BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 67300, 67301, 67302, 67310, 67311, 67312, and 84850,

Statutes 1977, Chapter 36 (AB 447); Statutes 1978, Chapter 1403 (AB 2670); Statutes 1979, Chapters 282 (AB 8) and 1035 (SB 186); Statutes 1981, Chapter 796 (SB 1053); Statutes 1982, Chapter 251 (AB 1729); Statutes 1983, Chapter 323 (AB 223); Statutes 1985, Chapter 903 (SB 1160); Statutes 1986, Chapter 248 (SB 2451); Statutes 1987, Chapters 829 (AB 746) and 998 (SB 252); Statutes 1990, Chapters 1066 (AB 2625) and 1206 (AB 3929); Statutes 1991, Chapter 626 (AB 1021); Statutes 1992, Chapter 1243 (AB 3090); Statutes 1995, Chapter 758 (AB 446); Statutes 1999, Chapter 379 (AB 422); Statutes 2001, Chapter 745 (SB 1191); and

California Code of Regulations, Title 5, Sections 54100, 56000, 56002, 56004, 56005, 56006, 56008, 56010, 56020, 56022, 56026, 56027, 56028, 56029, 56030, 56032, 56034, 56036, 56038, 56040, 56042, 56044, 56046, 56048, 56050, 56052, 56054, 56060, 56062, 56064, 56066, 56068, 56070, 56072, 56074, 56076 (As Added or Amended by Register 76, No. 51, Register 77, Nos. 12 & 45, Register 79, No. 46, Register 83, No. 18, Register 88, No. 16, Register 91, No. 31, Register 92, No. 12, and Register 93, No. 6)

Implementing Guidelines for Title 5 Regulations, *Disabled Student Programs and Services*, Issued by the Chancellor's Office, California Community Colleges, January 2, 1997

Filed on May 23, 2003, by West Kern Community College District, Claimant

Case Nos.: 02-TC-22

Disabled Student Programs and Services

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

(*Adopted on September 26, 2008*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on September 26, 2008. Keith Petersen appeared for the claimant, West Kern Community College District. Susan Geanacou, Senior Staff Counsel for the Department of Finance, appeared for the Department of Finance.

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

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

Summary of Findings

The Commission makes the following findings:

- Issue 1: Disabled Student Programs and Services ("DSPS") program (Ed. Code, §§ 67300, 67310, 67311, 67312, and 84850; Cal. Code Regs., tit. 5, §§ 56000 et seq.;and the Chancellor's Office DSPS "Implementing Guidelines for Title 5 Regulations"). The Commission finds that the Implementing Guidelines for the DSPS program does not constitute an executive order requiring reimbursement under article XIII B, section 6, because the guidelines impose no requirements on community college districts.

  The Commission further finds that the federal Rehabilitation Act and the ADA mandate community colleges to provide academic adjustments and/or auxiliary aids to disabled students and, thus, some of the activities required under the state's DSPS program are not reimbursable state-mandated activities. Although some accounting, reporting, and administrative activities required by the DSPS program may go beyond the requirements of federal law, these activities are not mandated by the state, pursuant to the California Supreme Court's decision in *Kern High School Dist., supra*, because community colleges perform the activities as a condition of receiving funding.

- Issue 2: Requesting instructional materials in an electronic format pursuant to Education Code section 67302. The Commission finds that community college districts have a preexisting duty under the federal Rehabilitation Act and the ADA to provide students with visual impairments access to print and computer based information through alternate media, including electronic text. The state, through the test claim statute, has established an optional program to assist community college districts in meeting this requirement at a lower cost.

- Issue 3: Disabled parking services pursuant to Education Code section 67301 and section 54100 of the Chancellor's Office regulations.

  A. Education Code section 67301 imposes duties on the Board of Governors of the California Community Colleges to adopt regulations, but does not directly require activities of community college districts. Therefore, Education Code section 67301 does not impose a state-mandated program on community college districts.

  B. Providing accessible parking to disabled students and those who provide transportation to disabled students pursuant to section 54100, subdivisions (a), (d),

and (e), of the Chancellor's Office regulations does not mandate a new program or higher level of service on community college districts *if* the community college has constructed or altered a parking area (including repaving and restriping the parking area) since June 1977, the effective date of the Rehabilitation Act regulations. The federal Rehabilitation Act and the ADA both mandate community colleges to provide accessible parking for all persons with disabilities pursuant to specific building and architectural standards if the community college constructed a new parking lot or altered an existing parking lot (including repaving or restriping the parking area) since the effective dates of the federal regulations (Rehabilitation Act, June 3, 1977; ADA, January 26, 1992). Similar state law has been in place since 1980 (Gov. Code, § 11135; Cal.Code Regs., tit. 22, §§ 98250 et seq.) Under these existing laws, reserved parking for the disabled must be located in the most accessible area, closest to the building or pedestrian walkway the lot serves. Moreover, federal law prohibits community colleges from charging special fees on individuals with disabilities to provide accessible parking. These are the same requirements imposed by subdivisions (a), (d), and (e) of the test claim regulation, section 54100.

Section 54100, subdivisions (a), (d), and (e), does mandate a higher level of service, however, *if* a community college *existed* before 1977 and offered parking, but did not repave, restripe, or in any way alter any portion of its parking area by February 18, 1992, the date section 54100 became effective. The higher level of service is the one-time activity of altering the existing parking areas, "which are the most accessible to facilities that the district finds are most used by students," to provide reserved parking spaces for students with disabilities and those providing transportation for disabled students. Under these circumstances, federal law *suggested* that public entities with existing parking lots have reserved parking for the disabled, but did not require specific action as long as the community college's program, as a whole, is readily accessible and usable by individuals with disabilities. Any subsequent alteration to the parking area (including repaving and restriping) is governed by federal law.

But the reimbursement period for this test claim begins in July 2001, more than nine (9) years after section 54100 became effective. There is no evidence in the record that the claimant, or any other community college district, waited nine years to comply with section 54100 and incurred the one-time cost of altering existing parking areas during the reimbursement period of this claim. Accordingly, the Commission finds that there is no evidence of costs mandated by the state.

C. Section 54100, subdivision (f), regarding notice of accessible parking, does not impose a reimbursable state-mandated program since federal law mandates the same requirement.

BACKGROUND

This test claim concerns the provision of services to disabled students within the California community colleges system. The test claim alleges that community college districts have incurred costs mandated by the state, due to the enactment or amendment of Education Code sections 67300, 67301, 67302, 67310, 67311, 67312, and 84850, and thirty-six related title 5

regulations,[1, 2] as well as the "Implementing Guidelines for Title 5 Regulations, *Disabled Student Programs and Services*," issued by the California Community Colleges Chancellor's Office on January 2, 1997.

The claimant alleges that the laws and claimed executive orders require community college districts to provide disabled student services activities, including verifying a student's eligibility for support services, establishing a Student Educational Contract, and completing related accounting, budget and fiscal reports. There are also activities alleged for requesting instructional materials from publishers in an electronic format, and providing disabled student parking services.

As more fully discussed in the analysis, the federal Rehabilitation Act of 1973 and the Americans with Disabilities Act ("ADA") impose many of the same requirements as the test claim statutes and regulations.

Claimant's Position

West Kern Community College District's May 23, 2003[3] test claim filing, at pages 74 through 97, sets out a list of new activities, "A" through "Z," alleged to be required by the test claim statutes and executive orders. Claimant alleges that the state has required community college districts to adopt and implement procedures, and periodically update those procedures, pursuant to the test claim statutes and executives orders to offer support services and instruction to disabled students. Some examples of the claimant's specific allegations include: verifying that a student has a disability "which results in an educational limitation;" categorize a student's disability using the definitions in title 5, sections 56032, 56034, 56036, 56038, 56040, 56042, and 56044; identify and describe any educational limitations, along with a plan to meet the student's educational needs, in a "Student Education Contract," and review and update each contract annually.[4]

The claimant also alleges that title 5, section 56020 requires districts to "employ reasonable means to inform all students about the support services or instruction available through the DSPS program." Claimant states that the required support services includes providing adaptive educational equipment, material and supplies; employment development; priority registration; special parking; supplemental orientation; test taking facilitation; special assessments and counseling; interpreter, reader, note-taker, transcription, tutor, and mobility assistance.[5]

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[1] References to "title 5" are to the California Code of Regulations.

[2] The original test claim filing included mandate allegations for California Code of Regulations, title 5, sections 55522 and 55602.5 (Register 91, Nos. 23 & 43; Register 95, No. 22), regarding matriculation accommodations and contracting for disabled student vocational education, respectively. These regulations are also included in another pending test claim; therefore they were severed from *DSPS* and will be included in the Commission's decision on *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31).

[3] The potential reimbursement period begins no earlier than July 1, 2001, based upon the filing date for this test claim. (Gov. Code, § 17557.)

[4] Test Claim Filing, pages 74-81.

[5] *Id.* at pages 81-85.

Further, the test claim alleges that community college districts are required to "provide special classes designed to address the educational limitations of students with disabilities who would not be able to substantially benefit from regular college classes, even with appropriate support services and accommodations."[6]

The claim contends that the test claim statutes and executive orders require the development of policies for suspension and termination from the DSPS program; recordkeeping requirements for DSPS student files; the designation of a qualified DSPS Coordinator for each college; formation of a DSPS advisory committee; developing and updating "specialized accounting procedures" for calculating the direct and indirect costs of DSPS services; and "to determine and certify that reasonable efforts have been made to utilize all funds from federal, state and local sources available for serving students with disabilities."[7]

The test claim also alleges new activities for disabled student parking services and requesting instructional materials from publishers in an electronic format.

The claimant acknowledges that some apportionment funding (Ed. Code, § 84850, subd. (c)), funds for special classes (Cal. Code Regs., tit. 5, § 56028), and parking fees (Ed. Code, § 67301) may be available to "reduce the costs incurred by these mandated duties."[8]

The claimant rebutted the Chancellor's Office comments on the test claim filing in a letter dated April 1, 2004.[9] The claimant also filed comments on the draft staff analysis. The claimant's substantive arguments will be addressed in the analysis below.

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[6] Test Claim Filing, page 86.

[7] *Id.* at pages 87-96.

[8] *Id.* at page 98.

[9] In the April 1, 2004 rebuttal, the claimant argues that the Chancellor's Office comments are "incompetent" and should be stricken from the record since they do not comply with the Commission's regulations (Cal. Code Regs., tit. 2, § 1183.02.) That regulation requires written responses to be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge, information, or belief, and that any assertions of fact are to be supported by documentary evidence. The claimant contends that "the comments of [the Chancellor's Office] do not comply with these essential requirements."

Determining whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution is a pure question of law. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109). Thus, factual allegations raised by a party regarding how a program is implemented are not relied upon by staff at the test claim phase when recommending whether an entity is entitled to reimbursement under article XIII B, section 6. The state agency responses contain comments on whether the Commission should approve this test claim and are, therefore, not stricken from the administrative record.

