of California Regulations, title 8, section 32802. See also Register 2012, No. 31.

[38] Section 32804 was also amended by the emergency regulations and pertained to the test claim statute, specifically, the manner in which PERB would select the chairperson of the factfinding panel. Since Section 32804 is not relevant to the material issue of whether factfinding is mandatory under the test claim legislation, this Decision will not focus on Section 32804.

officially open for business.

> (e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.[39]

PERB Regulation 32802(a) begins by stating that "[a]n exclusive representative may request that the parties' differences be submitted to a factfinding panel" — a statement which is not qualified in terms of whether or not mediation has occurred.

Regulation 32802(a)(1) specifies a timeline for the initiation of factfinding after mediation, and Regulation 32802(a)(2) specifies a timeline for the initiation of factfinding when mediation has not occurred. Regulation 32802(a)(2) reads:

> If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

During the promulgation of this regulation, the question arose as to whether the test claim statute authorized PERB to oversee factfinding when no mediation had occurred since the test claim statute was silent on this point.

On November 8 and 10, 2011 — about one month after the Governor signed AB 646 — PERB staff members met in Oakland and Glendale with members of the public, including officials of unions representing city and county employees, regarding the draft regulations.[40] PERB also held formal meetings in its Sacramento headquarters about the regulations on December 8, 2011, and April 12, 2012.[41]

At these meetings, whether the test claim statute mandated factfinding in the absence of mediation was questioned.

During at least one of the non-Sacramento meetings, a union official "stated that at the PERB meeting he attended, the unions agreed that factfinding should be required even when mediation was not required by law."[42]

PERB member Dowdin Calvillo "commented on concerns expressed by some constituents with regard to staff's recommendation that factfinding would be required in situations where

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[39] Register 2011, No. 52. Subdivision (e) of Regulation 32802 was repealed as of October 1, 2013. (Register 2013, No. 34.)

[40] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 177-181 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 4-8).

[41] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 178-181 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 5-8); Exhibit H, pages 62-63 (Minutes, Public Employment Relations Board Meeting, April 12, 2012, pages 6-7).

[42] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 180 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

mediation was not required by law."[43] Member Calvillo "said she was not sure if the Board had authority to require factfinding in those situations given that AB 646 was silent in that regard but that she was willing to allow the language to move forward as staff proposed and allow OAL to make that determination."[44]

According to PERB Minutes, Mr. Chisholm, the Division Chief of PERB's Office of General Counsel, "stated that AB 646 provides, for the first time, a mandatory impasse procedure under the MMBA."[45] Mr. Chisholm stated that AB 646 "established a mandatory factfinding procedure under the MMBA that did not exist previously."[46] "Mr. Chisholm acknowledged the comments and discussions held regarding whether factfinding may be requested where mediation has not occurred. PERB, having considered all aspects, including comments and discussions held, related statutes, and legislative history and intent, drafted a regulatory package that would provide certainty and predictability."[47]

During the period of time when the emergency regulations were being reviewed by OAL, the City of San Diego, as an interested person, submitted comments arguing that Regulation 32802(a) was inconsistent with the test claim statute and also lacked clarity. "PERB's proposed regulation 32802(a) is not consistent with A.B. 646, nor does it provide clarity to the public agencies subject to it," the City of San Diego wrote, through its City Attorney.[48] "A.B. 646 does not authorize or mandate factfinding when the parties do not engage in mediation of a dispute, nor does A.B. 646 mandate mediation."[49]

In response to the City of San Diego's letter, PERB agreed "that nothing in AB 646 changes the voluntary nature of mediation under the MMBA," but stated that "any attempt to read and

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[43] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 180 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

[44] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 180 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

[45] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 178 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 5).

[46] Exhibit H, page 62 (Minutes, Public Employment Relations Board Meeting, April 12, 2012, page 6).

[47] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 179 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 6).

[48] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 120 (Letter from Joan F. Dawson, Deputy City Attorney, to Kathleen Eddy, Office of Administrative Law, and Les Chisholm, PERB, dated December 22, 2011, page 1).

[49] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 121 (Letter from Joan F. Dawson, Deputy City Attorney, to Kathleen Eddy, Office of Administrative Law, and Les Chisholm, PERB, dated December 22, 2011, page 2).

harmonize all of the statutory changes made by AB 646 must end in the conclusion that factfinding is mandatory . . . ."[50] PERB argued that its proposed emergency regulations were consistent with legislative intent and that the "majority of interested parties, both employer and labor representatives, also urged a reading of AB 646 that provides for a factfinding request whether mediation occurs or not."[51] PERB also argued that, since the test claim statute repealed the prior language regarding when an employer could implement its last, best, and final offer, the replacement language — which references factfinding — implies that factfinding must be a mandatory step in the process which leads to the ability of the employer to implement its last, best, and final offer.[52]

2. Statutes 2012, Chapter 314 (AB 1606) Amends Government Code Section 3505.4, Effective January 1, 2013.

Statutes 2012, chapter 314 (AB 1606), went into effect on January 1, 2013. According to the author of the bill, "Ambiguity in the drafting of AB 646 has called into question whether an employer can forgo all impasse procedures, including mediation and fact-finding. In fact, several government employers argue that AB 646 does not require fact-finding if the parties do not engage in mediation."[53]

Although PERB adopted Regulation 32802, "the issue whether AB 646 requires that mediation occur as a precondition to an employee organization's ability to request fact-finding remains unresolved," the author continued.[54] "AB 1606 would clarify that fact-finding is available to employee organizations in all situations, regardless of whether the employer and employee have

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[50] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 124 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 1).

[51] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 2).

[52] "[I]t also is important to consider that AB 646 *repealed* the prior language of section 3505.4, which set forth the conditions under which an employer could implement its last, best and final offer (LBFO). In new section 3505.7, added by AB 646, the MMBA now provides that implementation of the employer's LBFO may occur only '[a]fter any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5.' (Emphasis added.)" Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 124-125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, pages 1-2).

[53] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 37 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1).

[54] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 38 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 2).

engaged in mediation."[55]

Unidentified supporters of AB 1606 were quoted as stating,

> During the PERB rulemaking process, it became apparent that AB 646 was drafted in a manner that called into question whether mediation was a precondition to an employee organization's ability to request factfinding. . . . . AB 1606 seeks to provide a final, statutory clarification of this question, by revising the Government Code to allow factfinding in all circumstances in which a local public employer and its employees have reached an impasse in their negotiations.[56]

According to the Senate Public Employment & Retirement Committee, AB 1606, ". . . . clarifies that if the dispute leading to impasse was not submitted to mediation, the employee organization may request factfinding within 30 days after the date that either party provided the other with written notice of the declaration of impasse."[57]

Statutes 2012, chapter 314 (AB 1606), contains two sections. Section One codifies the timelines and language contained in PERB Regulation 32802(a) and states that a union may demand factfinding whether or not mediation has occurred. Section One amends Government Code section 3505.4(a) to read (in underline and italic):

> 3505.4. (a) ~~If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the~~ *The* employee organization may request that the parties' differences be submitted to a factfinding panel~~.~~ *not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.* 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 Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

Section One also adds to Government Code section 3505.4 a new subdivision (e) which reads:

> (e) The procedural right of an employee organization to request a factfinding

[55] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 38 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 2).

[56] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 38 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 2).

[57] Exhibit H, page 65 (Senate Public Employment & Retirement Committee, Analysis of AB 1606 as introduced February, 7, 2012 [emphases omitted], page 2).

panel cannot be expressly or voluntarily waived.

Section Two makes a finding that the legislation is technical and clarifying, by stating:

> SEC. 2. The Legislature finds and declares that the amendments to Section 3505.4 of the Government Code made by this act are intended to be technical and clarifying of existing law.

III. Positions of the Parties and Interested Person

A. City of Glendora

The claimant argues that the following activities are mandated by the test claim statute and are reimbursable state mandates:

> If mediation did not result in settlement after 30 days and if the employee organization requests factfinding:
>
> 1) The agency must notice impasse hearing if delay in factfinding request.
> 2) Agency must select a person to serve as its member of the factfinding panel, and pay for the costs of its member.
> 3) If chairperson is not approved by other party, agency must select a different chairperson.
> 4) PERB shall appoint a panel Chairperson and the agency shall pay for half of the panel chairperson's costs.
> 5) The agency shall review and respond to all requests and subpoenas made by the panel and furnish panel with all relevant documents as requested. (This includes both administrative time to review and approve materials as well as clerical time to process these requests. Travel time would also be reimbursable if required.)
> 6) The agency shall participate in all factfinding hearings.
> 7) The agency shall review and make the panel findings publicly available within 10 days of receipt.
> 8) The agency shall pay for half of the costs of the factfinding.
> 9) The agency must hold a public impasse hearing, if it chooses to impose its last, best offer.
> 10) The agency shall meet and confer with union and submit/resubmit last, best offer.
>
> One time costs would include:
>
> 1) Train staff on new requirements.
> 2) Revise local agency manuals, policies, and guidelines related to new factfinding requirements.[58]

[58] Exhibit A, Test Claim, page 7.

In response to Finance's comments on the Test Claim, the claimant filed written rebuttal comments.[59] In these rebuttal comments, the claimant took the position, without analysis, that the test claim statute established a mandatory factfinding procedure: "AB 646 changed the MMBA significantly by establishing new ***mandatory*** factfinding procedures, effective January 1, 2012."[60] The claimant also challenged the specific stances taken by Finance regarding what activities were newly imposed, or were discretionary.[61]

In comments on the Draft Proposed Decision, the claimant took the position that AB 646 imposed mandatory fact-finding and was therefore a reimbursable state mandate. In support of this outcome, the claimant made the following additional arguments:

- Instead of limiting this Test Claim to the statutes enacted by AB 646, the Commission should review the entire record, including the statutes enacted the following year by AB 1606.[62]
- The statutory language enacted by AB 646 is ambiguous, and, as such, legislative history and other indicia of intent — which indicate that the bill's author intended to impose mandatory fact-finding — should be reviewed and enforced by the Commission.[63]
- In the event that the language of AB 646 is not ambiguous, the Commission's literal interpretation yields an absurd result.[64]

B. Department of Finance

Finance asserts that the following activities identified in the Test Claim were required by prior law and, therefore, are not new programs or higher levels of service:

2) Agency must select a person to serve as its member of the factfinding panel, and pay for the costs of its member.
3) If chairperson is not approved by other party, agency must select a different chairperson.
5) The agency shall review and respond to all requests and subpoenas made by the panel and furnish panel with all relevant documents as requested. (This includes both administrative time to review and approve materials as well as clerical time to process these requests. Travel time would also be reimbursable if required.)
6) The agency shall participate in all factfinding hearings.[65]

Finance further alleges that activities 1, 9, and 10, identified in the Test Claim are discretionary

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[59] Exhibit D, Claimant's Rebuttal Comments.

