January 6, 2000

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

Subject: Test Claim CSM-4501 and Portions of CSM-4469,
"School Site Councils and Brown Act Reform"

Dear Ms. Higashi:

At the Commission on State Mandates (COSM) February 24, 2000 meeting, COSM members will hear the "School Site Councils and Brown Act Reform" test claim. While the workload of my office generally precludes our involvement in test claims before the COSM, the broad precedent-setting nature of this claim deserves review and comment.

The COSM's staff analysis recommends approving as a mandate certain costs associated with four programs that the Legislature designed to be optional—Native American Indian Education, Migrant Education, Federal Indian Education, and Compensatory Education. The COSM staff bases its recommendation upon a finding that the "funding from these programs is significant and that if school districts do not participate . . . the funding is lost." Below, we discuss why we believe such a finding by the COSM would be contrary to the (1) requirements of Article XIII B Section VI of the California Constitution (Constitution) and (2) California court analyses in *Hayes* and *City of Sacramento*.[1] We also discuss other state programs which might be construed to be "mandates," under the reasoning in the staff analysis.

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[1] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 75; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1581-1582.

Contrary to the Constitution

The purpose of California's mandate reimbursement requirement is to prevent the state from transferring the cost of government from itself to local agencies. Nothing in the history or wording of the reimbursement requirement, or the voter pamphlet analysis and arguments developed for Proposition 4 (the initiative which placed it into the Constitution), suggests that this reimbursement requirement should be construed as constraining the ability of the state to offer fiscal *incentives* to local governments to operate new programs or to change policies.

Article IX of the California Constitution makes the Legislature responsible for promoting education "by all suitable means" and specifically requires the Legislature to provide for a public school system. Because Proposition 4 did not modify this constitutional obligation to promote education, these two provisions of the Constitution (reimbursement and promotion of education) must be read together to give them both meaning. Accordingly, while the Constitution *prevents* the Legislature from issuing unreimbursed directives to school districts, it still *requires* the Legislature to promote education by all suitable means. One obvious way to promote education is to offer fiscal incentives for voluntary compliance with state education goals. Interpreting Article XIII B so broadly as to require the Legislature to reimburse costs incurred by voluntary school programs (1) stretches the obligation of the reimbursement requirement beyond its plain meaning and (2) decreases the Legislature's ability to carry out its constitutional obligations under Article IX.

Contrary to the *City of Sacramento* and *Hayes* Cases

In developing its recommendation that certain costs associated with the four optional school programs constitute a mandate, the staff cites the court's analyses in the *City of Sacramento* and *Hayes* cases. In both these cases, the court considered whether an *optional* federal program (unemployment insurance in the *City of Sacramento* case and special education in the *Hayes* case) constituted a federal mandate. In both cases, the court stated that there is no simple or single test to distinguish between mandatory and optional programs. Rather, the court analyses developed extensive records, looking at a wide variety of factors including the nature and purpose of the program, whether its design suggests an intent to coerce, the penalties assessed for noncompliance, and other legal and practical consequences of nonparticipation.

For example, in its discussion of the federal special education program in the *Hayes* case,[2] the Court of Appeals summarizes the record as follows:

> As this history demonstrates, in determining whether to adopt the requirements of the Education of the Handicapped Act as amended in 1975, our Legislature was faced with the following circumstances: (1) in the Serrano litigation, our Supreme Court had declared basic education to be a fundamental right, and without even considering special education in the equation, had found our educational system to be in violation of equal protection principles; (2) judicial decisions from other jurisdictions had established that handicapped children have an equal protection right to free public education appropriate to their needs and due process rights with regard to placement decisions; (3) Congress had enacted section 504 of the Rehabilitation Act of 1973 to codify the equal protection rights of handicapped children in any school system that receives federal financial assistance and to threaten the state and local districts with the loss of all federal funds for failure to accommodate the needs of such children; (4) parents and organized groups representing handicapped children were becoming increasingly litigatious in their efforts to secure an appropriate education for handicapped children; and (5) in enacting the 1975 amendment to the Education of the Handicapped Act, Congress did not intend to require state and local educational agencies to do anything more than the Constitution already required of them.

Given this historical backdrop, the court concluded that the state's alternatives were to "participate in the federal program and obtain federal financial assistance and the procedural protections accorded by the act, or to decline to participate and face a barrage of litigation with no real defense and ultimately be compelled to accommodate the educational needs of handicapped children in any event." On this basis, the court concluded in the *Hayes* case that the federal special education program constituted a federal mandate.

The COSM's staff attempt to apply the logic of the *Hayes* and *City of Sacramento* decisions on federal mandates to state mandates. The staff analysis for the School Site Councils and Brown Act Reform test claim, however, does not develop any issue beyond the level of funding available for these four education programs. The staff analysis simply states that the funding offered for the four programs is "significant" and if "school districts do not participate and establish advisory committees, as required, the funding is lost." Contrary to the analysis in the *Hayes* and *City of Sacramento* cases, there is no discussion of penalties, legal risk, regulatory environment, constitutional rights, or total program funding. In short, the staff analysis cites the *Hayes* and *City of Sacramento* cases, but ignores the *Hayes* and *City of Sacramento* analyses. From the record and analysis provided to the COSM for the school site council test claim, we see no support for con-

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[2] The court's reasoning regarding compulsory mandates in the *Hayes* case was very similar to its analysis in the *City of Sacramento* case. For purposes of brevity, we summarize below only the court's opinion published for the more recent *Hayes* case.

cluding that the programs—developed by the Legislature to be voluntary—impose "a new program, or higher level of service" on local school districts.

Additional Comments

Our discussion above should not be construed as a broad assertion that all voluntary programs are exempt from the mandate requirements under Article XIII B. We are, in fact, very mindful of the possibility of "compulsory" voluntary programs. Instead of looking solely to the amount of funding provided for a program to ascertain whether a voluntary program constitutes a mandate, however, we recommend that the COSM employ the broader test suggested by the court in the *Hayes* and *City of Sacramento* cases. For example, we recommend that, *at a minimum*, the COSM consider the following questions:

- Are there significant legal or financial penalties for failing to implement the program? Or, would the only consequence of refusing to implement the program be the loss of an increase in state funding?

- Is there a reasonable nexus between the state requirement, program funding, and program goals?

- What level of increased funding is proposed? How does this increase in funding compare with the local agency's current budget?

In the case of the school site council test claim, our review of the record finds no evidence that school districts would sustain any fiscal or legal penalty for nonparticipation in these programs. Further, there is a reasonable nexus between the state requirement and state funding. Finally, the scale of funding is small relative to total school funding: program funding represents only about 2.5 percent of total school funding. Thus, using the questions we outlined above, these school programs would not constitute a "mandate." Instead, they are discretionary programs, offered by the Legislature, to further the state's education policy goals.

Should the COSM fail to employ the broad mandate test outlined by the court, and rely instead on the reasoning in the staff analysis, many other state programs could potentially be considered state mandates. For example, the cost of state requirements associated with the following programs might then be considered reimbursable: kindergarten through third grade class size reduction, public school testing and accountability programs, school construction bonds, property tax administrative loans, and redevelopment low- and moderate-income housing. Such a finding, in our view, would inappro-

priately limit the Legislature's authority to set workable policies for the benefit of the people of the state.

Should you have any questions on these matters or need additional information, please contact Marianne O'Malley at (916) 445-6442 regarding state mandates and Robert Turnage at (916) 445-8641 on education issues.

Sincerely,

Elizabeth G. Hill
Legislative Analyst