California Community Colleges Chancellor's Office Position

The comments on the test claim filing, received March 16, 2004, from the Chancellor's Office dispute much of the test claim allegations. Regarding DSPS, the Chancellor's Office argues that Education Code sections 67310, 67311, 67312, and 84850, and the California Code of Regulations, title 5, sections 56000 through 56076, either do not expressly require activities of the community college districts, or are optional unless the districts seek state funds:

> . . . for the direct excess costs of providing certain services or instruction to students with disabilities. Under federal law, districts are required to provide accommodations for students with disabilities by section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, but nothing compels a district to apply for DSPS funds or claim reimbursement from the state for services it does provide.[10]

On Education Code section 67302, regarding the requirement for publishers to provide electronic versions of instructional materials for use by disabled students, the Chancellor's Office asserts that the statute does not impose mandatory duties on the colleges to request the materials from the publishers. However, "to the extent that colleges do call upon publishers to provide the electronic texts, the statute creates a potential savings to districts since federal law requires districts to provide students with visual impairments access to print and computer-based information."

Regarding disabled student parking accessibility pursuant to Education Code section 67301, and title 5, section 54100, the Chancellor's Office asserts that Government Code section 17556, subdivisions (d) and (e) may preclude the Commission from finding costs mandated by the state because the districts are authorized to use their other parking fees to offset the costs.

The Chancellor's Office did not file comments on the draft staff analysis.

Department of Finance's Position

On December 6, 2007, the Department of Finance submitted substantive comments on the test claim filing. The Department states: "Based on our review of the claim, as well as relevant statutes and regulations, we do not believe that the procedures, definitions, and general instruction provided in the DSPS program constitute a reimbursable state mandated activity on local community college districts." Further, the Department of Finance states agreement with the analysis in the Chancellor's Office letter of March 11, 2004, and bases this "on the fact that DSPS activities are already fully funded in the budget and that DSPS is a voluntary program."

The Department states:

> Funding for this program is now part of the annual appropriation for DSPS in Schedule (5) of Item 6870-101-0001 of the Budget Act. Since 2003, the year in which this test claim was filed, budgeted support for this program has been provided as follows: $115,001,000 in the Budget Act of 2007, $107,870,000 in the Budget Act of 2006, $91,191,000 in the Budget Act of 2005, $85,977,000 in the Budget Act of 2004, and $82,583,000 in the Budget Act of 2003. This represents a significant and ongoing commitment by the state of California to

[10] Chancellor's Office Comments on the Test Claim, dated March 11, 2004, page 5.

fund specific activities and costs associated with participation in the DSPS program.

The Department of Finance did not file comments on the draft staff analysis.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6, of the California Constitution[11] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[12] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[13] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[14] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[15]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[16] To determine if the program is new or imposes a higher level of service, the test claim statutes and executive orders must be compared with the legal requirements in effect immediately before the enactment.[17] A "higher level of service" occurs when the new "requirements were intended to provide an

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[11] Article XIII B, section 6, subdivision (a), provides: (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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

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

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

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

[16] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

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

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

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.[20] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[21]

Issue I: Do the "Disabled Student Programs and Services (DSPS)" statutes, regulations, and guidelines constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution?

The claimant alleges that Education Code sections 67300,[22] 67310,[23] 67311,[24] 67312,[25] and 84850,[26] impose a reimbursable state-mandated program. The claimant further alleges that California Code of Regulations, title 5, sections 56000 et seq., and the Chancellor's Office DSPS "Implementing Guidelines for Title 5 Regulations" are executive orders which impose a reimbursable state mandated program on community college districts. The new activities alleged relate to the provision of disabled student services, such as: verifying a student's eligibility for support services; establishing a Student Educational Contract to identify and provide for needed academic adjustments and auxiliary aids; as well as for DSPS-related accounting, budget and fiscal reporting activities.

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

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

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

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

[22] Added by Statutes 1981, chapter 796, amended by Statutes 1985, chapter 903, Statutes 1986, chapter 248, Statutes 1987, chapter 998, Statutes 1991, chapter 626. Repealed and reenacted by Statutes 1995, chapter 758.

[23] Repealed and reenacted by Statutes 1995, chapter 758; derived from Statutes 1987, chapter 829.

[24] *Ibid.*

[25] *Ibid.* A minor amendment by Statutes 2004, chapter 303 was not pled and does not impact the test claim analysis.

[26] Statutes 1990, chapter 1206 repealed and replaced this section; earlier versions also concerned special funding for services and assistance to disabled students. Derived from former Education Code section 18151, as added by Statutes 1972, chapter 1123.

The claimant agrees there is an underlying federal requirement to provide academic adjustments and auxiliary aids to disabled students under the Rehabilitation Act of 1973 and the American with Disabilities Act ("ADA"). Claimant contends, however, that reimbursement to community college districts for compliance with the DSPS program is still required based on the following allegations:

- The Rehabilitation Act of 1973 imposes a federal mandate on the state, and California has elected to shift those requirements to community college districts. Thus, under *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, and *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, reimbursement is required.
- The ADA imposes a "general" civil rights mandate on public entities. The DSPS program mandates more specific requirements on community colleges and, thus, is reimbursable under *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155.
- Even though compliance with the DSPS activities is required as a condition of funding, the DSPS program is not truly voluntary. Community colleges are practically compelled to take the funds and implement the program to implement the federal mandates. Thus, the court's holding in *Kern High School Dist., supra,* 30 Cal.4th 727, does not apply to deny this claim.

The Commission disagrees with the claimant's analysis of this case. The Commission finds that federal law mandates community colleges to provide academic adjustments and auxiliary aids to disabled students and, thus, some of the activities required under the state's DSPS program are not reimbursable state-mandated activities. Although some accounting, reporting, and administrative activities required by the DSPS program may go beyond the requirements of federal law, these activities are not mandated by the state, pursuant to the California Supreme Court's decision in *Kern High School Dist., supra,* because community colleges perform the activities as a condition of receiving funding.

A. Requirements imposed by the test claim statutes, regulations, and guidelines.

Chapter 14, "Disabled Student Services," was initially added to the Education Code by Statutes 1981, chapter 796, beginning with Education Code section 67300. The chapter was later repealed and reenacted in 1995.[27] Education Code section 67300, as added in 1995, states in pertinent part the following:

> Services for disabled students provided by the California Community Colleges … shall … at a minimum, conform to the level and quality of those services provided by the Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter requires the California Community Colleges … to provide the services for disabled students in the same manner as those services were provided by the Department of Rehabilitation…
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> [¶]

[27] Amended by Statutes 1985, chapter 903, Statutes 1986, chapter 248, Statutes 1987, chapter 998, Statutes 1991, chapter 626. Repealed and reenacted by Statutes 1995, chapter 758.

> Notwithstanding any other provision of this section or Section 67305, blind students who are attending California Community Colleges under the sponsorship of the Department of Rehabilitation shall have all reader services provided directly by the Department of Rehabilitation. Reader services provided by the Department of Rehabilitation pursuant to this section shall be furnished in accordance with federal and state law. The Department of Rehabilitation shall seek federal funds for the provision of readers to blind students pursuant to this section.[28, 29]

An interagency agreement between the Chancellor's Office and the California Department of Rehabilitation (DOR) [30] is described in the legislative history of Statutes 1981, chapter 796, which first added section 67300 to the Education Code. The "Cooperative Agreement" was signed in June 1981, stating:[31]

> [T]he Chancellor acknowledges and agrees that the community colleges are required by Section 504 of the [Federal] Rehabilitation Act of 1973, and the regulations implementing that Section and Article 9.5 (11135 to 11135.5)[32] of the California Government Code to provide auxiliary aids necessary to make the benefits of the community college programs fully accessible to all their disabled students;

The agreement continues:

> [T]he Chancellor, on behalf of Community Colleges and the Director, on behalf of the Department [of Rehabilitation], agree to the following:
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> 1. The Community Colleges will refer appropriate students to the Department for eligibility evaluation and services,
> 2. Beginning July 1, 1981, the Department will discontinue the provision of auxiliary aid services to its clients attending community colleges. To the extent possible, the community college system will continue to provide auxiliary aids and other educational services to all needy disabled community college students.

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[28] The omitted portions refer to California's university systems.

[29] Education Code section 67305 states that "[n]otwithstanding the provision of Section 67300, federal and state vocational rehabilitation funds may be utilized to provide reader and interpreter services to clients of the Department of Rehabilitation, provided that those funds are administered in full compliance with applicable federal and state laws and regulations and policies and procedures of the Department of Rehabilitation."

[30] The DOR's primary function is to provide and refer individuals with disabilities to a variety of vocational rehabilitation and independent living services. (Welf. & Inst. Code, § 19000 et seq.)

[31] Item 3, September 26, 2008 Commission Hearing, Exhibit G, page 587.

[32] Government Code section 11135 et seq., enacted by Statutes 1977, chapter 972, provides individuals with protection from discrimination on the basis of disability (as well as for other basis, including age, color, and sex), in any program or activity receiving state funding.

3. Disabled community college students who are or will be clients of the Department, will continue to receive non-auxiliary aid services provided by the Department, if in the judgment of the rehabilitation counselor such services are necessary to facilitate the agreed upon individualized written rehabilitation program (IWRP).

[¶]

For the purposes of this agreement, auxiliary aids are defined as those devices and services necessary to ensure that a disabled student will enjoy the benefits of and participation in all the education programs operated by the community colleges on an equal basis with other students.

Beginning July 1, 1981, the following auxiliary aids related to educational programs will no longer be provided by the Department of Rehabilitation:

1. Reader services for the blind and visually impaired.
2. Notetaker services for the blind and visually impaired.
3. Interpreter services for the deaf and hearing impaired.
4. On-campus mobility assistance.
5. On-campus transportation.
6. Special adaptive equipment.