[60] Exhibit D, Claimant's Rebuttal Comments, page 2, emphasis in original.

[61] Exhibit D, Claimant's Rebuttal Comments, pages 2-7.

[62] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 7.

[63] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 8-14.

[64] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 14-15.

[65] See Exhibit B, Department of Finance's Comments on the Test Claim, page 1.

and are not mandated at all. These activities are:

1) The agency must notice impasse hearing if delay in factfinding request.

9) The agency must hold a public impasse hearing, if it chooses to impose its last, best offer.

10) The agency shall meet and confer with union and submit/resubmit last, best offer.[66]

Finally, Finance asserts alleged activities 4 and 8 (below) identified in the Test Claim are not a "program" as defined and are instead "straight costs," which are not subject to reimbursement:

4) PERB shall appoint a panel Chairperson and the agency shall pay for half of the panel chairperson's costs.

8) The agency shall pay for half of the costs of the factfinding.[67]

Finance's comments do not address one activity identified in the Test Claim: "7) The agency shall review and make the panel findings publicly available within 10 days of receipt."

Finance did not file comments on the Draft Proposed Decision.

C. Nichols Consulting

Nichols Consulting submitted written comments noting that: (1) the "prior laws" implicated by Finance's comments with regard to alleged activities 1, 9, and 10, are EERA (the Educational Employment Relations Act) and HEERA (Higher Education Employer-Employee Relations Act), both of which contain factfinding provisions that do not apply to cities, counties and other local agencies which are governed by the Meyers-Milias-Brown Act; and (2) the claimant does not appear to have requested the reimbursement of mediation costs, a subject on which the test claim statute is silent.[68]

IV. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that

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[66] See Exhibit B, Department of Finance's Comments on the Test Claim, page 1.

[67] See Exhibit B, Department of Finance's Comments on the Test Claim, page 2.

[68] Exhibit C, Nichols Consulting's Comments on the Test Claim, pages 1-2.

articles XIII A and XIII B impose."[69] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[70]

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[71]
2. The mandated activity either:
   a. Carries out the governmental function of providing a service to the public; or
   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[72]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[73]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[74]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[75] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[76] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an

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

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

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

[72] *Id*., pages 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

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

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

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

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

"equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[77]

A. The Commission's Jurisdiction Is Limited to Statutes 2011, Chapter 680, the Only Statute Which the Claimant Pled.

A threshold issue of this and every test claim is the identification of the statute or executive order which the Commission is to review. The claimant must identify at several points in the initial test claim filing which specific statute or executive order imposes, according to the claimant, a reimbursable state mandate.

The Draft Proposed Decision limited jurisdiction of this Test Claim to the Government Code sections that were enacted by Statutes 2011, chapter 680. In its comments on the Draft Proposed Decision, the claimant argues that the Commission should also analyze whether Statutes 2012, chapter 314 (AB 1606), the subsequent year's clean-up legislation, created a reimbursable state mandate.[78]

The Commission finds that the claimant pled only Statutes 2011, chapter 680 in this Test Claim. As detailed below, the Commission is a tribunal of limited jurisdiction, and a claimant must specifically plead a test claim statute or executive order in order to invoke the Commission's jurisdiction. Since the claimant pled Statutes 2011, chapter 680 — but did not plead Statutes 2012, chapter 314 or any other law in this Test Claim — the Commission's jurisdiction is limited to Statutes 2011, chapter 680.

1. <u>A Claimant Is Obligated to Specifically Plead the Statute or Executive Order Which the Claimant Requests That the Commission Review.</u>

Government Code section 17521 defines a "test claim" to mean the first claim filed with the Commission alleging a *particular statute or executive order* imposes costs mandated by the state…." (Emphasis added.)

Government Code section 17553, which governs the filing of test claims, specifically requires that:

- "All test claims shall be filed on a form prescribed by the commission and shall contain at least the following elements and documents: (1) A written narrative that identifies the specific sections of statutes or executive orders and the effective date and register number of regulations alleged to contain a mandate . . . ."[79], and
- "The written narrative shall be supported with copies of . . . The test claim statute that includes the bill number or executive order, alleged to impose or impact a mandate."[80]

The test claim form reads in relevant part:

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

[78] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 6, 7.

[79] Government Code section 17553(b).

[80] Government Code section 17553(b)(3)(A)(i).

- In Section 4 of the test claim form, titled Test Claim Statutes Or Executive Orders Cited, the form states, "Please identify all code sections (*including statutes, chapters, and bill numbers*) (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 290]), regulations (include register number and effective date), and executive orders (include effective date) that impose the alleged mandate."[81]
- In Section 4, the test claim form contains a large box on the right-hand side in which the claimant is to identify the statute, regulation, and/or executive order which allegedly imposes a reimbursable state mandate.[82]
- In Section 4 of the test claim form, the claimant is required to check a box to indicate compliance with the adjacent text which reads, "*Copies of all statutes and executive orders cited are attached*."[83]

Consequently, a claimant filing a test claim is repeatedly placed on notice of the claimant's obligation to specifically identify the code section, including the statute, chapter, and bill number by which it was added or amended, which the claimant requests that the Commission review.

2. <u>The Claimant Pled Only Statutes 2011, Chapter 680 (AB 646).</u>

The claimant specifically pled only Statutes 2011, Chapter 680 (AB 646) in its Test Claim. The claimant did not plead any later statutory amendment to the Meyers-Milias-Brown Act, such as Statutes 2012, Chapter 314 (AB 1606). The claimant did not plead Public Employment Relations Board Regulation 32802 or any other regulation promulgated to implement, interpret, or make specific the Meyers-Milias-Brown Act.

Throughout the Test Claim, the claimant pled, quoted, or referred at least eleven times to Statutes 2011, Chapter 680 (AB 646):

- In Section 4 of the test claim form, inside the box titled Test Claim Statutes Or Executive Orders Cited, the claimant wrote, "Government Code sectopm [*sic*] 3505.4, 3505.5 and 3505.7, Statutes 2011, Chapter 680 (AB 646)."[84]
- The first sentence of the Test Claim reads: "On June 22, 2011, Assembly Bill 646 (Atkins) added duties to Collective Bargaining activities under Milias-Meyers-Brown Act (MMBA)."[85]
- Consistent with Statutes 2011, Chapter 680 (AB 646), the claimant described the test claim legislation as requiring factfinding only after mediation. "The bill authorized the employee organization, if the mediator is unable to effect settlement of the controversy

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[81] See Exhibit A, Test Claim, page 1, emphasis added.

[82] See Exhibit A, Test Claim, page 1.

[83] See Exhibit A, Test Claim, page 1, emphasis in original.

[84] Exhibit A, Test Claim, page 1.

[85] Exhibit A, Test Claim, page 3.

within 30 days of his or her appointment, to request that the matter be submitted to a factfinding panel."[86]

- In its Written Narrative, the claimant quoted Government Code sections 3505.4, 3505.5 and 3505.7 as those sections existed after the enactment of Statutes 2011, chapter 680 (AB 646), but before the enactment of Statutes 2012, chapter 314 (AB 1606) or any other subsequent amendment.[87]
- When listing the new activities which the claimant alleges were imposed by the test claim legislation, the claimant introduced the list by stating, "If mediation did not result in settlement after 30 days and if the employee organization requests factfinding . . . ."[88] The reference to mediation as a pre-requisite to factfinding is consistent with Statutes 2011, Chapter 680 (AB 646) but is not consistent with later amendments to the Meyers-Milias-Brown Act.
- In noting the legislative history of the Meyers-Milias-Brown Act, the claimant stated, "There was no Mandatory Impasse Procedures requirement prior to 1975, nor in any of the intervening years, until the passage of Chapter 680, Statutes of 2011, filed on October 9, 2011."[89]
- With regard to a statewide cost estimate, the claimant quoted from an Assembly Floor Analysis of AB 646 which was dated September 1, 2011.[90]
- The Written Narrative portion of the Test Claim concluded, "The enactment of Chapter 680, Statutes of 2011 adding sections 3505.4, 3505.5 and 3505.7 imposed a new state mandated program . . . ."[91]
- In the Claim Requirements section of the Written Narrative, the claimant stated that it was complying with a Commission regulation by attaching only "Exhibit 1: Chapter 680, Statutes of 2011."[92]
- The first exhibit to the Test Claim was a copy of Statutes 2011, chapter 680 (AB 646) in slip law format.[93]
- The claimant attached to the Test Claim a copy of the Assembly Floor Analysis of AB 646 dated September 1, 2011.[94]

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[86] Exhibit A, Test Claim, page 3.

[87] Exhibit A, Test Claim, pages 4-7.

[88] Exhibit A, Test Claim, page 7.

[89] Exhibit A, Test Claim, page 8.

[90] Exhibit A, Test Claim, page 8.

[91] Exhibit A, Test Claim, page 11.

[92] Exhibit A, Test Claim, page 11.

[93] Exhibit A, Test Claim, page 15-18.

[94] Exhibit A, Test Claim, page 24-26.

In contrast to these eleven references to the 2011 statute, the Test Claim contains in the exhibits a computer printout from "leginfo.ca.gov" of the current version of Government Code section 3505.4, which contains language that was added by Statutes 2012, chapter 314. Neither in the leginfo printout nor anywhere else in the test claim filing is there a reference to Statutes 2012, chapter 314 or AB 1606, however.[95]

In light of the totality of the evidence, the Commission concludes that the claimant requested a ruling in this Test Claim on the question of whether Statutes 2011, chapter 680 (AB 646) — and only Statutes 2011, chapter 680 (AB 646) — imposed a reimbursable state mandate. The Test Claim's eleven references to Statutes 2011, chapter 680 — most of which are substantive references on the face of the test claim form or within the Written Narrative — outweigh the happenstance that one computer printout containing the current version of Government Code section 3505.4, as later amended, was appended as an exhibit.

The substantive portions of the Test Claim contain no references to or quotations from Statutes 2012, chapter 314 (AB 1606). The Test Claim contains no analysis of Statutes 2012, chapter 314 (AB 1606). The Test Claim contains no references to, quotations of, or analysis of PERB Regulation 32802 or any other regulation or executive order.[96]

The claimant also argues that the Commission should review Statutes 2012, chapter 314 (AB 1606) because AB 1606 states, in Section Two, that it is "intended to be technical and clarifying of existing law."[97]

Statements such as those contained in Section Two of AB 1606 — which purport to state what the Legislature meant when it passed a previous bill — are not binding upon judicial bodies or quasi-judicial bodies such as the Commission. A "subsequent legislative declaration as to the meaning of a preexisting statute is neither binding nor conclusive in construing the statute's application to past events. (Citation.) Nevertheless, the Legislature's expressed views on the prior import of its statutes are entitled to due consideration . . . ."[98]

On this record, the Commission concludes that the claimant invoked the Commission's jurisdiction to obtain an adjudication of whether Statutes 2011, chapter 680 (AB 646) imposed a reimbursable state mandate.[99] The Commission will now address this limited question.

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[95] Compare Exhibit A, Test Claim *passim*, with Exhibit A, Test Claim, pages 19-21 (the leginfo printout).

[96] The claimant repeatedly argues that the Commission should review Statutes 2012, chapter 314 (AB 1606) because the claimant first incurred costs after the effective date of Statutes 2012, chapter 314 (AB 1606). See Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 5, 7, 10, 11, 14. The claimant's assertion is not consistent with the test claim pleading requirements in Government Code sections 17521 and 17553.

[97] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 3-5.

[98] *Hunt v. Superior Court (Guimbellot)* (1999) 21 Cal. 4th 984, 1007-1008.

[99] The claimant did not request leave to amend its Test Claim to add Statutes 2012, chapter 314 (AB 1606). Government Code section 17557(e) and section 1183.1 of the Commission's regulations allow the claimant to amend a test claim at any time before the test claim is set for hearing, without affecting the original filing date, as long as the amendment substantially relates

B. Statutes 2011, Chapter 680 (AB 646) Does Not Impose a State-Mandated Program on Local Agencies.

In 2003, the California Supreme Court decided the *Kern High School District* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution.[100] In *Kern High School District*, school districts participated in various optional education-related programs that were funded by the state and federal government. Each of the underlying funded programs required school districts to establish and utilize school site councils and advisory committees. State open meeting laws later enacted in the mid-1990s required the school site councils and advisory bodies to post a notice and an agenda of their meetings. The school districts requested reimbursement for the notice and agenda costs pursuant to article XIII B, section 6.[101]

There, the *Kern* court reviewed and affirmed the holding of *City of Merced v. State of California*,[102] determining that, when analyzing state-mandate claims, the underlying program must be reviewed to determine if the claimant's participation in the underlying program is voluntary or legally compelled. The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain — but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[103]

Thus, the California Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have

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to the original test claim and is timely filed within the statute of limitations required by Government Code section 17551(c). This matter was set for hearing when the Draft Proposed Decision was issued on November 16, 2016. (Exhibit F.) Moreover, the statute of limitations to file a test claim on Statutes 2012, chapter 314 has long past whether based on being 12 months from the effective date of the statute or on 12 months from the date of first incurring costs.

[100] *Department of Finance v. Commission on State Mandates (Kern High School District)* (2003) 30 Cal.4th 727.

[101] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 730.

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

[103] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 743 (emphasis in original).

> participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.*[104]

More recently, the court in *POBRA* held that school districts that choose to employ peace officers and have a school police department are not mandated by the state to comply with the requirements of the Peace Officer Procedural Bill of Rights Act (POBRA).[105] Consistent with the prior decisions of the court, the court stated that "[t]he result of the cases discussed above is that, if a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement."[106]

1. <u>The Test Claim Statute, by Its Plain Language, Does Not Legally Compel Local Agencies to Engage in Mediation or Factfinding.</u>

In this case, the test claim statute does not legally compel local agencies to act. The plain language of the test claim statute links factfinding to mediation. Government Code section 3505.4 as replaced by the test claim statute reads in relevant part:

> If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel.[107]

This is the only sentence in the test claim statute which addresses how factfinding would commence.[108] The remainder of the test claim statute addresses the procedures for factfinding. Under the Meyers-Milias-Brown Act as it existed prior to the enactment of the test claim statute, mediation was voluntary, as supported by numerous judicial decisions.[109] The plain language of the statute indicated that mediation was voluntary. Government Code section 3505.2 read at that time (and still reads to this day):

> If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the

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[104] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 731 (emphasis added).

[105] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1357.

[106] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366.

[107] Statutes 2011, chapter 680.

[108] The claimant does not identify any other language in the test claim statute which would trigger factfinding. See Exhibit G, Claimant's Comments on the Draft Proposed Decision.

[109] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034; *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21; *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

> parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations.

The plain language of Section 3505.2 — the parties "may agree" to appoint a "mutually agreeable" mediator — means that mediation under the Meyers-Milias-Brown Act is voluntary.[110]

The courts have concluded that mediation under the Meyers-Milias-Brown Act is voluntary. "In the event of a failure to reach agreement after good faith efforts over a reasonable time to do so, the parties may agree to place the disputed matters in the hands of a mediator, but are not required to do so."[111] "[S]ection 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator."[112] "We conclude, therefore, that there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."[113]

While other potential impasse procedures exist in the field of labor law (such as, for example, submission of the dispute to a form of binding arbitration named "interest arbitration" or to a factfinding panel), the Meyers-Milias-Brown Act (as it existed prior to the test claim statute) did not contain or require an impasse procedure other than voluntary mediation. Courts have stated: "Several California statutes applicable to different kinds of public employees contain mandatory procedures for identifying and resolving a bargaining impasse, usually requiring mediation. (Citations.) [¶] In contrast with those statutes, the applicable version of the MMBA did not mandate an impasse resolution procedure."[114] "Moreover, the Meyers-Milias-Brown Act provides for negotiation and permits the local agency and the employee organization to agree to mediation but not to fact-finding or binding arbitration."[115]

Consequently, the test claim statute allows for factfinding only "[i]f the mediator is unable to effect settlement." Since mediation remained voluntary after the effective date of the test claim statute, factfinding — which can be triggered by the union after an unsuccessful mediation — is a non-reimbursable downstream requirement of a discretionary decision by both parties to

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[110] "'Shall' is mandatory and 'may' is permissive." Government Code section 14. "Under 'well-settled principle[s] of statutory construction,' we 'ordinarily' construe the word 'may' as permissive and the word 'shall' as mandatory, 'particularly' when a single statute uses both terms." *Tarrant Bell Property, LLC v. Superior Court (Abaya)* (2011) 51 Cal.4th 538, 542.

[111] *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21.

[112] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034.

[113] *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

[114] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.

[115] *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25.

engage in mediation.[116]

Under state mandates law, the voluntary actions of a local agency do not create a reimbursable state mandate. "[T]he core point . . . is that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds — even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice."[117] "[I]f a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement."[118]

Mediation is voluntary under the plain meaning of the test claim statute, and under the test claim statute, fact finding can only be triggered after the mediation. Since the State is not obligated to reimburse a local agency for activities which are conducted voluntarily, the test claim statute does not impose a reimbursable state mandate.

Though, as discussed in the Background above, PERB came to a different legal conclusion regarding the test claim statute during the promulgation of PERB Regulation 32802 than the Commission does here, the plain language of the statute, the case law, and the legislative history of AB 646 strongly support the Commission's conclusion.

As discussed above, the plain language of the test claim statute conditions factfinding upon mediation, which is voluntary. The test claim statute does not contain any language which makes mediation or factfinding mandatory or which requires factfinding in the absence of mediation.

The claimant contends that the test claim statute's language is ambiguous.[119] The Commission disagrees. "Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction. A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable."[120] The Commission finds the plain language of the test claim statute to be unambiguous and that the plain meaning therefore controls. "If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's

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[116] See *Department of Finance v. Commission on State Mandates (Kern High School District),* 30 Cal.4th 727, 743 and *San Diego Unified School Dist. v. Commission On State Mandates* (2004) 33 Cal.4th 859, 887.

[117] *Department of Finance v. Commission on State Mandates (Kern High School District),* 30 Cal.4th 727, 742.

[118] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366 ("POBRA").

[119] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 9-14.

[120] *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 778 [citations omitted].

plain meaning governs."[121] "[C]ourts should start . . . with the actual language of the statute, and if the text is clear as applied to a given case, and it does not fall into any of the exceptions, stop there. (Citation.) As Oliver Wendell Holmes said, 'we do not inquire what the legislature meant; we ask only what the statute means.'"[122]

The relevant language of the test claim statute is susceptible of only one meaning. At the time of the passage of the test claim statute (and currently), mediation under the Meyers-Milias-Brown Act was voluntary. The test claim statute allowed a union to request factfinding "[i]f the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment," and the test claim statute contained no other provision triggering factfinding. There is therefore only one way to read the plain language of the statute. No ambiguity exists.

The Commission notes that, in the Claimant's Comments on the Draft Proposed Decision, the claimant does not identify a second, reasonable reading of the test claim statute which relies *only* upon the language of the test claim statute and the other then-extant provisions of the Meyers-Milias-Brown Act. The claimant's argument of ambiguity is based entirely upon extrinsic evidence, specifically, the legislative and amendment history of the test claim statute.

To the extent that the claimant attempts to identify an ambiguity by relying upon committee reports and other legislative history,[123] the claimant fails because unambiguous language in a statute trumps arguably inconsistent statements in legislative history. "When a statute is unambiguous, its language cannot be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."[124] "Committee reports, often drafted by unelected staffers, cannot alter a statute's plain language."[125]

In a 1994 decision, the Fourth District Court of Appeal summarized some of the myriad problems with using legislative history to discern intent:

> [W]e must acknowledge that the criticisms of judicial use of legislative history are formidable indeed: The Constitution does not elevate the bits and pieces that make up any legislative history to the status of law — it reserves that honor only for the text of legislation that has run the gauntlet of the Legislature and the Governor's possible veto. The members of the Legislature have no opportunity to disapprove legislative history, and the Governor has no chance to veto it. Legislative history directly represents only the views of the few actors in the legislative process, including lobbyists and committee staff people, who are intimately involved with particular legislation. It is virtually impossible to accurately reconstruct exactly what went on when a legislative body passed a bill. Legislative history has become contaminated by documents which are more

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[121] *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838.

[122] *J.A. Jones Construction Co. v. Superior Court (Dai-Ichi Bank Kangyo Bank, Ltd.)* (1994) 27 Cal.App.4th 1568, 1575 [quoting Holmes, Collected Legal Papers (1920) page 207].