Education Code section 67300 generally codifies this agreement, except that reader services for the blind are still provided by the Department of Rehabilitation. Pursuant to the regulations that implement the DSPS program, "student with a disability" or "disabled student" is defined as "a person enrolled at a community college who has a verified impairment which limits one or more major life activities, as defined in 28 C.F.R. 35.104 [a regulation implementing the ADA"], and which imposes an educational limitation." (Tit. 5, CCR, § 56002.) "Educational limitation" is defined as a "disability related functional limitation in the educational setting. This occurs when the limitation prevents the student from fully benefiting from classes, activities, or services offered by the college to nondisabled students, without specific additional support services or instruction …" (Tit. 5, CCR, § 56004.)[33]

Education Code section 67310 is a lengthy statement of legislative intent and principles to provide state funding to state colleges and universities, "to cover the actual cost of providing services and instruction" through the state budget process to disabled postsecondary students. (Ed. Code, § 67310, subd. (d).) The Legislature identifies six principles in subdivision (c) for public postsecondary institutions and budgetary control agencies to observe in providing postsecondary programs and services for students with disabilities. These principles include: (1) the "state funded activity" shall be consistent with the stated purpose of programs and services for disabled students provided by the California Community Colleges, as governed by the

[33] See also, Education Code section 84850, subdivision (b), which defines "disabled students" under the DSPS program as "persons with exceptional needs enrolled at a community college who, because of a verified disability, cannot fully benefit from classes, activities, and services regularly provided by the college without specific additional specialized services or educational programs."

statutes, regulations, and guidelines of the community colleges; (2) the "state funded activity" shall not duplicate services or instruction available to all students; (3) the "state funded activity" shall be directly related to the functional limitations of the verifiable disabilities of the students to be served; (4) the "state funded activity" shall be directly related to these students' full access to and participation in the educational process; (5) the "state funded activity" shall have as its goals the independence of disabled students and the maximum integration of these students with other students; and (6) the "state funded activity" shall be provided in the most integrated setting possible, consistent with state and federal law, state policy and funding requirements, and missions and policies of the postsecondary segment, and shall be based on identified student needs.[34]

Community college districts participating in the DSPS program are entitled to an appropriation of funds to offset the "direct excess cost" of providing specialized support services or instruction to disabled students. (Ed. Code, §§ 67311, 84850; Cal. Code Regs., tit. 5, §§ 56060 et al.) Education Code section 84850 defines "direct excess costs" as those fixed, variable, and one-time costs defined in Education Code section 67311 that exceed the combined total of the following:

1. The average cost to the district of providing services to non-disabled students times the number of students served by disabled student programs and services.
2. The indirect cost to the district of providing facilities and support for the administration of disabled student programs and services.
3. The revenue derived from average daily attendance in special classes.
4. Any other funds for serving disabled students that the district receives from federal, state, or local sources.[35]

Subdivision (e) of section 84850 states that the board of governors may authorize the chancellor to designate up to 3 percent of the funds allocated under this program for program development and program accountability.

Education Code section 67311 and section 56026 of the DSPS regulations describe the fixed, variable, and one-time support services that may be provided by a community college district under this program, and funded by the state pursuant to Education Code section 84850. The fixed services described in section 67311, subdivision (a), include the following:

- Access to, and arrangements for, adaptive educational equipment, materials, and supplies required by disabled students.
- Job placement and development services related to the transition from school to employment.
- Liaisons with campus and community agencies, including referral and follow-up services to these agencies on behalf of disabled students.

[34] See also, California Code of Regulations, title 5, section 56000.

[35] See also, California Code of Regulations, title 5, section 56064.

- On-campus and off-campus registration assistance, including priority enrollment, applications for financial aid, and relaxed college services.
- Special parking, including on-campus parking registration, temporary parking permit arrangements, and application assistance for students who do not have state handicapped placards or license plates.
- Supplemental specialized orientation to acquaint students with campus environment.
- Activities to coordinate and administer specialized students with campus environment.
- Activities to assess the planning, implementation, and effectiveness of disabled student services and programs.

The baseline costs of the fixed services "shall be determined by the respective system and fully funded with annual adjustments for inflation and salary range changes, to the extent funds are provided." (Ed. Code, § 67311, subd. (a).)

Education Code section 67311, subdivision (b), identifies the following variable services, the costs of which vary depending on the needs of students:

- Diagnostic assessment, including both individual and group assessment not otherwise provided by the institution to determine functional, educational, or employment levels or to certify specific disabilities.
- On-campus mobility assistance, including mobility training and orientation and manual or automatic transportation assistance to and from college courses and related educational activities.
- Off-campus transportation assistance, including transporting students with disabilities to and from the campus in areas where accessible public transportation is unavailable, inadequate, or both.
- Disability-related counseling and advising, including specialized academic, vocational, personal, and peer counseling, that is developed specifically for disabled students and not duplicated by regular counseling and advising services available to all students.
- Interpreter services, including manual and oral interpreting for deaf and hard-of-hearing students.
- Reader services to coordinate and provide access to information required for equitable academic participation if this access is unavailable in other suitable modes.
- Services to facilitate the repair of equipment and learning assistance devices.
- Special class instruction that does not duplicate existing college courses but is necessary to meet the unique educational needs of particular groups of disabled students.
- Test taking facilitation, including adapting tests for and proctoring test taking by disabled students.
- Transcription services, including, but not limited to, the provision of Braille and print materials.
- Specialized tutoring services not otherwise provided by the institution.

- Notetaker services for writing, notetaking, and manual manipulation for classroom and related academic activities.

Education Code section 67311, subdivision (b), further states the following: "State funds may be provided annually for the cost of these [variable] services on an actual-cost basis, including wages for the individuals providing these services and expenses for attendant supplies. Each institution shall be responsible for documenting its costs to the appropriate state agencies."

Education Code section 67311, subdivision (c), identifies one-time variable costs associated with the DSPS program for the purchase of supplies or the repair of equipment, such as adapted educational materials and vehicles. "State funds shall be provided for these expenses on an actual cost basis as documented by each institution."

In addition, special class instruction may be provided to students with disabilities. Special classes are instructional activities designed to address the educational limitations of students with disabilities who would be unable to substantially benefit from regular college classes even with appropriate support services or accommodations. Such classes generate revenue based on the number of full-time equivalent students enrolled in the classes. Districts are authorized to permit repetition of special classes to provide an accommodation to a student's educational limitation pursuant to state and federal nondiscrimination laws. (Tit. 5, CCR, §§ 56028, 56029.) The revenue derived from the special class instruction is not included in the reimbursement for "direct excess costs." (Ed. Code, § 84850; Tit. 5, CCR, § 56064, subd. (b).) The calculation of the revenue derived from special classes is described in section 56070 of the regulations.[36]

Funding under the program can be used for the service provided to the student. Funding can also be used for the salaries, benefits, and professional development costs of DSPS certificated and classified personnel and for supplies and materials necessary for operations of the DSPS program. The DSPS funding cannot be used, however, for a college's indirect costs for lighting, heating, or janitorial service for its facilities; or for legal matters and audit expense costs.[37]

In order to receive funding for the program, community college districts are required to demonstrate institutional accountability and clear program effectiveness evaluations for services to students with disabilities. (Ed. Code, § 67310, subd. (f).) Thus, in addition to providing an academic adjustment or other service to a disabled student under Education Code section 67300 and 67311, each community college district receiving funds under the DSPS program is required to perform the following activities:

- Employ reasonable means to inform all students and staff about the support services or instruction available through the DSPS program. (Tit. 5, CCR, § 56020.)

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[36] Section 56070 of the regulations states in relevant part that the revenue from special classes shall be calculated by adding together the following:

(1) the FTES instructional non-credit rate times the number of units of FTES in noncredit special classes; and

(2) the FTES instructional credit rate, not including indirect administrative costs, times the number of units of FTES in credit special classes for each college in the District.

[37] Chancellor's Office document "*Commonly Asked Questions about DSP&S Expenditures*" (Revised July 2003). (Item 3, Sept. 26, 2008 Commission Hearing, Ex. I, p. 1399.)

- Identify and verify a student's educational limitations. This activity must be performed by appropriate DSPS professional staff and described in the Student Education Contract (SEC). The existence of an impairment may be verified by (1) observation; (2) assessment by appropriate DSPS professional staff; or (3) review of documentation provided by appropriate agencies or certified or licensed professionals outside of the DSPS program. Eligibility for each service provided must be directly related to an educational limitation. (Tit. 5, CCR, § 56006.)
- Protect all records pertaining to students with a disability from disclosure. Such records shall also be subject to other requirements for handling of student records as provided in section 54600 of the regulations. (Tit. 5, CCR, § 56008.)
- Establish a Student Educational Contract (SEC), which is a plan to address the specific needs of a disabled student, upon initiation of DSPS services. The Contract shall be reviewed and updated annually for every student with a disability participating in DSPS. The contract specifies those regular and/or special classes and support services identified and agreed upon by both the student and DSPS professional staff as necessary to meet the student's specific educational needs. The Contract shall be reviewed annually by a DSPS professional staff person to determine whether the student has made progress toward his or her stated goals. Whenever possible, the Contract shall serve as the Student Educational Plan (SEP) and shall meet the requirements of section 55525 of the regulations. For students in noncredit special classes, the Contract shall include a description of the criteria used to evaluate the student's progress. (Tit. 5, CCR, § 56022.)

  The Implementing Guidelines for the Title 5 regulations for the DSPS program, which "represents the consensus of the Chancellor's Office regarding interpretation of the regulations, describes the Chancellor's interpretation of the Student Educational Contract. The Guidelines state the following:

  > The SEC should be initially developed when the student first applies for DSPS services. A DSPS professional staff person and the student should develop the SEC. It is important for the student to participate in the development of the SEC, and the student's signature is necessary to indicate agreement with short-term objectives as well as criteria for measuring their progress.
  >
  > After the initial preparation of the SEC, it should be reviewed and updated each year thereafter to determine the student's progress toward their stated instructional and educational goal(s). This process should include an up-to-date copy of the student's class schedule, delineation of services provided, an indication that a DSPS professional staff has reviewed the SEC and determined that measurable progress has been made, and the signature of the student showing agreement with the updated SEC. The review and update can be completed incrementally. Where no major changes in the program or services are made, DSPS classified staff can assist in obtaining the student's signature and

preparing the file for review by DSPS professional staff. This review can be completed by the DSPS specialist without the student being present.[38]

- Establish a policy and procedure for timely responding to accommodation requests involving academic adjustments. This procedure shall provide for an individualized review of each request. The procedure shall also permit the "Section 504 Coordinator," or other designated district official with knowledge of accommodation requirements, to make an interim decision pending a final resolution. (Tit. 5, CCR, § 56027.)
- Submit to the Chancellor, at such times as the Chancellor shall designate, a DSPS program plan for each college within the district. Upon approval by the Chancellor, the plan shall be a contract between the district and the Chancellor. Expenditures of funds appropriated pursuant to this program shall conform to the approved plan. In addition, each district shall submit updates to its program plan upon request of the Chancellor. The program plan shall contain the following: (1) long-term goals of the DSPS program; (2) short-term measurable objectives of the program; (3) activities to be undertaken to accomplish the goals and objectives; and (4) a description of the methods used for program evaluation. (Tit. 5, CCR, § 56046.)
- Designate a DSPS coordinator for each college in the district. The coordinator has the responsibility for the day-to-day operation of DSPS. Minimum qualifications for the coordinator are listed in the regulation. Districts "may" also employ classified and/or paraprofessional support staff, under the direction of the coordinator, as appropriate for support services or instruction being provided. Persons employed as counselors and instructors of students with disabilities shall meet minimum qualifications set forth in section 53414 of the regulations. (Tit. 5, CCR, § 56048.)
- Establish at each college in the district an advisory committee that shall meet at least once per year. The advisory committee shall include a student with a disability and representatives of the disability community and agencies or organizations serving persons with disabilities. (Tit. 5, CCR, § 56050.)
- Each college's DSPS program shall be evaluated at least once every five years by the Chancellor. The evaluation shall provide for the gathering of outcome data, staff and student perceptions of program effectiveness, access requirements of the ADA and the Federal Rehabilitation Act, compliance with Education Code section 67311.5 with respect to parking for persons with disabilities, and data on the implementation of the program as outlined in Education Code section 84850. (Tit. 5, CCR, § 56052.)
- Submit budget and fiscal reports as the Chancellor may require. When submitting the reports, districts shall conform to the reporting format, procedures, and deadlines the Chancellor may prescribe and shall use the disability categories set forth in sections 56032-56044 of the DSPS regulations. The disability categories define physical, communication, learning, and psychological disabilities, and also define acquired brain impairment and developmentally delayed learner. (Tit. 5, CCR, § 56030.) The Chancellor shall provide for audits of DSPS programs to determine the accuracy of the

[38] Chancellor's Office Implementing Guidelines for the Title 5 regulations for the DSPS program, pages 517-518, issued January 2, 1997.

reports. The Chancellor may adjust funding allocations to a district based on audit findings or enrollment and budget reports to compensate for over or under-allocated amounts in the current fiscal year or any of the three immediately proceeding fiscal years. (Ed. Code, § 84850, subd. (d); Tit. 5, CCR, § 56072.)