[123] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 9-14.

[124] *Sabi v. Sterling* (2010) 183 Cal.App. 4th 916, 934.

[125] *People v. Johnson* (2015) 60 Cal. 4th 966, 992.

aimed at influencing the judiciary after the bill is passed than explaining to the rest of the legislature what the bill is about before it is passed. Most basically, the idea that the diverse membership of a democratically elected legislature can ever have one collective "intent" on anything is a myth; if there is ambiguity it is because the legislature either could not agree on clearer language or because it made the deliberate choice to be ambiguous — in effect, the only "intent" is to pass the matter on to the courts.[126]

To the extent that the claimant contends that an ambiguity exists in the test claim statute when it is compared to its legislative history, the Commission rejects the argument.

The claimant also argues that the test claim statute contains a latent ambiguity.[127] The Commission is not persuaded. The Third District Court of Appeal has warned, "As we have recently cautioned, although extrinsic evidence may reveal a latent ambiguity in a statute, such ambiguity must reside in the statutory language itself. It cannot exist in the abstract, or by ignoring the statutory language."[128]

No ambiguity exists within the language of the test claim statute. The claimant's alleged latent ambiguity exists only if a person ignores the test claim statute's plain language or reads the statute to include language which is not there.

While legislative history need not be reviewed when a statute's plain language is unambiguous, if the relevant legislative history were to be reviewed in this Test Claim, then the legislative history would be found to be consistent with the plain language of the statute. The Legislature specifically chose to omit mandatory mediation from the test claim statute, as is reflected in the Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 3 and in the March 23, 2011 amendments themselves.[129] With regard to courts or quasi-judicial tribunals, such as the Commission, their rulings may not create or add text which was omitted by the Legislature. In the words of the California Supreme Court:

> [I]n construing this, or any statute, we may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does. "Our office ... 'is simply to ascertain and declare' what is in

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[126] *J.A. Jones Construction Co. v. Superior Court (Dai-Ichi Bank Kangyo Bank, Ltd.)* (1994) 27 Cal.App.4th 1568, 1577 [footnotes omitted]. See also Katzman, Judging Statutes (2014) pages 40-41 [noting the criticism that legislative history fails to meet the constitutional requirements of bicameralism (passage by both houses) and presentation (providing a copy to the executive for signature or veto)].

[127] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 11-12.

[128] *Siskiyou County Farm Bureau v. Department of Fish and Wildlife* (2015) 237 Cal.App.4th 411, 420.

[129] See Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 21 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 3) (wherein the author agrees to and takes amendments to "remove all of the provisions related to mediation").

> the relevant statutes, 'not to insert what has been omitted, or to omit what has been inserted.' " (Citation.) "'[A] court . . . may not rewrite the statute to conform to an assumed intention which does not appear from its language.'" (Citation.)[130]

Therefore, since the Legislature excluded language making factfinding or mediation mandatory, it is not within the authority of this Commission to re-write the test claim statute and insert new provisions.

PERB supported its reading of the test claim statute by stating that it was harmonizing the test claim statute with the rest of the Meyers-Milias-Brown Act.[131] However, even when the test claim statute is read in conjunction with the rest of the Act, nothing in the text passed by the Legislature (in 2011 or before) makes factfinding or mediation mandatory. The process of harmonization cannot be used to add terms which the Legislature has not enacted; phrased differently, a person construing an amended statute must seek to harmonize all of the provisions which have been enacted but cannot add new provisions which have not been enacted.

Nor is the Commission persuaded by the arguments of the claimant and of PERB that, since factfinding is referenced in the statutory section as amended by the test claim statute which authorizes an employer to implement its last, best, and final offer, factfinding is therefore mandatory.[132] As amended by the test claim statute, Government Code section 3505.7 authorizes the employer to implement its last, best, and final offer "[a]fter any applicable mediation and factfinding procedures have been exhausted." The use of the term "applicable" means only that; if a procedure is applicable, it must be exhausted, and, if a procedure is not applicable, it need not be exhausted. Government Code section 3505.7 is not the statutory provision which determines whether or not a procedure is applicable; other provisions of the Act do that. Since Government Code section 3505.4 as amended by the test claim statute linked factfinding to mediation, and since mediation under the Act is indisputably voluntary, then factfinding under the test claim statute is voluntary and is not legally compelled by the State. Nothing in Section 3505.7 changes the voluntary nature of mediation under the Act. Government Code section 3505.7 refers to "any applicable mediation and factfinding procedures." Under the claimant's and PERB's reasoning, mediation would also be required (or one of either mediation or factfinding would be required) before an employer could implement its last, best, and final offer. Yet, the legal authorities (cited and quoted above) are unanimous in holding that mediation under the Act is voluntary. Nothing in the claimant's or PERB's analysis explains how the phrase "any applicable mediation and factfinding procedures" can be construed to mean that mediation is voluntary while factfinding is mandatory. The determination of

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[130] *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545.

[131] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 124 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 1).

[132] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 124-125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, pages 1-2).

whether or not mediation or factfinding is voluntary must be determined by reference to other provisions of the Act, not to Section 3505.7.

PERB based its reading in part on the fact that a staffer from the author's legislative office stated in December 2011 (after the test claim statute had been enacted) that mandatory factfinding in all situations was consistent with the legislative intent.[133] Post-enactment statements of intent by legislators and their staff are of little or no legal weight. "The views of an individual legislator or staffer concerning the interpretation of legislation may not properly be considered part of a statute's legislative history, particularly when the views are offered after the statute has already been enacted."[134]

As discussed above, the Committee Reports in fact reveal that the Legislature was well aware of the omission of the mandatory mediation provisions, although that was not the author's original intent in introducing the bill. As the Assembly Committee on Public Employees, Retirement and Social Security memorialized, the amendments taken by the author:

> 1) *Remove all of the provisions related to mediation*, making no changes to existing law.
>
> 2) *Remove the requirements that an employer and employee organization submit their differences to a fact-finding panel* and instead provides employees organizations with the *option* to participate in the fact-finding process established in Government Section 3505.4 which is added by this measure.
>
> 3) Clarify the existing requirement for a public employer to conduct a public impasse hearing prior to imposing its last, best, and final offer.[135]

PERB based its reading in part on the fact that the "majority of interested parties, both employers and labor representatives, also urged a reading of AB 646 that provides for a factfinding request whether mediation occurs or not."[136] The opinions of third parties on what the law ought to be cannot alter the plain language of the test claim statute or express the intent of the Legislature as a whole.

The claimant argues that, even if the language of the test claim statute is unambiguous, then the Commission's reading is still erroneous because it yields an absurd result.[137] The "absurd result" rule is well-established. "If the [statutory] language is clear, courts must generally follow its

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[133] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 2).

[134] *California Highway Patrol v. Superior Court (Allende)* (2006) 135 Cal.App.4th 488, 501.

[135] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 21 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, page 3).

[136] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 2).

[137] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 14-15.

plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend."[138] "'Absurd' means when a statute is obviously not construed in a reasonable and commonsense manner."[139] "We must exercise caution using the 'absurd result' rule; otherwise, the judiciary risks acting as a 'super-Legislature' by rewriting statutes to find an unexpressed legislative intent."[140]

The Commission finds nothing absurd in the plain language of the test claim statute. Prior to the enactment of the test claim statute, the Meyers-Milias-Brown Act contained no provision regarding factfinding. After the enactment of the test claim statute, the Act required factfinding downstream of voluntary mediation. The test claim statute increased the bargaining options available to local government employees under certain circumstances. Although the test claim statute as passed may not have been the ideal envisioned by the bill's sponsor, it was consistent with the sponsor's intent in that (1) factfinding became a part of the Act, and (2) in certain downstream circumstances, an employee organization could require a local government to engage in factfinding.[141] There is nothing absurd in this result.

The Commission finds that Statutes 2011, chapter 680 does not legally compel local agencies to comply with the factfinding provisions of the test claim statute.

2. <u>The Test Claim Statute's Requirement of a Public Hearing Before the Implementation of a Last, Best, and Final Offer Does Not Legally Compel Local Agencies to Hold a Public Hearing.</u>

The test claim statute can arguably be read to state that, if a local government employer seeks to implement its last, best, and final offer, the local government employer is mandated to first hold a public hearing — even if the local government employer opted out of mediation and factfinding. Compare former Government Code section 3505.4 ("a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer") with the test claim statute's Government Code section 3505.7 ("a public agency that is not required to proceed to interest arbitration may, *after holding a public hearing regarding the impasse*, implement its last, best, and final offer") (new language emphasized).

While the test claim statute appears to create the new requirement of a public hearing regarding an impasse, the local government employer would only be obligated to hold the public hearing if the local government employer decided to impose its last, best, and final offer — and the imposition of the last, best, and final offer is a discretionary activity. In *Operating Engineers Local 3 v. City of Clovis,* PERB held that "[p]ursuant to MMBA section 3505.4, once an impasse has been properly reached between the parties, a public agency 'may implement its last, best, and

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[138] *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131.

[139] *People v. Kainoki* (1992) 7 Cal.App.4th Supp.8, 17.

[140] *California School Employees Ass'n v. Governing Board of South Orange County Community College District* (2004) 124 Cal.App.4th 574, 588.

[141] The unambiguous meaning of a statute cannot be altered or ignored merely because the law's sponsor did not understand the ramifications of her bill. "The [absurdity] doctrine does not include substantive errors arising from a drafter's failure to appreciate the effect of certain provisions." Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) page 238.

final offer.' This provision is permissive, not mandatory. Therefore, while the parties are properly at impasse, the City is not obligated to implement its last, best, and final offer." [142] Under state mandates law, the voluntary actions of a local agency do not create a reimbursable state mandate. "[I]f a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement."[143]

The discretionary nature of the imposition of the last, best, and final offer renders the pre-requisite of a public hearing to be discretionary as well; the public hearing, therefore, is not a reimbursable state mandate.

3. <u>There Is No Evidence in the Record That Local Agencies Are Practically Compelled to Engage in Mediation or Factfinding or to Hold a Public Hearing.</u>

The court in *Kern High School District* left open the possibility that a state mandate might be found in circumstances of practical compulsion, where a local entity faced certain and severe penalties as a result of noncompliance with a program that is not legally compelled. The court in *POBRA* explained further that a finding of "practical compulsion" requires a concrete showing in the record that a failure to engage in the activity in question will result in certain and severe penalties and that as a practical matter, local agencies do not have a genuine choice of alternative measures.[144]

The claimant has not submitted any evidence that the claimant was under a practical compulsion to engage in factfinding. There is no evidence in the record that, for example, the claimant would have automatically suffered draconian consequences if it refused to engage in factfinding. Rather, the record reveals that the claimant engaged in voluntary factfinding in or around August 2015 or perhaps mandatory factfinding under a later enacted statute or regulation that is not before the Commission, apparently under the mistaken belief that the test claim statute mandated factfinding.[145]

If a local agency government employer like the claimant and one of its unions reached an impasse, all that the test claim statute required was that the local agency employer engage in factfinding if, as a pre-requisite, the local agency employer previously agreed to voluntary mediation — which the local agency employer was under no obligation to do. Under the test

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[142] Exhibit H, page 72 (*Operating Engineers Local 3 v. City of Clovis*, PERB Case No. SA-CE-513-M, page 5, footnote 5).

[143] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366 ("POBRA").

[144] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367 ("POBRA").

[145] Exhibit D, Claimant's Rebuttal Comments, pages 11-16 (Fact-finding Report & Recommendations, City of Glendora and Glendora Municipal Employees Association, dated August 24, 2015, pages 1-6).

claim statute, a local agency employer who has reached impasse was free to decline mediation (and thus factfinding) and to implement its last, best, and final offer.[146]

In addition, the claimant has not submitted evidence that it is practically compelled to implement a last, best, and final offer which would then trigger the requirement under the test claim statute to hold a public hearing.

V. Conclusion

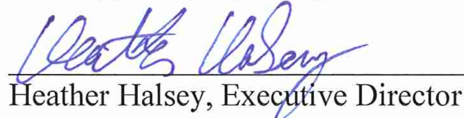
Based on the foregoing analysis, the Commission finds that Statutes 2011, chapter 680, does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. Therefore, the Commission denies this Test Claim.

[146] Government Code section 3505.7, as added by Statutes 2011, chapter 680, section 4.

RE: **Decision**

Local Agency Employee Organizations: Impasse Procedures, 15-TC-01
Government Code Sections 3505.4, 3505.5, and 3505.7;
Statutes 2011, Chapter 680 (AB 646)
City of Glendora, Claimant

On January 27, 2017, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.



Heather Halsey, Executive Director

Dated: February 1, 2017

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code section 44977.5 Statutes 2015, Chapter 400 (AB 375) Filed on December 21, 2016 By Fresno Unified School District, Claimant	Case No.: 16-TC-01 *Certificated School Employees: Parental Leave* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 22, 2017*) (*Served September 26, 2017*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 22, 2017. Art Palkowitz appeared on behalf of the claimant. Kimberly Leahy appeared on behalf of the Department of Finance (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 sections 17500 et seq., and related case law.

The Commission adopted the Proposed Decision to deny the Test Claim by a vote of 7-0, as follows:

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

Summary of the Findings

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

employees who qualify under the California Family Rights Act (CFRA) for parental leave, which may be taken for up to 12 school weeks, due to the birth of the employee's child or the placement of a child with the employee as a result of adoption or foster care. Differential pay is the remainder of the certificated employee's salary after the substitute employee's pay (or the equivalent amount if no substitute is employed) is deducted. The Test Claim alleges reimbursable costs for the differential pay provided to certificated employees, and one-time costs for administrative activities, such as developing and implementing internal policies, training, procedures, and forms.

Although the test claim statute applies uniquely to local school districts and provides a new benefit to certificated employees, a reimbursable state mandate exists only when the state imposes a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution. A new program or higher level of service exists only when the test claim statute requires an increase in the *actual level of service provided to the public*.[1] The courts have consistently held that increases in the cost of providing employee benefits do not increase the actual level of providing a service to the public.[2]

In this case, the requirement to provide differential pay does not increase the level of governmental service provided to the public. The governmental service provided by school districts is public education.[3] Based on the plain language of the test claim statute and the Legislature's placement of section 44977.5, which requires differential pay for parental leave, in the chapter relating to "Employees,"[4] and not in the chapters addressing "Instruction and Services,"[5] the Commission finds that differential pay is a benefit provided solely to certificated employees on parental leave who are *not* engaged in providing educational services to the public.

In addition, the requirement to provide differential pay does not impose increased costs mandated by the state because differential pay is the difference between the certificated employee's salary and the amount paid to a substitute employee (or the equivalent amount if no substitute is employed) after exhaustion of the certificated employee's sick leave and accumulated sick leave. Thus, if a certificated employee earns $200 per day, and a substitute is paid $75 per day, the differential pay to the absent employee is $125 per day during the 12-week authorized absence, after exhausting applicable sick leave. The amount the district spent on the differential pay and the amount paid to the substitute equals the amount the school district budgeted and would have paid the certificated employee if no parental leave were taken. The

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

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

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

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

[5] Division 4 "Instruction and Services," beginning at Education Code section 46000.

district is not incurring *increased* costs for the differential pay. A school district may lose cost savings as a result of the differential pay requirement because before the test claim statute, only the substitute teacher would be paid during the certificated employee's parental leave. The courts, however, have held that article XIII B, section 6 of the California Constitution is not designed to provide reimbursement for a loss of cost savings, but requires "*increased actual expenditures* of limited tax proceeds that are counted against the local government's spending limit."[6]

Moreover, the administrative activities to develop and implement internal policies, procedures, training, and forms, are not mandated by the plain language of the test claim statute. Although a school district may find that administrative activities are necessary to comply with the differential pay requirement, a state-mandated activity must be "ordered" or "commanded" by the state.[7] In addition, calculating and paying differential pay to the employee under the test claim statute is incidental to, and part and parcel of, providing the employee benefit. These activities do not provide an increased level of educational service to the public and therefore, do not constitute a new program or higher level of service.

Accordingly, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

12/21/2016	The Fresno Unified School District (claimant) filed the Test Claim with Commission.[8]
02/14/2017	The Department of Finance filed comments on the Test Claim.[9]
03/15/2017	The claimant filed rebuttal comments.[10]
07/14/2017	Commission staff issued the Draft Proposed Decision.[11]
08/04/2017	The claimant filed comments on the Draft Proposed Decision.[12]
09/06/2017	Commission staff issued the Proposed Decision.
09/15/2017	The claimant filed comments on the Proposed Decision.[13]

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

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

[8] Exhibit A, Test Claim.

[9] Exhibit B, Finance's Comments on the Test Claim.

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

[11] Exhibit D, Draft Proposed Decision.

[12] Exhibit E, Claimant's Comments on the Draft Proposed Decision.

[13] Claimant's Comments on the Proposed Decision: https://csm.ca.gov/matters/16-TC-01/doc10.pdf. These comments were not included in the decision since they were submitted

II. Background

This Test Claim addresses Statutes 2015, chapter 400, which requires school districts to provide differential pay to K-12 certificated employees for purposes of maternity and paternity (parental) leave during the 12-week protected leave period under the California Family Rights Act (CFRA) after the employee's sick leave and accumulated sick leave has been exhausted. Differential pay is the remainder of the certificated employee's salary after the substitute employee's pay (or the equivalent amount if no substitute is employed) is deducted.

Preexisting law provides certificated employees with various types of paid and unpaid leave that may be used for a disability related to pregnancy and childbirth, and unpaid parental leave to care for a newly born or adopted child or foster child.

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

1. Pregnancy Disability Leave

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

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

Unless the school district participates in the State Disability Insurance Program (SDI),[14] the employee must use available sick leave to be paid during disability due to pregnancy. Sick leave accrues at 10 days per year for full-time employees, and proportionately less for part-time employees.[15] Unused sick leave accumulates from year to year with no cap and can be transferred (provided the employee worked for a district for at least a year), if the employee

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after the close of the comment period, however the issues raised were addressed at the September 22, 2017 Commission hearing on this matter.

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

[15] Education Code section 44978.

subsequently accepts a certified position with another school district.[16] School districts are authorized to adopt rules and regulations regarding proof of illness or injury.[17]

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

If the certificated employee has exhausted her available sick leave and remains on temporary leave due to pregnancy, miscarriage, childbirth, and childbirth recovery, there were two ways, under preexisting law that school districts could pay her for up to five months of the absence.[18]

Under the first method, the employee is paid the difference between her salary and the sum that is actually paid a substitute employee employed to fill the position during her absence. If no substitute is employed, the certificated employee receives this "differential pay" as though the substitute had been employed. The district must make every reasonable effort to secure the services of a substitute employee.[19] An employee may not be provided more than one five-month period per illness or accident.[20] If a school year ends before the five-month period is exhausted, the employee may take the balance of the leave in a subsequent school year.[21] The differential pay statute was amended in 1998 so that the employee's sick leave, including accumulated sick leave, and the five-month leave period run consecutively, not concurrently.[22] The 1998 amendment was the subject of the Commission's *Differential Pay and Reemployment*, 99-TC-02, Statement of Decision, discussed below.

Under the second method, any school district may adopt and maintain in effect a rule that provides 50 percent or more of the employee's regular salary during the absence for up to five months.[23]

3. <u>Unpaid Parental Leave</u>

Both federal (Federal Family and Medical Leave Act, or FMLA)[24] and state law (CFRA)[25] authorize up to 12 weeks of unpaid leave to employees who have worked for an employer for at least 12 months prior to starting the leave, and have actually worked (not counting paid or unpaid

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[16] Education Code section 44979.

[17] Education Code section 44978.

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

[19] Education Code section 44977(a).

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

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

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

[23] Education Code section 44983.

[24] 29 United States Code section 2611, et seq.

[25] Government Code sections 12945.2 and 19702.3.

time off) 1,250 hours in the past 12 months. Employees may take up to 12 workweeks of unpaid leave in a 12-month period for various family and medical reasons, including for "the birth of a child of the employee, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, or the serious health condition of a child of the employee."[26] CFRA only applies to school districts or private employers who employ 50 employees within 75 miles of the worksite where that employee is employed.[27] Upon granting the leave request, employers must provide the employee a guarantee of employment in the same or a comparable position when the leave period ends.[28]

If the employee is on pregnancy disability leave, she may take her 12 weeks of unpaid parental leave under CFRA after her physician clears her to return to work. If she is not on pregnancy disability leave, she may take her 12 weeks of unpaid parental leave upon the birth or placement of her child or at any time during the subsequent year.[29]

To receive pay during CFRA leave, the employee must use accrued vacation or other accrued leave. For leave in connection with a birth, adoption, or foster care of a child, sick leave may only be used if mutually agreed to by the employer and the employee.[30]

Although most school districts do not participate in the SDI program, employees of those that do may receive paid pregnancy disability benefits of roughly half of their current salary. For a pregnancy without complications, the benefit period is generally from four weeks before the due date to six weeks after the delivery. If the pregnancy prevents the employee from working before or after that period, she may receive benefits for a longer period of time if her doctor verifies the need for additional leave.[31]

B. Parental Leave for Male Certificated Employees Under Preexisting Law

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

Male certificated employees may also be able use their paid sick leave for a leave of absence due to "personal necessity." This leave may last up to seven days unless more time is specified in the

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

[27] Government Code section 12945.2(b).