- Establish a unique budget identifier code to separately account for all funds provided pursuant to this program. The district shall certify through fiscal and accounting reports prescribed by the Chancellor that all funds were expended in accordance with the requirements of the program. (Tit. 5, CCR, § 56074.)
- Certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving students with disabilities. (Ed. Code, § 84850, subd. (d); Tit. 5, CCR, § 56076.)

The Chancellor is required to adopt and use an allocation formula to make advance allocations of funding to each community college district consistent with the district's approved DSPS program plan and the requirements of the DSPS statutes and regulations. (Tit. 5, CCR, § 56072.)

B. The Chancellor's Office Implementing Guidelines for the DSPS Program does not constitute an executive order requiring reimbursement under article XIII B, section 6 of the California Constitution.

The Chancellor's Office Implementing Guidelines for the Title 5 regulations for the DSPS program, issued on January 2, 1997, have been pled in the test claim as an executive order. The Guidelines provide each DSPS regulation, followed by a restatement and a description of what type of documentation may demonstrate compliance with the regulation. The first page of the Guidelines states: "It is important to note that the Guidelines are not regulations which have gone through the full regulatory approval process. *College staff are encouraged, but not required, to use the Guidelines in administering the DSPS programs.* It is the responsibility of the colleges to establish programs, policies, and procedures which meet the requirements of these and other relevant statutes and regulations." [Emphasis added.]

Government Code section 17516 defines an "executive order" as "any order, plan, requirement, rule, or regulation issued by . . . any agency, department, board, or commission of state government."

The Commission finds that the Implementing Guidelines for the DSPS program does not constitute an executive order requiring reimbursement under article XIII B, section 6, because the guidelines impose no requirements on community college districts.

C. Federal law mandates community college districts to provide academic adjustments and auxiliary aids to disabled students and, thus, some of the activities required under the state's DSPS program are not reimbursable state-mandated activities.

Summary of Federal Law

In 1973, Congress enacted the Rehabilitation Act of 1973, section 504 (29 U.S.C. § 794, 34 C.F.R. §§ 104 et seq.) to extend the protections of the Civil Rights Act of 1964 to the handicapped.[39] The Rehabilitation Act prohibits discrimination on the basis of physical or

[39] *Lloyd v. Regional Transp. Authority* (1977) 548 F.2d 1277, 1285.

mental disability with respect to "any program or activity receiving federal financial assistance." It states the following:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity.

The Rehabilitation Act applies to all recipients of federal financial assistance, including colleges, universities, and postsecondary vocational education and adult education programs. The federal law also extends to all operations of a college, including admissions, academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services.[40]

In 1990, Congress enacted the Americans with Disabilities Act (ADA), which extended the requirements of the Rehabilitation Act to all services, programs, and activities of all public entities, including those that do not receive federal financial assistance. (42 U.S.C. § 12101, 28 C.F.R. §§ 35.101 et seq.). A "public entity" is defined to include "any State or local government," including postsecondary education programs.[41] There is no significant difference in the analysis of the rights and obligations created by the ADA and the Rehabilitation Act.[42]

Under both federal programs, colleges are required to perform the following activities:

- Designate an employee to coordinate efforts to comply with the Rehabilitation Act and the ADA. (34 C.F.R. § 104.7; 28 C.F.R. 35.107.)
- Adopt grievance procedures that incorporate due process standards and provide for prompt and equitable resolution of complaints. (34 C.F.R. § 104.7; 28 C.F.R. 35.107.)
- Take appropriate initial and continuing steps to notify participants, beneficiaries, applicants and employees, and unions and professional organizations holding collective bargaining agreements that it does not discriminate on the basis of handicap. The notification shall also include an identification of the responsible employee designated to coordinate these programs. Notification can be made through recruitment materials, catalog, and student handbooks. (34 C.F.R. § 104.8; 28 C.F.R. 35.106.)
- Conduct a one-time evaluation of the services, policies and practices, and the effects thereof, that do not or may not meet the requirements of the Rehabilitation Act and the

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[40] "Program or activity," as it pertains to the community colleges, is defined as "*all* of the operations of" … "(2)(A) a college, university, or other postsecondary institution, or a public system of higher education." (29 United States Code, section 794(b).) See also, 34 Code of Federal Regulations, Subpart E, sections 104.42 and 104.43.

[41] 28 Code of Federal Regulations, section 35.104; *Zuckle v. University of California* (1999) 166 F.3d 1041.

[42] *Zuckle, supra,* 166 F.3d 1041, 1045, fn. 11.

ADA, and make necessary modifications. An opportunity for the public to comment shall be provided. (34 C.F.R. § 104.6; 28 C.F.R. 35.105.)

- Once a student provides notice to the college of the need for an academic adjustment or auxiliary aid, conduct a fact-specific, individualized analysis of the disabled student's circumstances and the accommodations that might allow the student to meet the program's standards. Colleges have the duty to gather sufficient information from the student and qualified experts to determine the accommodations that are necessary for the student. (*Wong v. Regents of University of California* (1999) 192 F.3d 807, 817-818.) In *Wong*, the U.S. Court of Appeal stated the following:

> …"the educational institution has a real obligation to seek suitable means of reasonably accommodating a handicapped person *and to submit a factual record indicating that it conscientiously carried out this statutory obligation*." [Citations omitted, emphasis in original.] Subsumed within this standard is the institution's duty to make itself aware of the nature of the student's disability; to explore alternatives for accommodating the student; and to exercise professional judgment in deciding whether the modification under consideration would give the student the opportunity to complete the program without fundamentally or substantially modifying the school's standards…
>
> [¶]
>
> …Because the issue of reasonableness depends on the individual circumstances of each case, this determination requires a fact-specific individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards. [Citation omitted.] As we have observed in the employment context, "mere speculation that a suggested accommodation is not feasible" falls short of the "reasonable accommodation" requirement; the Acts create "a duty to 'gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are *necessary* to enable the individual to meet the standards in question.'" [Citations omitted, emphasis in original.][43]

- Provide academic adjustments in a timely manner, which may include auxiliary aids, to qualified applicants or students who have disabilities in order to afford those individuals an equal opportunity to participate in, and enjoy the benefits of, the college program. Section 104.44, subdivision (a), of the Rehabilitation Act regulations states that a

[43] See also, "*Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities*," U.S. Department of Education, Office for Civil Rights', dated March 2007. (Item 3, Sept. 26, 2008 Commission Hearing, Ex. I, p. 1177.)

recipient of federal financial assistance "shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student." Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

In addition, the college may be required to provide auxiliary aids to the handicapped student, which may include the following:

> Taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and action. Recipients need not provide attendants, individually prescribed devises, readers for personal use or study, or other devices or services of a personal nature.[44]

The ADA requires similar services.[45]

In 1998, the U.S. Department of Education, Office for Civil Rights, the agency responsible for enforcing the Rehabilitation Act and the ADA in public colleges and universities, issued a publication entitled "*Auxiliary Aids and Services for Postsecondary Students with Disabilities - Higher Education's Obligations Under Section 504 and Title II of the ADA*." [46] The publication describes the requirements regarding the provision of auxiliary aids and services in higher education institutions under these federal laws as follows:

> [¶]
>
> It is, therefore, the school's responsibility to provide these auxiliary aids and services in a timely manner to ensure effective participation by students with disabilities. If students are being evaluated to determine their eligibility under Section 504 or the ADA, the recipient must provide auxiliary aids in the interim.
>
> **Postsecondary Student Responsibilities**
>
> A postsecondary student with a disability who is in need of an auxiliary aid is obligated to provide notice of the nature of the disabling condition to the college to assist it in identifying appropriate and effective auxiliary aids. In elementary and secondary schools, teachers and school specialists may have arranged support services for students with disabilities. However, in postsecondary schools, the students themselves must identify the need for an auxiliary aid and give adequate notice of the need. The student's notification should be provided to the appropriate representative of the college, who, depending upon the nature

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[44] 34 Code of Federal Regulations, section 104.44(d).

[45] 28 Code of Federal Regulations, sections 35.104, 35.160, 35.164.

[46] Item 3, September 26, 2008 Commission Hearing, Exhibit G, page 591.

and scope of the request, could be the school's Section 504 or ADA coordinator, an appropriate dean, a faculty advisor, or professor. Unlike elementary or secondary schools, colleges may ask the student, in response to a request for auxiliary aids, to provide supporting diagnostic test results and professional prescriptions for auxiliary aids. A college also may obtain its own professional determination of whether specific requested auxiliary aids are necessary.

Examples of Auxiliary Aids

[¶]

…Colleges are not required to provide the most sophisticated auxiliary aids available; however, the aids provided must effectively meet the needs of the student with a disability. An institution has the flexibility in choosing the specific aid or service it provides to the student, as long as the aid or service is effective.[47] …

Effectiveness of Auxiliary Aids

No aid of service will be useful unless it is successful in equalizing the opportunity for a particular student with a disability to participate in the education program or activity….

[¶]

The institution must analyze the appropriateness of an aid or service in its specific context….College officials also should be aware that in determining what types of auxiliary aids and services are necessary under Title II of the ADA, the institution must give primary consideration to the requests of individuals with disabilities.