[28] Government Code section 12945.2(a).

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

[30] Government Code section 12945.2(e).

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

district's bargaining agreement. School districts adopt rules and regulations regarding the manner and proof of personal necessity.[32]

C. The Test Claim Statute – Differential Pay for Certificated Employees on Parental Leave

The test claim statute, Statutes 2015, chapter 400, added section 44977.5 to the Education Code, effective January 1, 2016, to provide differential pay to certificated K-12 school district employees who qualify for CFRA and who take maternity or paternity leave for up to 12 school weeks due to the birth of their child or placement of a child with them through adoption or foster care, as follows:[33]

> (a) During each school year, when a person employed in a position requiring certification qualifications has exhausted all available sick leave, including all accumulated sick leave, and continues to be absent from his or her duties on account of maternity or paternity leave pursuant to Section 12945.2 of the Government Code [the CFRA] for a period of up to 12 school weeks, whether or not the absence arises out of or in the course of the employment of the employee, the amount deducted from the salary due him or her for any of the additional 12 weeks in which the absence occurs shall not exceed the sum that is actually paid a substitute employee employed to fill his or her position during his or her absence or, if no substitute employee was employed, the amount that would have been paid to the substitute had he or she been employed. The school district shall make every reasonable effort to secure the services of a substitute employee.
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> (b) For purposes of subdivision (a):
>
> (1) The 12-week period shall be reduced by any period of sick leave, including accumulated sick leave, taken during a period of maternity or paternity leave pursuant Section 12945.2 of the Government Code.
>
> (2) An employee shall not be provided more than one 12-week period per maternity or paternity leave. However, if a school year terminates before

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[32] Education Code section 44981. Female employees may also use paid sick leave for absences due to personal necessity.

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

the 12-week period is exhausted, the employee may take the balance of the 12-week period in the subsequent school year.

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

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

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

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

Under the test claim statute, the certificated employee is required to exhaust existing and accumulated sick leave benefits before he or she is eligible for differential pay during the 12-weeks of parental leave. Differential pay is the remainder of the certificated employee's salary after the substitute employee's pay is deducted. As the statute states, differential pay is "the amount deducted from the salary due [the certificated employee] for any of the additional 12 weeks in which the absence occurs [and] shall not exceed the sum that is actually paid a substitute employee employed to fill his or her position during his or her absence or, if no substitute employee was employed, the amount that would have been paid to the substitute had he or she been employed." For example, if a certificated employee earns $200 per day, and a substitute is paid $75 per day, the differential pay to the absent certificated employee is $125 per day during the 12-week authorized absence, after exhausting existing and accumulated sick leave.[34] Therefore, after the sick leave is exhausted, the differential pay to the certificated employee on leave and the substitute's pay equals the amount the school district budgeted for and would have paid the certificated employee if no parental leave were taken. As recognized in the May 26, 2015 analysis of the bill by the Assembly Appropriations Committee, the statute may result in a loss of cost savings to the district as a result of not paying the employee on leave:

> Employer costs based on the differential pay program should not exceed what is normally paid to a school employee who would otherwise be working; however,

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

> this bill may place additional cost pressures on school district budgets to the extent they no longer experience cost savings as a result of not paying employees during a leave of absence due to maternity or paternity leave.[35]

Similarly, the Senate Appropriations Committee states that school districts "will not realize the savings attributed to unpaid maternity and paternity protected leave that they currently experience. . . . [E]mployer costs based on the differential pay program should not exceed what is normally paid to a school employee who would otherwise be working."[36]

The initial reason for enacting the bill, according to the author, is stated in the legislative history:

> According to the author, currently, certificated school employees can only take up to six or eight weeks of paid leave when they have a baby. Six or eight weeks is insufficient time for a new parent to care for and bon [sic] with their child. If a certificated employee wants to take off more time to spend with their newborn, then they must take unpaid leave.
>
> [¶] . . . [¶]
>
> The U.S. is the only industrialized nation that doesn't mandate that parents of newborns get paid leave.[37]

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

> According to the author's office, "Forcing teachers and other certificated employees to take entirely unpaid leave after only six or eight weeks of maternity leave, or none in the case of a new father, can lead to several issues for the employee, the school district, and society. Less parental leave has been positively correlated with lower cognitive test scores and higher rates of behavioral problems. A lack of proper postpartum support in the form of reasonable parental leave tends to lead to a delay in childhood immunizations, a decrease in the duration and likelihood of breastfeeding, increased financial hardship, and a higher chance of postpartum depression." The author's office indicates that six or eight weeks is insufficient time for a new parent to care for and bond with their child. If a certificated employee wants to take off more time to spend with their newborn, then they must take unpaid leave.[38]

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

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

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

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

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

On July 31, 2003, the Commission adopted a decision partially approving *Differential Pay and Reemployment*, 99-TC-02, a test claim on Statutes 1998, Chapter 30, which amended Education Code section 44977 and added Education Code 44978.1.

As originally enacted before 1975, Education Code section 44977 required that certificated employees who are absent from work on account of illness or accident (including pregnancy, miscarriage, childbirth, and childbirth recovery) to receive differential pay (i.e., the difference between the employee's salary and the sum paid to the substitute employee who filled in during the absence) for a period of up to five school months. This requirement was subject to alternative interpretations. Education Code section 44978, in addition to providing a minimum of ten days of annual sick leave for full-time certificated employees, states that "Section 44977 relating to compensation, shall not apply to the first 10 days of absence on account of illness or accident." Thus, differential pay in section 44977 was calculated by many school districts to run after the exhaustion of annual sick leave, and *concurrently* with any accumulated sick leave the teacher may have carried over from previous years. This interpretation was supported by case law in the First and Second District Courts of Appeal and several opinions of the Attorney General.[39]

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

The Commission concluded that the change in calculating differential pay from concurrent to consecutive with accrued sick leave may result in an increased cost to school districts in some instances, but does not provide an increased level of service to the public. Therefore, the Commission found that the 1998 amendment to Education Code section 44977 did not impose a new program or higher level of service within the meaning of article XIII B, section 6 for the amount of differential pay to the employee.[40] However, the Commission approved reimbursement for the one-time administrative activity for changing the calculation of differential pay from running concurrently to consecutively with accumulated sick leave.[41]

The 1998 test claim statute also added Education Code section 44978.1, which states that certificated employees who remain unable to return to their original duties due to illness or injury after all sick leave and differential pay is exhausted shall, if not placed in another position, be

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

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

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

placed on a reemployment list. The Commission concluded that Education Code section 44978.1 imposed a reimbursable state-mandated program for school districts to:

- When a certificated employee is not medically able to resume the duties of his or her position following the exhaustion of all sick leave and the five-month differential pay period described in Education Code section 44977 has been exhausted, place the employee, if not placed in another position, on a reemployment list for 24 months for probationary employees, or 39 months for permanent employees. (This activity includes the one-time activity of establishing a reemployment list for this purpose, and ongoing activities of maintaining the list.)
- When the employee is medically able, return the employee to a position for which he or she is credentialed and qualified. (This activity includes the administrative duties required to process the re-employment paperwork, but not reimbursement of salary and benefits for the employee once they return to work.)[42]

Costs for the *Differential Pay and Reemployment* program are currently reimbursed under the education mandates block grant.[43]

III. Positions of the Parties

A. Fresno Unified School District

The claimant maintains that the test claim statute imposes a reimbursable state-mandated program on school districts under article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimant alleges reimbursable costs for differential pay for up to 12 school weeks to certificated school district employees who exhaust their sick leave. The claimant also alleges one-time administrative costs for developing and implementing internal policies, training, and procedures and forms. The claimant's declaration, filed under penalty of perjury, states that the test claim statute resulted in total actual costs to the claimant of $17,972.86 during 2016.[44]

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

> The pending test claim in providing maternity and paternity leave, implements the state policy to benefit a child's future mental, physical, social and emotional health in life impacted by the strength of the relationship with both of the child's parents. The test claim does not involve concurrent and consecutive sick leave that is limited to a change in calculating differential pay.[45]

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

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

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

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

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

1. Maternity leave is essential, not only for a mother's full recovery from childbirth, but also to facilitate a stronger mother-child bond.
2. A child's ability to succeed in school and in life is impacted by the strength of the relationship with the primary caretaker. This relationship affects a child's future mental, physical, social, and emotional health. Additionally, this relationship is founded on the nonverbal emotional communication between child and parent, known as the attachment bond, which occurs naturally as a baby's needs are cared for. A secure attachment bond ensures that a child will feel secure, understood, and safe; this results in eagerness to learn, healthy self-awareness, trust, and empathy.
3. Overall, paid family leave helps keep people in the workforce after they have children. When more workers are able to take leave, they are more likely to choose to remain in the labor market; and paid parental leave is associated with higher employment in economies around the world. (AB 375; Assembly Third Reading – May 4, 2015)
4. Forcing teachers and other certificated employees to take entirely unpaid leave after only six to eight weeks of maternity leave, or none in the case of a new father, can lead to several issues for the employee, the school district, and society. Less parental leave has been positively correlated with lower cognitive test scores and higher rates of behavioral problems. A lack of proper postpartum support in the form of reasonable parental leave tends to lead to a delay in childhood immunizations, a decrease in the duration and likelihood of breastfeeding, increased financial hardship, and a higher chance of postpartum depression.
5. The author's office indicates that six or eight weeks is insufficient time for a new parent to care for and bond with their child. If a certificated employee wants to take off more time to spend with their newborn, then they must take unpaid leave. (Senate Rules Committee, July 8, 2015).[46]

The claimant's rebuttal comments and comments on the Draft Proposed Decision distinguish *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, and *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, that were cited by Finance to argue that the test claim statute does not impose a new program or higher level of service. The claimant argues that unlike the statutes in those cases, this test claim statute imposes unique requirements on school districts that constitute a state-mandated new program or higher level of service.[47]