Cost of Auxiliary Aids

Postsecondary schools receiving federal financial assistance must provide effective auxiliary aids to students who are disabled. If an aid is necessary for classroom or other appropriate (nonpersonal) use, the institution must make it available, unless provision of the aid would cause undue burden. A student with a disability may not be required to pay part or all of the costs of that aid or service. An institution may not limit what it spends for auxiliary aids or services or refuse to provide auxiliary aids because it believes that other providers of these services exist, or condition its provision of auxiliary aids on availability of funds. In many cases, an institution may meet its obligation to provide auxiliary aids by assisting the student in obtaining aid or obtaining reimbursement for the cost of an aid from an outside agency or organization, such as a state rehabilitation agency or a private charitable organization. However, the institution remains responsible for providing the aid.

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[47] See also, *Alexander v. Choate* (1985) 469 U.S. 287, 300, where the U.S. Supreme Court held that an educational institution is not required to make fundamental or substantial modifications to its program or standards; it need only make reasonable ones.

If an allegation is made that a college has violated the Rehabilitation Act and the ADA, the U.S. Department of Education, Office for Civil Rights, is required to investigate, attempt informal resolution and, if resolution is not achieved, issue a letter of findings to the college describing the remedy for each violation found.[48] The college is required to take such remedial action as the federal government deems necessary to overcome the effects of discrimination.[49] In addition, students have a private right of action to litigate complaints for violation of the Rehabilitation Act and the ADA, and may pursue equitable and monetary damages.[50,51]

Federal law imposes a mandate directly on community college districts to provide services to disabled students

When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[52]

However, when federal law imposes a mandate on the state, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[53]

The claimant argues that the Rehabilitation Act of 1973 imposes a federal mandate *on the states*, and California has elected, or "freely chosen" to shift those requirements to community college districts through the DSPS program. Claimant contends that:

> Although 29 U.S.C.A. § 794 does prohibit discrimination by postsecondary and vocational education programs receiving federal funds, it must be viewed and interpreted within the larger context of the Rehabilitation Act of 1973. 29 U.S.C.A. § 721 requires the *states* to develop and enact a *state plan* that implements the Act's substantive requirements, and specifies that the states are ultimately responsible for reporting and compliance. 29 U.S.C.A. § 714 states:

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[48] 34 Code of Federal Regulations, section 104.6; 28 Code of Federal Regulations, sections 35.170-35.190.

[49] *Ibid.*

[50] *Greater Los Angeles Council on Deafness, Inc. v. Zolin* (1987) 812 F.2d 1103, 1107; *Garcia v. S.U.N.Y. Sciences Center of Brooklyn* (2001) 280 F.3d 98, 110-111.

[51] Similar equal protection rights are provided by Government Code section 11135, which was enacted by Statutes 1977, chapter 972, to provide individuals with protection from discrimination on the basis of disability (as well as for other basis, including age, color, and sex), in any program or activity receiving state funding. (See also, *Greater Los Angeles Council on Deafness, Inc., supra*, 812 F.2d 1103, 1113-1114.)

[52] *Hayes, supra*, 11 Cal.App.4th 1564, 1593, citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; see also, Government Code sections 17513, 17556, subdivision (c).

[53] *Hayes, supra*, 11 Cal.App.4th at p. 1594.

> "The application of any State rule or policy relating to the administration or operation of programs funded by this chapter [29 U.S.C.A. § 701 et seq.] (including any rule or policy based on State interpretation of Federal law, regulation, or guideline) shall be identified as a State imposed requirement." (Emphasis in original.)[54]

Thus, like the legislation at issue in *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, the claimant argues that reimbursement for the state's DSPS program is required by article XIII B, section 6 of the California Constitution.

The claimant misinterprets the provisions of the federal Rehabilitation Act. The Rehabilitation Act applies not only to the states, but directly to "any program or activity receiving Federal financial assistance."[55] "Program or activity" is expressly defined to include local community colleges; "all of the operations of …a college, university, or other postsecondary institution, or public system of higher education."[56] Compliance with Rehabilitation Act is a condition on the receipt of *any* federal financial assistance.

> In this regard, section 504 [the Rehabilitation Act] is similar to other statutes placing conditions on the receipt of federal funding…Congress may attach reasonable conditions to federal financial assistance. The recipients of federal funding are not thereby obligated to accept the conditions, however, because they "may terminate their participation in the program and thus avoid" the conditions imposed by the statute. [Citation omitted.][57]

Thus, community college districts are not legally compelled to comply with the Rehabilitation Act. The courts, however, including the Third District Court of Appeal in *Hayes*, have acknowledged that federal financial assistance to education is pervasive. Further, failure to comply with the Act has resulted in equal protection lawsuits. The court in *Hayes*, therefore, found the Rehabilitation Act of 1973 applicable to virtually all public educational programs in California and other states.[58] While the issue in *Hayes* primarily involved the Education of the Handicapped Act, legislation enacted after the Rehabilitation Act as it applied to the state with regard to elementary and secondary education, the court also discussed the Rehabilitation Act of 1973 since it was the first federal legislation to codify the equal protection rights of citizens with disabilities.[59] With respect to elementary and secondary school districts, the court "was satisfied that section 504 [the Rehabilitation Act] does impose an obligation upon local school districts to accommodate the needs of handicapped children."[60] The same obligation is imposed on

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[54] Item 3, September 26, 2008 Commission Hearing, Exhibit H, Claimant's comments on the draft staff analysis, dated June 24, 2008.

[55] 29 United States Code, section 794(b).

[56] 29 United States Code section 794(b); 34 Code of Federal Regulations, Subpart E, sections 104.42 and 104.43.

[57] *Greater Los Angeles Council on Deafness, Inc, supra*, 812 F.2d 1103, 1111, fn. 11.

[58] *Hayes, supra*, 11 Cal.App.4th 1564, 1584.

[59] *Hayes, supra*, 11 Cal.App.4th at pp. 1583-1587.

[60] *Id*. at p. 1586.

postsecondary education institutions, including community college districts, under the Rehabilitation Act. Thus, the Commission finds that community colleges are practically compelled to comply with the equal protection requirements of the Rehabilitation Act. In 1990, Congress passed the ADA, which imposes the same requirements as the Rehabilitation Act on all public entities, including community college districts, regardless of whether they receive federal financial assistance. Thus, under federal law, community colleges are mandated to provide services to disabled students.

Nevertheless, the claimant cites sections 714 and 721 of the Rehabilitation Act to support its position that the federal law applies only to the states, and not directly on local community college districts. Sections 714 and 721, however, do not apply to postsecondary educational institutions. These sections apply to state vocational rehabilitation programs funded by the Rehabilitation Act. Section 714 specifically refers to "the administration or operation of programs *funded* by this chapter." Section 721 addresses state plans for vocational rehabilitation services that are required as a condition of applying for and receiving federal grant funding pursuant to Title 29 of the United States Code, section 720. Section 720(b) authorizes grant funding "[f]or the purpose of making grants to States under part B of this subchapter [for "Basic Vocational Rehabilitation Services"] to assist States in meeting the costs of vocational rehabilitation services …" A state's plan must designate a "sole" state agency to administer the plan (29 U.S.C. § 721(a)(2)) and may include evidence of an interagency agreement for the coordination of services provided by the state's vocation rehabilitation agency and an institution of higher education. (29 U.S.C. § 721(a)(8)(B).) Notwithstanding the interagency agreement, if the institution of higher education is obligated under state or federal law to provide services that are also considered to be vocational rehabilitation services, then the institution "shall fulfill that obligation or responsibility." (29 U.S.C. § 721(a)(8)(C).) Thus, regardless of the federal funding to the states for vocational rehabilitation services, community college districts have independent obligations under the Rehabilitation Act.

Moreover, the Rehabilitation Act does not provide federal funding to postsecondary education institutions for the purpose of paying for services to disabled students. The history of the federal regulations adopted to implement the Rehabilitation Act supports this conclusion. When notice of the federal regulations were first issued, several universities and colleges expressed concern about the cost of providing auxiliary aids and asserted that the financial burden of providing auxiliary aids should be borne only by the state vocational rehabilitation agencies that receive federal funds earmarked for providing such services. In response to the comments, the Federal Department of Health, Education, and Welfare (the agency originally responsible for enforcing the Rehabilitation Act), acknowledged the concern about the cost of compliance, but emphasized that recipients "can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations."[61] Community college districts remain responsible for providing the aid, however. According to U.S. Department of Education, Office for Civil Rights (the agency now responsible for enforcing the Rehabilitation Act and the ADA with respect to postsecondary colleges):

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[61] *U.S. v. Board of Trustees for University of Alabama* (1990) 908 F.2d 740, 745; *Jones v. Illinois Dept. of Rehabilitation Services* (1982) 689 F.2d 724, 729-730.

> Postsecondary schools receiving federal financial assistance must provide effective auxiliary aids to students who are disabled…In many cases, an institution may meet its obligation to provide auxiliary aids by assisting the student in obtaining the aid or obtaining reimbursement, for the cost of an aid from an outside agency or organization, such as a state rehabilitation agency or a private charitable organization. *However, the institution remains responsible for providing the aid*. (Emphasis added.)[62]

As the agency responsible for enforcing the Rehabilitation Act and the ADA, the Office for Civil Rights' policy interpretations of the Rehabilitation Act have been given substantial deference by the courts.[63]

Therefore, to the extent the Rehabilitation Act and the ADA require community college districts to perform the same activities as the state's DSPS program, the state has not shifted costs to the community college districts and reimbursement is not required. "When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[64]

The activities required by the DSPS program that are also mandated by federal law do not constitute reimbursable state-mandated activities.

The activities required by the DSPS program that are listed in the table below are mandated by the federal Rehabilitation Act and ADA and, thus, do not constitute state-mandated activities.

DSPS Program	**Federal Rehabilitation Act/ADA**
Employ reasonable means to inform all students and staff about the support services or instruction available through the DSPS program. (Tit. 5, CCR, § 56020.)	Take appropriate initial and continuing steps to notify participants, beneficiaries, applicants and employees, and unions and professional organizations holding collective bargaining agreements that it does not discriminate on the basis of handicap. The notification shall also include an identification of the responsible employee designated to coordinate these programs. Notification can be made through recruitment materials, catalog, and student handbooks. (34 C.F.R. § 104.8)

[62] "*Auxiliary Aids and Services for Postsecondary Students with Disabilities - Higher Education's Obligations Under Section 504 and Title II of the ADA*," U.S. Department of Education, Office for Civil Rights (1998). (Item 3, Sept. 26, 2008 Commission Hearing, Ex. I, p. 1167.)

[63] *Cohen v. Brown University* (1996) 101 F.3d 155, 173.

[64] *Hayes, supra*, 11 Cal.App.4th 1564, 1593, citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76.)

	A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part. (28 C.F.R. § 35.106.)
Designate a DSPS coordinator for each college in the district, *to the extent the employee coordinates efforts to comply with the requirements of the Rehabilitation Act and the ADA.* (Tit. 5, CCR, § 56048.	Designate an employee to coordinate efforts to comply with the Rehabilitation Act and the ADA. (34 C.F.R. § 104.7; 28 C.F.R. § 35.107.)
Identify and verify a student's educational limitations. (Tit. 5, CCR, § 56006.)	Conduct a fact-specific, individualized analysis of the disabled student's circumstances and the accommodations that might allow the student to meet the program's standards. Colleges have the duty to gather sufficient information from the student and qualified experts to determine the accommodations that are necessary for the student. (*Wong v. Regents of University of California* (1999) 192 F.3d 807, 817-818.)
Provide academic adjustments or auxiliary aids to disabled students. (Ed. Code, §§ 67300, 67311; Tit. 5, CCR, § 56026.)	Provide academic adjustments or auxiliary aids in a timely manner to qualified applicants or students who have disabilities in order to afford those individuals an equal opportunity to participate in, and enjoy the benefits of, the college program. (34 C.F.R. § 104.44; 28 C.F.R. §§ 35.104, 35.160, 35.164).

The Commission further finds that the DSPS activity to protect all records pertaining to students with a disability from disclosure in accordance section 54600 of the Chancellor's regulations (Tit. 5, CCR, § 56008) may also be mandated by federal law and, thus, not subject to article XIII B, section 6. Section 54600 of the Chancellor's regulations implements Education Code section 76200 regarding student records. Education Code section 76200 states the intent of the chapter is "to resolve potential conflicts between California law and the provisions of Public Law 93-380 regarding the confidentiality of student records in order to insure the continuance of federal education funds to public community colleges within the state, and to revise generally and update the law relating to such records." Federal Public Law 93-380 enacted Title 20, U.S.C. section 1232g, the Family Educational and Privacy Rights Act, or "FERPA" (see also, 34

CFR Part 99). FERPA protects the privacy of student education records by requiring schools, including postsecondary educational institutions that receive funds under any applicable program of the U.S. Department of Education to obtain the written permission from the student before disclosing the student's education records, except as specified. FERPA also requires schools to provide their students with access to their records. These federal requirements are also required in section 54600 et al. of the Chancellor's regulations.

Community colleges are not legally compelled to comply with FERPA because the activities are required as a condition of the continued receipt of federal education funding. However, a court could find practical compulsion in the FERPA requirements making its requirements federally mandated. That issue does not need to be resolved, however. As analyzed below, all of the DSPS activities are required as a condition of receiving state DSPS funding and, thus, do not constitute reimbursable state-mandated activities pursuant to *Kern High School Dist.*

D. Although some activities required by the DSPS program may go beyond the requirements of federal law, these activities are not mandated by the state, pursuant to *Kern High School Dist.*, because community colleges perform the activities as a condition of receiving funding.

If the requirements of a test claim statute or regulation go beyond or exceed the requirements of federal law, those activities are *not* federal mandates and *may* be subject to article XIII B, section 6. For example, in *Long Beach Unified School Dist. v. State of California*, federal law required school districts to take reasonable steps to alleviate racial and ethnic segregation, and the federal courts suggested certain approaches to comply. State law was enacted to require specific action of school districts to alleviate segregation. The court found that the state law requirements went beyond federal constitutional and case law requirements or suggestions and mandated a higher level of service.[65] In addition, Government Code section 17556, subdivision (c), requires the Commission to not find costs mandated by the state if "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and imposes costs mandated by the federal government, *unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation*." (Emphasis added.)

In this case, there are several administrative, accounting, and reporting activities that exceed the requirements of federal law and are, thus, not mandated by federal law. These excess activities are listed below:

- Designate a DSPS coordinator for each college in the district, *to the extent the employee coordinates efforts to comply with the administrative, accounting, and reporting requirements of the DSPS program that go beyond the federal Rehabilitation Act and the ADA*. (Tit. 5, CCR, § 56048.)
- Establish a Student Educational Contract (SEC), which is a plan to address the specific needs of a disabled student, upon initiation of DSPS services. The Contract shall be reviewed and updated annually for every student with a disability participating in DSPS. The contract specifies those regular and/or special classes and support services identified and agreed upon by both the student and DSPS professional staff as necessary to meet the student's specific educational needs. (Tit. 5, CCR, § 56022.)

[65] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 173.

Federal law does not require the completion of a student educational contract or an annual review and update of the contract. Federal law requires a community college district to conduct a fact-specific, individualized analysis of the disabled student's circumstances and the accommodations that might allow the student to meet the program's standards. Colleges have the duty to gather sufficient information from the student and qualified experts to determine the accommodations that are necessary for the student. (*Wong v. Regents of University of California* (1999) 192 F.3d 807, 817-818.)

- Establish a policy and procedure for timely responding to accommodation requests involving academic adjustments. This procedure shall provide for an individualized review of each request. The procedure shall also permit the "Section 504 Coordinator," or other designated district official with knowledge of accommodation requirements, to make an interim decision pending a final resolution. (Tit. 5, CCR, § 56027.)

  Federal law requires community college districts to adopt separate procedures for grievances that incorporate due process standards and provide for prompt and equitable resolution of complaints. (34 C.F.R. § 104.7; 28 C.F.R. § 35.107.) In addition, federal law generally requires public entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability. The requirement, however, does not mandate specific information in the policy and procedure. (28 C.F.R. § 35.130(b)(7).)

- Submit to the Chancellor, at such times as the Chancellor shall designate, a DSPS program plan for each college within the district. Upon approval by the Chancellor, the plan shall be a contract between the district and the Chancellor. Expenditures of funds appropriated pursuant to this program shall conform to the approved plan. In addition, each district shall submit updates to its program plan upon request of the Chancellor. The program plan shall contain the following: (1) long-term goals of the DSPS program; (2) short-term measurable objectives of the program; (3) activities to be undertaken to accomplish the goals and objectives; and (4) a description of the methods used for program evaluation. (Tit. 5, CCR, § 56046.)

- Establish at each college in the district an advisory committee that shall meet at least once per year. The advisory committee shall include a student with a disability and representatives of the disability community and agencies or organizations serving persons with disabilities. (Tit. 5, CCR, § 56050.)

- Each college's DSPS program shall be evaluated at least once every five years by the Chancellor. The evaluation shall provide for the gathering of outcome data, staff and student perceptions of program effectiveness, access requirements of the ADA and the Federal Rehabilitation Act, compliance with Education Code section 67311.5 with respect to parking for persons with disabilities, and data on the implementation of the program as outlined in Education Code section 84850. (Tit. 5, CCR, § 56052.)

- Submit budget and fiscal reports as the Chancellor may require. When submitting the reports, districts shall conform to the reporting format, procedures, and deadlines the Chancellor may prescribe and shall use the disability categories set forth in sections 56032-56044 of the DSPS regulations. The disability categories define physical, communication, learning, and psychological disabilities, and also define acquired brain impairment and developmentally delayed learner. (Tit. 5, CCR, § 56030.) The

Chancellor shall provide for audits of DSPS programs to determine the accuracy of the reports. The Chancellor may adjust funding allocations to a district based on audit findings or enrollment and budget reports to compensate for over or under-allocated amounts in the current fiscal year or any of the three immediately proceeding fiscal years. (Ed. Code, § 84850, subd. (d); Tit. 5, CCR, § 56072.)

- Establish a unique budget identifier code to separately account for all funds provided pursuant to this program. The district shall certify through fiscal and accounting reports prescribed by the Chancellor that all funds were expended in accordance with the requirements of the program. (Tit. 5, CCR, § 56074.)
- Certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving students with disabilities. (Ed. Code, § 84850, subd. (d); Tit. 5, CCR, § 56076.)

While these activities go beyond the requirements of federal law, the Commission finds that these activities are not mandated by the state because the activities are required only as a condition of receiving funding under the DSPS program.

In 2003, the California Supreme Court decided the *Kern High School Dist.* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. The school district claimants in *Kern* participated in various funded programs each of which required the use of school site councils and other advisory committees. The claimants sought reimbursement for the costs from subsequent statutes which required that such councils and committees provide public notice of meetings, and post agendas for those meetings. [66]

When analyzing the term "state mandate," the court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[67] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders." [68] The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 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.[69] 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

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

[67] *Id.* at page 737.

[68] *Ibid*.

[69] *Id.* at page 743.

> that program does not constitute a reimbursable state mandate. (Emphasis in original.)[70]

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][71]

Based on the plain language of the statutes creating the underlying education programs in *Kern High School Dist.*, the court determined that school districts were not legally compelled by the state to establish school site councils and advisory bodies, or to participate in eight of the nine underlying state and federal programs and, hence, not legally compelled to incur the notice and agenda costs required under the open meeting laws. Rather, the districts elected to participate in the school site council programs to receive funding associated with the programs.[72]

Similarly, community college districts here are not legally compelled to comply with the DSPS program. The plain language of Education Code section 84850 and California Code of Regulations, title 5, section 56000 state that compliance with the DSPS rules and regulations is a condition of receiving state DSPS funding. Education Code section 84850, subdivision (d) states: "*As a condition of receiving funds pursuant to this section,* each community college district shall certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving disabled students. Districts shall also provide the programmatic and fiscal information concerning programs and services for disabled students that the regulations of the board of governors require." Similarly, title 5, section 56000 provides: "This subchapter applies to community college districts offering support services, or instruction through Disabled Student Programs and Services (DSPS), on and/or off campus, to students with disabilities pursuant to Education Code sections 67310-12 and 84850. *Programs receiving funds allocated pursuant to Education Code Section 84850 shall meet the requirements of this subchapter."*

Moreover, the Chancellor's Office issued a short document titled "*Commonly Asked Questions About "Mandated" vs "Non-Mandated" DSP&S Services* (Revised July, 2003)"[73] discussing the DSPS regulatory scheme. The California Supreme Court acknowledged that although the interpretation of regulations is a question of law, it "will give great weight to an administrative agency's interpretation of its own regulations and the statutes under which it operates."[74] Therefore, this document is valuable as an interpretation of the regulations issued by the Chancellor's Office.

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[70] *Ibid.*

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

[72] *Id.* at pp. 744-745.

[73] Item 3, September 26, 2008 Commission Hearing, Exhibit G, page 597.

[74] *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 235.

Q. What DSP&S services are colleges mandated to provide?

A. Because of the nature of serving students with disabilities there is no specific list of mandated versus non-mandated services.

Technically, no "DSP&S" services are required, because participation in DSP&S is voluntary on the part of each college. Colleges are governed by the Title 5 regulations regarding DSP&S only because they accept the DSP&S funds allocated to them every year. A college could refuse the DSP&S funds and not be subject to the requirements of Title 5 regarding DSP&S. [Emphasis added.]

However, colleges are still subject to state and federal law regarding the civil rights of people with disabilities to be served in a non-discriminatory manner. State Government Code sections 11135-11139.5, Section 504 of the federal Rehabilitation Act and the federal [ADA] all guarantee equal access to people with disabilities, and community colleges are subject to all of those laws.