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

[47] Exhibit C, Claimant's Rebuttal Comments, pages 3-4. Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 6. The Claimant's Rebuttal Comments (Exhibit C, p. 3, fn. 1) also state: "Finance's comments failed to comply with Cal. Code Regs., tit. 2, §§1183.2 and 1187.5 and shall be excluded from the Commission's ultimate findings and the record." These regulations require all representations of fact, including written comments and supporting documentation to be signed at the end of the document by an authorized representative, with a declaration that they are true and complete to the best of the representative's personal knowledge

In comments on the Draft Proposed Decision, the claimant maintains that the test claim statute applies uniquely to school districts and increases the level of service to the public "in providing higher student test scores, reduces gap in education, avoids costly turnover, and retains the valued expertise, skills, and perspective of teachers who are mothers."[48] Citing a Senate analysis of the test claim statute, the claimant states that less parental leave has been positively correlated with lower cognitive test scores and higher rates of behavioral problems, and other benefits to the children of mothers who used maternity leave. The claimant also cites: (1) the part of the legislative history expressing support from the California Teachers Association, which touted the benefits of maternity leave and paid family leave, and (2) legislative history from the bill's author that six or eight weeks of leave is insufficient time for a parent to care for and bond with a child. The claimant also alleges that school teachers who take parental leave are more likely to return to the classroom and provide an "experienced level of service" to the public in reducing the time that substitute teachers, who are often less experienced or un-credentialed, are in the classroom.[49] "Previous mandates that denied reimbursement did not exclusively apply to public education or provide a higher level of service. (unemployment insurance, worker's compensation, pensions, and death benefits.)"[50]

The claimant distinguishes the activities required by this test claim statute from those in the *Differential Pay and Reemployment*, 99-TC-02, test claim, which the Commission found did not provide an increased level of service to the public, though they may have resulted in increased costs to school districts in some instances. According to the claimant:

> The pending test claim in providing maternity and paternity leave, implements the state policy to benefit a child's educational performance, future mental, physical, social, and emotional health in life, impacted by the strength of the relationship with both of the child's parents. The test claim does not involve concurrent and consecutive sick leave that is limited to a change in calculating differential pay.[51]

The claimant also alleges that the test claim statute results in increased costs mandated by the state because school districts were not required to pay differential leave before the test claim statute, but now must do so for three months during the employee's leave.[52] The claimant contends that the school district budget is not the decisive factor, but actual costs, and the shift in

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or information or belief. Although the Finance's comments are not signed under penalty of perjury with the declaration, the issues presented in this Test Claim are pure questions of law. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.) Finance's comments relevant to test claim findings contain arguments interpreting the law and do not include representations of fact.

[48] Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 3.

[49] Exhibit E, Claimant's Comments on the Draft Proposed Decision, pages 3-4.

[50] Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 5.

[51] Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 6.

[52] Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 5.

program funding from the state to a local entity violates the intent of article XIII B, section 6 of the California Constitution.[53]

The claimant submitted comments in response to the Proposed Decision, objecting to the citation to an unpublished decision, *CSAC-Excess Insurance Authority v. Commission on State Mandates,* on the ground that the citation violates California Rule of Court 8.1115. The claimant included a declaration regarding the increased costs for differential pay, arguing that it is inaccurate to say that the claimant does not incur increased costs for differential pay, and that due to the test claim statute, the claimant "has been required to develop and implement internal policies, training, procedures, and forms relating to the administration of the Parental Leave Program. (One-time)"[54]

B. Department of Finance

Finance states that recognizing one-time administrative activities (such as for developing and implementing internal policies, training, procedures and forms to comply with the statute) as reimbursable activities would be consistent with the Commission's 2003 Statement of Decision in *Differential Pay and Reemployment,* 99-TC-02. Finance anticipates that ongoing costs associated with the administrative activities would "likely be less than the low tens of thousands of dollars annually."[55]

Finance also argues that the cost of differential pay to certificated employees on maternity or paternity leave is not a state-reimbursable cost for the same reasons stated in the Statement of Decision for the Test Claim, *Differential Pay and Reemployment,* 99-TC-02. Courts have found that a higher cost of employee compensation is not the same as a higher cost of providing a service to the public.[56]

Finance did not file comments on the Draft Proposed Decision.

IV. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped'

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[53] Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 5.

[54] Claimant's Comments on the Proposed Decision, Declaration of Kim Kelstrom, September 15, 2017, page 2: https://csm.ca.gov/matters/16-TC-01/doc10.pdf. These comments were not included in the decision since they were submitted after the close of the comment period, however the issue regarding increased costs was addressed at the September 22, 2017 Commission hearing on this matter.

[55] Exhibit B, Finance's Comments on the Test Claim, page 1.

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

to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[57] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[58]

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[59]
2. The mandated activity constitutes a "program" that either:
   a. Carries out the governmental function of providing a service to the public; or
   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[60]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[61]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[62]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[63] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[64] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an

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

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

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

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

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

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

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

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

"equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[65]

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

As stated in the background, Education Code section 44977.5, as amended by Statutes 2015, chapter 400, provides for differential pay for up to 12 weeks to a certificated school employee who is absent due to parental leave, after the exhaustion of sick leave. "Differential pay" is the remainder of the certificated employee's salary after the substitute employee's pay (or the equivalent amount if no substitute is employed) is deducted.

The Commission finds that the differential pay required by the test claim statute increases an employee benefit, but does not increase the level of governmental service provided to the public, nor does it result in increased costs mandated by the state. Thus, the differential pay required by the test claim statute does not constitute a reimbursable state-mandated program.

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

The courts have consistently held that increases in the cost of providing employee compensation or benefits are not subject to reimbursement as state-mandated new programs or higher levels of service within the meaning of article XIII B, section 6. Rather, a new program or higher level of service exists only when the test claim statute requires an increase in the *actual level of governmental service provided to the public*.[66]

In 1987, the California Supreme Court decided *County of Los Angeles v. State of California,*[67] and for the first time, defined a " new program or higher level of service" within the meaning of article XIII B, section 6. Counties were seeking reimbursement for legislation that required local agencies to provide the same level of workers' compensation benefits to their employees as employees of private individuals or organizations receive. The Supreme Court recognized that workers' compensation is not a new program and was left to decide whether the legislation imposed a higher level of service on local agencies.[68] Although the court defined a "program" to

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

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

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

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

include "laws which, to implement a state policy, impose unique requirements on local governments," the court emphasized that a new program or higher level of service requires "state mandated increases in the services provided by local agencies in existing programs."[69]

> Looking at the language of article XIII B, section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. *Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs."*[70]

The court continued:

> The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility *for providing services which the state believed should be extended to the public*.[71]

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

> Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers … In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program … Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[72]

Seventeen years later, the California Supreme Court summarized its holding in *County of Los Angeles* by stating that although "[t]he law increased the cost of employing public servants, … it did not in any tangible manner increase the level of service provided by those employees to the public."[73]

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

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

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

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

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

In 1998, the Third District Court of Appeal decided *City of Richmond v. Commission on State Mandates*,[74] involving legislation requiring local governments to provide death benefits to local safety officers under both the Public Employees Retirement System (PERS) and the workers' compensation system. This resulted in survivors of local safety members of PERS who were killed in the line of duty receiving both a death benefit under worker's compensation and a special death benefit under PERS, instead of the greater of the two as under prior law. The court held that the legislation did not constitute a new program or higher level of service even though the benefits might generate a higher quality of local safety officers and thereby, in a general and indirect sense, provide the public with a higher level of service by its employees.[75] The court in *City of Richmond* stated:

> Increasing the costs of providing services cannot be equated with requiring an increased level of service under [article XIII B,] section 6 … A higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public.[76]

The court further clarified that "[a]lthough a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate."[77]

Two other published cases have reached the same conclusion regarding employee compensation or benefits. In *City of Anaheim*, the court found that a temporary increase in PERS benefits for retired employees, resulting in higher contribution rates for local government, did not constitute a new program or higher level of service to the public. [78] As the court said: "City is faced with a higher cost of compensation to its employees. This is not the same as a higher cost of providing services to the public."[79] And in *City of Sacramento*, the California Supreme Court determined that the requirement to provide unemployment insurance to the city's employees was not a service to the public.[80]

In 2004, the California Supreme Court summarized the above line of cases in *San Diego Unified School Dist.*, as those "in which the cost of employment was increased but the resulting governmental services themselves were not directly enhanced or increased."[81] The Supreme Court stated: "simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order

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

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

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

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

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

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

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

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

constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514."[82, 83]

Based on these cases, a new program or higher level of service requires more than increased costs experienced uniquely by local government. A new program or higher level of service exists only if the state has mandated an increase in the actual level of governmental service provided to the public.[84] For example, the courts have found a reimbursable new program or higher level of service when the state imposed a new requirement on local agencies to provide protective clothing and safety equipment to firefighters "because the increased safety equipment apparently was designed to result in more effective fire protection . . . ."[85] In addition, courts have found a reimbursable new program or higher level of service when the state mandated school districts to take specific steps to measure and address racial segregation in public schools. The court found this was a higher level of service to the extent the requirements exceeded federal law and case law requirements by mandating school districts to undertake defined actions that were merely advisory under prior law.[86] The California Supreme Court has held that requirements to immediately suspend and recommend expulsion for pupils who possess a firearm at school were intended to provide a new program or higher level of service to the public in the form of "safer schools for the vast majority of students."[87] The courts have also found a new program or higher level of service when the state shifted the cost of educating pupils at state schools for the severely handicapped to local school districts; a program that was previously administered and funded entirely by the state.[88]

In this case, the claimant argues that the test claim statute provides a service to the public, citing the legislative history of the test claim statute that extols the benefits of parental leave to families

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

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

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

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

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

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

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

and society. According to the claimant: "The pending test claim in providing maternity and paternity leave, implements the state policy to benefit a child's future mental, physical, social and emotional health in life impacted by the strength of the relationship with both of the child's parents."[89]

However, the governmental service provided by school districts is public education,[90] which has not been increased or enhanced by the test claim statute. In fact, the Legislature placed section 44977.5 in the part of the Education Code that relates to "Employees"[91] and *not* in the part that relates to "Instruction and Services" for pupils.[92] Based on the plain language of the test claim statute and its placement of section 44977.5, the differential pay is a benefit provided solely to certificated employees who are *not* engaged in providing educational services to the public. In this regard, the test claim statute resembles the statutes at issue in the cases that involved unemployment insurance,[93] workers compensation,[94] pensions,[95] and public safety death benefits,[96] in which reimbursement was denied. In those cases, employment benefits were also provided to employees not engaged in their official duties. As recognized by the California Supreme Court, employee benefits might generate a higher quality of local employees and, "in a general and indirect sense," provide the public with a higher level of service.[97] But the purpose of article XIII B, section 6 is to require reimbursement to local government for the costs of carrying out functions peculiar to government, not for compensating local government employees. "A higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public."[98]

The claimant now argues, however, that the statute provides a higher level of service to the public because teachers who take parental leave are more likely to return to the classroom and provide an "experienced level of service" to pupils, and reduce the time that substitute teachers,

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[89] Exhibit C, Claimant's Rebuttal Comments, pages 2, 4; Exhibit E, Claimant's Comments on the Draft Proposed Decision, pages 3-4.