Given all of that, the answer of what is "mandated" always depends on the disability-related educational limitation(s) of each individual student. You can never say that any specific type of service or accommodation is always "mandated", because there are some students with disabilities who won't need those services in order to receive equal access to the instruction, information, or programs offered by the college.

Even though there may be no legal compulsion in the DSPS program, claimant argues that community college districts are practically compelled to comply with the DSPS program because DSPS funding is essential for the colleges to comply with federal law and to prevent funding encroachment on other college programs. Claimant states the following:

> Here, the colleges did not choose to implement the Rehabilitation Act federal mandate, nor can the colleges discontinue implementing the Act, whether the state funds the implementation or not.
>
> The state has recognized for more than thirty years that the special education program encroaches on other college programs. The DSA (4, 5) cited the historical commitment (since Statutes of 1971, Chapter 1619, now found in Education Code section 84850) of the state to fund "the excess cost of providing special facilities, special education material, educational assistance, mobility assistance, and transportation for handicapped students." This funding was (since Statutes 1972, Chapter 1123) conditioned upon a certification by the college "that it has made every reasonable effort to secure federal funds or other state funds for the purpose, and has been unable to secure sufficient funds." These funds prevented the cost of providing special education to college students from encroaching on funds to provide all other college programs.
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> The DSPS funding provided in annual state budget acts ($111,084,597 for FY 2007-08) is an appropriation to the college districts based upon an allocation formula and not on actual costs. In addition, as a matter of law (Title 5, Section 56060), the DSPS program funds on "direct excess costs" of the program (as defined in Section 56064) and intentionally does not fund other related (e.g.

> "administrative") costs. Therefore, the DSPS funding, voluntary or not, is as a matter of law insufficient to fund both the federal and state requirements.
>
> However, even though the DSPS funding is not complete or actual cost reimbursement, it is substantial. As described in Hayes, just as the federal funding to the state to implement the Education of the Handicapped Act utilizes a "cooperative federalism" scheme (characterized as the "carrot and stick" approach), the DSPS funding here makes substantial state funding available to the colleges to implement substantive terms of the program. The state DSPS funding is not trivial or insubstantial.
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> So the ultimate question is whether the colleges' participation in the DSPS program is truly voluntary. The alternatives are to participate in the DSPS program and obtain significant funding or to decline to participate and severely encroach on other program funding since the colleges are compelled to accommodate the educational needs of the special education students in any event… It is unlikely that there will come a time when the colleges will decline $111 million in DSPS funds each year when it is the only significant source of funds to mitigate the federal special education mandates, so there is no true "*Kern*" choice.[75]

In *Kern High School Dist*., the school districts made similar arguments and urged the court to define "state mandate" broadly to include situations where participation in the program is practically compelled; where the absence of a reasonable alternative to participation creates a "de facto" mandate.[76] The court previously applied such a construction to the definition of a federal mandate in the case of *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74, where the court considered whether state statutes enacted as a result of various federal "incentives" for states to extend unemployment insurance coverage to public employees constituted a reimbursable state-mandated program under article XIII B, section 6. The court in *City of Sacramento* concluded that the costs resulted from a federal mandate because the financial consequences to the state and its residents of failing to participate in the federal plan (full, double unemployment taxation by both state and federal governments) were so onerous and punitive; amounting to "certain and severe federal penalties" including "double taxation" and "other "draconian" measures.[77]

Although the court in *Kern High School Dist*. declined to apply the reasoning in *City of Sacramento* that a state mandate may be found in the absence of strict legal compulsion, after reflecting on the purpose of article XIII B, section 6 – to preclude the state from shifting financial responsibilities onto local agencies – the court stated: "In light of that purpose, we do not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6,

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[75] Item 3, September 26, 2008 Commission Hearing, Exhibit H, Claimant comments on draft staff analysis.

[76] *Kern High School Dist., supra,* 30 Cal.4th 727, 748.

[77] *City of Sacramento, supra*, 50 Cal.3d 51, 74; *Kern High School Dist., supra,* 30 Cal.4th 727, 750.

properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds."[78]

However, the court in *Kern High School Dist*. found that the facts before it failed to amount to such a "de facto" mandate since a school district that elects to discontinue participation in one of the educational programs at issue did not face "certain and severe" penalties (independent of the program funds at issue)[79] such as "double … taxation" or other "draconian" consequences. The court concluded that:

> [T]he circumstances presented in the case before us do not constitute the type of nonlegal compulsion that reasonably could constitute, in claimants' phrasing, a "de facto" reimbursable state mandate. Contrary to the situation that we described in *City of Sacramento* … a claimant that elects to discontinue participation in one of the programs here at issue does not face "certain and severe … penalties" such as "double … taxation" or other "draconian" consequences … but simply must adjust to the withdrawal of grant money along with the lifting of program obligations. Such circumstances do not constitute a reimbursable state mandate for purposes of article XIII B, section 6.[80]

The court acknowledged that a participant in a funded program may be disappointed when additional requirements are imposed as a condition of continued participation in the program. Such conditions, however, do not make the program mandatory or reimbursable under article XIII B, section 6:

> Although it is completely understandable that a participant in a funded program may be disappointed when additional requirements (with their attendant costs) are imposed as a condition of continued participation in the program, just as such a participant would be disappointed if the total amount of the annual funds provided for the program were reduced by legislative or gubernatorial action, the circumstances that the Legislature has determined that the requirements of an ongoing elective program should be modified does not render a local entity's decision whether to continue its participation in the modified program any less voluntary.[81]

The Commission finds that community college districts are not practically compelled to comply with the DSPS program. The state has imposed some regulatory requirements upon districts receiving DSPS funds. The incentive, or "carrot," for community colleges to comply with the regulatory requirements of the DSPS program is the availability of funding to cover the costs of providing educational services to disabled students; the only consequence is the removal of the funds. There are no other "certain and severe" penalties imposed by law, or evidenced in the record, such as double taxation, or the removal of other, unrelated funding sources, if a district declines to participate in the DSPS program. Like the Court in *Kern*, a "district will decline

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[78] *Kern High School Dist., supra*, 30 Cal.4th 727, 752.

[79] *Id.* at page 731.

[80] *Id*. at page 754.

[81] *Id.* at pages 753-754.

participation if and when it determines that the costs of program compliance outweigh the funding benefits."[82] While it is true that community college districts are required by federal law to provide reasonable accommodations to disabled students that ensure equal access to education, and districts may not turn those students away due to the cost of the service or aid, there is no requirement in law for the state to pay those expenses. Under *Kern,* when additional requirements are imposed as a condition of participating in a funded program, those conditions do not make the program mandatory or reimbursable under article XIII B, section 6.

Accordingly, the Commission finds that Education Code section 67300, 67310, 67311, 67312 and 84850; California Code of Regulations, title 5, section 56000 et seq.; and the Chancellor's Office "Implementing Guidelines for Title 5 Regulations, *Disabled Student Programs and Services*," issued January 2, 1997, do not impose a state-mandated program on community college districts.

Issue 2: Does requesting instructional materials in an electronic format pursuant to Education Code section 67302 constitute a reimbursable state-mandated program?

Education Code section 67302 was added by Statutes 1999, chapter 379 (AB 422) to require publishers to provide electronic versions of certain printed and non-printed instructional materials (i.e., books, software programs, video disks, compact disks, and audio tapes) to community colleges so that disabled students with visual impairments attending the college may have access to the materials in alternate media. "Instructional materials" are defined as "textbooks and other materials written and published primarily for use by students in postsecondary instruction that are required or essential to a student's success in a course of study in which a student with a disability is enrolled." The determination of which materials are "required or essential" shall be made by the instructor of the course in consultation with the community college official making the request for the instructional materials.[83] Upon receipt of a written request from the community college, the publisher is required to provide an electronic version of the material to the college "at no additional cost and in a timely manner." The written request to the publisher must certify the following:

1. the college or student has purchased the printed instructional material for use by a student;
2. the student has a disability that prevents him or her from using standard instructional materials;
3. the materials are for use by the student in connection with a course he or she is registered or enrolled in; and
4. is signed by the community college DSPS coordinator, or another campus official responsible for monitoring ADA compliance. [84]

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

[83] Education Code section 67302, subdivision (e)(1).

[84] Education Code section 67302, subdivision (a).

A publisher may also require that the request include a signed statement by the student agreeing that the electronic materials will be used for "his or her own educational purposes" and that the student "will not copy or duplicate the printed instructional material for use by others."[85] If a college allows a student to use an electronic version of instructional materials directly, the college is required to take reasonable precautions, such as copy-protecting the file, to prevent students from violating the federal Copyright Revision Act, by further distributing the material.[86] Moreover, community colleges may use the electronic instructional materials to transcribe the materials into braille, and to share the braille copy with other disabled students.[87] The electronic version of the material is required to be compatible with commonly used Braille translation and speech synthesis software.[88]

Education Code section 67302, subdivision (g), authorizes the Chancellor's Office to establish a statewide or regional center for processing requests for electronic versions of instructional materials. If a center is established, the colleges in the jurisdiction of a center are required to submit requests for instructional material to the center, which shall than transmit the request to the publisher.

Education Code section 67302, subdivision (i), requires the Chancellor's Office to adopt guidelines to implement the statute. The Chancellor's Office published the guidelines in April 2000; "Guidelines for Producing Instructional and Other Printed Materials in Alternate Media for Persons with Disabilities," Part II.[89]

Education Code section 67302, subdivision (j), states that failure to comply with the requirements of the section is a violation of Section 54.1 of the Civil Code. Civil Code section 54.1 is the California version of the ADA, requiring that disabled persons be granted full and equal access to transportation, facilities open to the general public, and housing.

The claimant alleges that Education Code section 67302 imposes a reimbursable state-mandated program by requiring community colleges "[w]hen seeking printed instructional materials in an electronic format, to provide to the publisher or manufacturer a written request" meeting the statutory certification requirements; to copy protect disks or electronic files when being used directly by a student; and to submit requests for materials through a statewide processing center, if one is established by the Chancellor's Office.[90]

The Chancellor's Office and the Department of Finance contend that Education Code section 67302 does not impose a state mandate or a higher level of service on community college districts. The Chancellor's Office states the following:

> The statute requires publishers of certain instructional materials to provide electronic versions of those materials to community colleges, upon request, at no

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[85] Education Code section 67302, subdivision (b).

[86] Education Code section 67302, subdivision (c).

[87] Education Code section 67302, subdivision (f).

[88] Education Code section 67302, subdivision (a).

[89] Item 3, September 26, 2008 Commission Hearing, Exhibit G, page 633 et seq.

[90] Test Claim Filing, pages 84-85.