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

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

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

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

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

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

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

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

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

who are often less experienced or un-credentialed, are in the classroom.[99] The claimant's argument is not supported by the evidence in the record. The assertion that the test claim statute will result in teachers returning to the classroom, thereby reducing substitute teacher time, is not supported by the record. Although the legislative history of the test claim statute recognizes the possibility that differential pay may result in more employees staying in the labor market,[100] the bill analysis by the Senate Appropriations Committee states that the benefit will likely provide an incentive for the certificated employee to be absent longer than if the leave were unpaid:

> The expanded differential pay requirement will likely provide employees on maternity and paternity leave an incentive to be absent longer than they otherwise would have been if they were not paid during this time. However, the strength of this incentive will depend on the how long the employee can go without earning his or her full salary.[101]

In addition, the claimant provides no evidence for the assertion that a permanent certificated employee provides a higher and more "experienced" level of service than a substitute employee.[102] To the extent that this may be true in some cases, it only provides the public with a higher level of service "in a general and indirect sense," similar to how a pension,[103] or public safety death benefits[104] might help to "generate a higher quality" of public employees but the purpose of article XIII B, section 6 of the California Constitution is to require reimbursement to local government for the costs of carrying out functions peculiar to government, not to

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[99] Exhibit E, Claimant's Comments on the Draft Proposed Decision, pages 3-4.

[100] Assembly Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended May 4, 2015, page 3. Support for AB 375 from the California Teachers Association stated: "when more workers are able to take leave, they're more likely to choose to remain in the labor market, and paid parental leave is associated with higher employment in economies around the world."

[101] Senate Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended July 8, 2015, page 3.

[102] According to Education Code section 41401(d): ""Teacher" means an employee of a school district, employed in a position requiring certification qualifications, whose duties require him or her to provide direct instruction to pupils in the schools of that district for the full time for which he or she is employed. "Teacher" includes, but is not limited to, teachers of special classes, teachers of exceptional children, teachers of pupils with physical disabilities, teachers of minors with intellectual disabilities, <u>substitute teachers</u>, ..." Emphasis added.

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

[104] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1195. One of the arguments the City of Richmond made and the court rejected was that the death benefit at issue was provided "to generate a higher quality of local safety officers and thus provide the public with a higher level of service." In discussing the *City of Richmond* case, the California Supreme Court said this employee benefit provided a service to the public in a "general and indirect" sense. *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876.

compensate local government employees. "A higher cost to local government for compensating its employees is not the same as a higher cost of providing services to the public."[105]

Thus, the test claim statute does not directly enhance or increase the level of educational services provided by school districts to the public.[106] The statute simply provides an employee benefit. The claimant also suggests that the test claim statute shifted the financial responsibility for paying employee benefits from the state to local school districts, thereby requiring reimbursement under article XIII B, section 6.[107] The courts have determined that reimbursement under article XIII B, section 6 is required, not only when the state mandates local government to perform new activities or to increase the level of service provided to the public, but also when the state compels local government to accept financial responsibility in whole or in part for a governmental program which was funded and administered entirely by the state before the advent of article XIII B, section 6.[108] The test claim statute, however, has not shifted an educational program from itself to local school districts, and the State has never been responsible for paying the salary and benefits (including differential pay) of local employees. Paying salaries and benefits to certificated employees has always been the responsibility of the local school district.[109] Thus, the state has not shifted the financial responsibility of a governmental program to the local districts.

Therefore, the Commission finds that the differential pay required by the test claim statute does not impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

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

The claimant alleges that the test claim statute results in increased costs mandated by the state, and filed a declaration by the Executive Officer of Fiscal Services from Fresno Unified School District, who declares under penalty of perjury that the district incurred actual costs of $17,972.86 during 2016 to comply with the test claim statute.[110] The claimant, however, does not identify which expenses were actually incurred, or provide any evidence of the cost of each alleged activity to implement the test claim statute.

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

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

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

[107] Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 5.

[108] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 91.

[109] Education Code sections 45022, et seq.

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

their limited tax revenues that are counted against the local government's annual spending limit in accordance with articles XIII A and XIII B.[111] The Commission finds, as a matter of law, that the differential pay required by the test claim statute does not result in actual increased costs mandated by the state within the meaning of article XIII B, section 6.

As indicated in the Background, after a certificated employee's sick leave and accumulated sick leave have been exhausted, differential pay is the remainder of the certificated employee's salary after the substitute employee's pay (or the equivalent amount if no substitute is employed) is deducted. Substitute employees are generally paid by the day.[112] Thus, if a certificated employee earns $200 per day, and a substitute is paid $75 per day, the differential pay to the absent certificated employee is $125 per day during the 12-week authorized absence, after exhausting sick leave and accumulated sick leave. The amount spent by the district on the differential pay and the amount paid to the substitute equals the amount the school district budgeted and would have paid the certificated employee if the certificated employee had not taken parental leave.[113] Thus, the district is not incurring an *increased* cost for the differential pay. Rather, the district is simply paying part of the certificated employee's budgeted salary to the certificated employee, and part to the substitute. Thus, the test claim statute does not require "increased actual expenditures" of a school district's limited tax revenues that are counted against the district's annual spending limit for the differential pay.

As recognized in the legislative history of the test claim statute, a school district may lose cost savings as a result of the differential pay requirement because before the test claim statute, only the substitute would be paid during the certificated employee's parental leave.[114] The courts, however, have held that article XIII B, section 6 is not designed to reimburse a loss of cost savings. In *County of Sonoma v. Commission on State Mandates*, the court concluded that reimbursement is not required for a loss of revenue; "it is the expenditure of tax revenues of local

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

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

[113] Under the Education Code, school districts must adopt their annual budgets by July 1. (Ed. Code, § 42127(a)(2)(A).) Between 50 to 60 percent of state-apportioned district funds are required to be spent on salaries of certificated classroom teachers, which is included in the district's annual budget. (Ed. Code, §§ 41370, 41372(b); and Exhibit F, California Department of Education, California School Accounting Manual (2016) pages 210-1 – 210-19. The manual requires budgeting for certificated employees separately: http://www.cde.ca.gov/fg/ac/sa/documents/csam2016complete.pdf (accessed on May 31, 2017).)

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

governments that is the appropriate focus of section 6."[115] In that case, several counties challenged a Commission decision denying reimbursement for a statute that reduced property taxes previously allocated to local governments and simultaneously placed, in an amount equal to the amount reduced, into the Educational Revenue Augmentation Fund for distribution to school districts.[116] The court found that the counties' tax revenues were not expended. "No invoices were sent, no costs were collected, and no charges were made against the counties . . ."[117] As the court explained, reimbursement is only required when a test claim statute results in increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit:

> An examination of the intent of the voters and the language of Proposition 4 [the source of article XIII B, section 6] itself supports our conclusion that Proposition 4 was aimed at controlling and capping government spending, not curbing changes in revenue allocations [between counties and school districts]. Section 6 is an obvious compliment to the goal of Proposition 4 in that it prevents the state from forcing extra programs on local governments in a manner that negates their careful budgeting of expenditures. A forced program that would negate such planning is one that results in *increased actual expenditures* of limited tax proceeds that are counted against the local government's spending limit. Section 6, located within a measure aimed at limiting expenditures, is expressly concerned with 'costs' incurred by local government as a result of state-mandated programs, particularly when the costs of compliance with a new program restrict local spending in other areas.[118]

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

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

The claimant alleges that the test claim statute mandates a new program or higher level of service for administrative activities, such as developing and implementing internal policies, training, and adopting forms to administer differential pay for certificated employees on maternity and paternity leave.[119] Finance states that one-time reimbursement for these types of administrative activities would be consistent with the Statement of Decision for the *Differential Pay and*

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

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

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

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

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

Reemployment Program, 99-TC-02.[120] In that decision, the Commission approved reimbursement for the one-time administrative activity of changing the process for calculating the five-month differential pay period from running concurrently to consecutively with accumulated sick leave.[121]

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

Developing and implementing internal policies, procedures, training, and forms, is not mandated by the plain language of the test claim statute. The test claim statute states in pertinent part: "…the amount deducted from the salary due … [the certificated employee] for any of the additional 12 weeks in which the absence occurs shall not exceed the sum that is actually paid a substitute employee employed to fill his or her position during his or her absence."[122] Although a school district may find that administrative activities are necessary to comply with the requirement to provide differential pay, a state-mandated activity must be "ordered" or "commanded" by the state.[123]

Moreover, the administrative activities of calculating and paying the differential salary under the test claim statute are incidental to, and part and parcel of, providing the employee benefit. These activities do not result in an increased level of educational services provided to the public and thus, do not constitute a new program or higher level of service. "Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate."[124] As clarified by the Supreme Court in the 2004 *San Diego Unified School District* case, incidental aspects of law that are designed to implement a statute, like the administrative activities in this case, are not eligible for reimbursement under article XIII B, section 6.[125]

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

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[120] Exhibit B, Finance's Comments on the Test Claim, page 1.

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

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

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

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

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

arbitrary in itself.[126] In addition, the Statement of Decision in *Differential Pay and Reemployment*, 99-TC-02, was adopted before the California Supreme Court clarified the law on this issue in the *San Diego Unified School District* case.[127]

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

V. Conclusion

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

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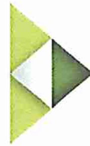
[126] *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 776-777; 72 Opinions of the California Attorney General 173, 178, footnote 2 (1989) ["We do not question the power of an administrative agency to reconsider a prior decision for the purpose of determining whether that decision should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

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



RE: **Decision**

Certificated School Employees: Parental Leave, 16-TC-01
Education Code Section 44977.5;
Statutes 2015, Chapter 400 (AB 375)
Fresno Unified School District, Claimant

On September 22, 2017, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

Heather Halsey, Executive Director

Dated: September 26, 2017