> cost to the college. However, the statute is not mandatory since colleges are not required to use the mechanism established by section 67302 or to ask publishers to provide texts in electronic form. Of course, to the extent that colleges do call upon publishers to provide the electronic texts, the statute creates a potential savings to districts since federal law requires districts to provide students with visual impairments access to print and computer-based information. (See Section 504 of the Rehabilitation Act of 1973 … and the American with Disabilities Act of 1990 …. Education Code section 67302 assists districts in meeting their pre-existing obligations to provide instructional materials in alternate media.[91]

For the reasons below, the Commission finds that community college districts have a preexisting duty under the federal Rehabilitation Act and the ADA to provide students with visual impairments access to print and computer based information through alternate media, including electronic text. The state, through the test claim statute, has established an optional program to assist community college districts in meeting this requirement.

A. Federal law requires community colleges to provide instructional materials in alternate formats, including electronic format, when requested by a disabled student.

As indicated above, community colleges are required by the Rehabilitation Act and the ADA to provide auxiliary aids and/or services in a timely manner to ensure effective participation by students with disabilities. Under the Rehabilitation Act any recipient of federal financial assistance is required to afford a qualified individual with a disability an opportunity to participate in the program or activity that is as effective as that provided to other students.[92] The recipient of federal financial assistance "shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity … because of the absence of educational auxiliary aids for students with sensory, manual, or speaking skills."[93] Auxiliary aids include:

> Taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and action. Recipients need not provide attendants, individually prescribed devises, readers for personal use or study, or other devices or services of a personal nature.[94]

Similarly, under title II of the ADA, a public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of a service, program or activity conducted by the public

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[91] Item 3, September 26, 2008 Commission Hearing, Exhibit B, page 397.

[92] 34 Code of Federal Regulations, section 104.4 (b)(1)(iii).

[93] 34 Code of Federal Regulations, section 104.44 (d)(1).

[94] 34 Code of Federal Regulations, section 104.44(d).

entity.[95] In this regard, public colleges under the ADA are required to take appropriate steps to ensure that communications with persons with disabilities "are as effective as communications with others"[96] The ADA further states that, in determining what type of auxiliary aid and service is necessary, a public college shall give primary consideration to the requests of the individual with a disability.[97]

The U.S. Department of Education, Office for Civil Rights (OCR) enforces the Rehabilitation Act and the ADA with respect to educational institutions and has issued several opinions applying the requirements of the Rehabilitation Act and ADA regulations to situations involving access to instructional materials. OCR has held that the three basic components of effective communication include "timeliness of delivery, accuracy of the translation, and provision in a manner and medium appropriate to the significance of the message and the abilities of the individual with the disability."[98] In applying this standard, OCR required one college to provide a textbook in Braille to a visually impaired student because the subject matter of the textbook was ill-suited to an auditory translation. OCR held that "mathematics and science textbooks, as well as textbooks to assist in acquiring proficiency in a written (rather than conversational) foreign language, ordinarily rely heavily on unique symbols, equations, charts, grids, subscripts, punctuation, underscores, and accent marks, which are often hard to effectively convey through auditory speech."[99, 100]

Thus, community colleges have an existing duty under federal law to provide timely, accurate and accessible instructional materials to disabled students, and to give primary consideration to the requests of the individual with a disability for instructional materials in alternate formats. Types of alternate media or formats that a disabled student may request include materials

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[95] 28 Code of Federal Regulations, sections 35.104, 35.130, 35.160, 35.164.

[96] 28 Code of Federal Regulations, section 35.160(a).

[97] 28 Code of Federal Regulations, section 35.160(b)(2).

[98] "Guidelines for Producing Instructional and Other Printed Materials in Alternate Media for Persons with Disabilities, Chancellor's Office, April 2000 (Item 3, Sept. 26, 2008 Commission Hearing, Ex. G, p. 607, 610), citing OCR Docket No. 09-97-2145 (Jan. 9, 1998).

[99] *Ibid*.

[100] In 1996, OCR conducted a statewide review of California's community colleges to determine if they were meeting their obligation under the ADA and the Rehabilitation Act to provide students with visual impairments access to print and computer-based information. OCR concluded that the many colleges did not have adequate systems in place for responding in a timely and efficient manner to requests for materials in alternate media, and found that most colleges rely heavily on use of readers or pre-recorded audio tapes as a means of making printed material accessible for blind or visually impaired students. OCR recommended that the Chancellor's Office work with the colleges to develop a coordinated systemwide approach that would streamline the present time-consuming and labor-intensive process of converting hardcopy print into electronic text and/or Braille. ("Guidelines for Producing Instructional and Other Printed Materials in Alternate Media for Persons with Disabilities, Chancellor's Office, April 2000; OCR letter to Chancellor's Office re: Docket Number 09-97-6001, August 21, 2001 (Item 3, Sept. 26, 2008 Commission Hearing, Ex. G, pp. 687 et seq., 692-693).)

provided in (1) a recorded audio format; (2) Braille; (3) tactile graphics to make diagrams and other graphic images printed on a Braille printer using specialized software; (4) large print in either hardcopy format or closed-circuit television that permits magnification of the page being viewed; or (5) electronic text. Electronic text can be stored, searched and indexed, and converted to large print or hard copy Braille through use of a translation program. If a document is not available in electronic text, it is necessary for the college to use a scanner to create an electronic version and then proofread the document to eliminate scanning errors. This can be time-consuming, especially for longer documents.[101]

The cost of providing instructional materials in alternate media under federal law is the obligation of the community college, and may not be passed on to the student.[102] The community college is required to honor the choice of the student's request for the material in an alternative format unless the college can demonstrate that another "effective" means of communication exists or that use of the means chosen would fundamentally alter the service or program, or would result in undue financial and administrative burdens.[103] Providing instructional materials to disabled students, including materials provided in electronic format, therefore does not impose a state-mandated program.[104]

B. Education Code section 67302 does not impose state-mandated duties, or a higher level of service on community college districts.

The Commission finds that Education Code section 67302 does not impose a state-mandated program on community college districts. The plain language of Education Code section 67302 requires publishers of certain instructional materials to provide electronic versions of those materials to community colleges, upon request of the college. The electronic version of the text is then provided to the college at no cost. If electronic text is obtained, the college remains responsible for converting the electronic text into Braille, if requested by the student and determined effective for compliance with the equal protection requirements of the Rehabilitation Act and the ADA.

Community colleges have the option, however, to directly scan or transcribe materials from hard copy publications to create accessible versions for their disabled students, just as they could prior

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[101] "Guidelines for Producing Instructional and Other Printed Materials in Alternate Media for Persons with Disabilities, Chancellor's Office, April 2000 (Item 3, Sept. 26, 2008 Commission Hearing, Ex. G, pp. 615-620.)

[102] "*Auxiliary Aids and Services for Postsecondary Students with Disabilities – Higher Education's Obligations Under Section 504 and Title II of the ADA*," U.S. Department of Education, Office for Civil Rights, Revised September 1998. (Item 3, Sept. 26, 2008 Commission Hearing, Ex. G, p. 591, 593.)

[103] 28 Code of Federal Regulations, section 35.164; *Alexander, supra,* 469 U.S. 287, 300-302.

[104] *Hayes, supra*, 11 Cal.App.4th 1564, 1593, citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; see also, Government Code sections 17513, 17556, subdivision (c).

to the operation of Education Code section 67302.[105] Thus, the statute does not legally compel community college districts to comply with its requirements.[106]

This conclusion is supported by the Chancellor's Guidelines. Page ii of the Guidelines states Education Code section 67302 provides an option to obtain electronic text from publishers.

> This new law, which became effective January 1, 2000, will assist colleges in meeting their pre-existing obligations to provide instructional materials in alternate media. The electronic text supplies by a publisher may be used to produce large print, translated and sent to a braille embosser, or accessed directly with speech synthesizers or refreshable braille displays.
>
> …Part II of this document [guidelines] addresses the procedures to be used by colleges *in taking advantage of the option provided by AB 422 to obtain electronic text from publishers.* (Emphasis added.)[107]

The interpretation of a statute by the agency charged with the responsibility of enforcing the statute is given great weight by the courts.[108]

Even if the claimant were to argue that community college districts are practically compelled to comply with the requirements of Education Code section 67302 in order to provide instructional materials in alternate media to a visually disabled student in a timely manner as required by federal law, the statute does not impose a higher level of service. Filling out a one-page form and sending it to a publisher to obtain electronic text at no cost, as in the sample provided in the appendix to the Chancellor's Office Alternate Media Guidelines, is a lower level of service than the alternative of scanning, or otherwise transcribing, an entire textbook into electronic format.[109]

Accordingly, the Commission finds that Education Code section 67302 does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

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[105] "Guidelines for Producing Instructional and Other Printed Materials in Alternate Media for Persons with Disabilities, Chancellor's Office, April 2000 (Item 3, Sept. 26, 2008 Commission Hearing, Ex. G, p. 620).

[106] *Kern High School Dist., supra,* 30 Cal.4th 727, 743.

[107] Exhibit G, page 599, Preface, page ii.

[108] *Robinson, supra,* 2 Cal.4th 226, 235.

[109] See also Item 3, September 26, 2008 Commission Hearing, Exhibit I, page 1403, Assembly Floor Analysis, Concurrence in Senate Amendments to AB 422 (1999-2000 Reg. Sess.), August 25, 1999, page 2, where the analysis states the following:

> Public colleges and universities make available the instructional materials in a format for the visually impaired, but oftentimes these materials must be "manually" in-putted in order to have them converted appropriately. This is a time consuming and expensive process. A way to expedite this process and reduce costs is to have the materials available in easily readable electronic format.

Issue 3: Do the parking services required for students with disabilities pursuant to Education Code section 67301 and section 54100 of the Chancellor's Office regulations constitute a reimbursable state-mandated program?

The test claim alleges that Education Code section 67301 (including former section 67311.5), and section 54100 of the Chancellor's Office regulations require community colleges to provide special parking for students with disabilities, as well as for those providing transportation for them. The claim alleges that this includes "waiv[ing] any restrictions, fines or meter fees."[110]

Education Code section 67301,[111] first added in 1990 as former section 67311.5, requires the California Community Colleges Board of Governors to adopt rules and regulations, which, pursuant to subdivision (a), include authorization for students with disabilities to park for unlimited periods in public time-restricted or metered spaces, without a fee. Subdivision (b) requires that the adopted regulations require visitor parking be provided at no charge for a disabled person, or someone providing their transportation, and to "provide accommodations to any person whose disability prevents him or her from operating the gate controls" in a parking facility controlled by a mechanical gate. Subdivision (c) requires the California Community Colleges Board of Governors to institute audit procedures to monitor individual campus compliance with disabled parking laws, including the requirements of the ADA. The Commission finds that Education Code section 67301, including former section 67311.5 as it was initially numbered, require duties of the Board of Governors to adopt regulations, but does not directly require activities of community college districts, and therefore does not impose a state-mandated activity on community college districts.

California Code of Regulations, title 5, section 54100[112] is the implementing regulation for the disabled parking statute. Students with disabilities are defined in subdivision (b) as enrolled students who either qualify as disabled under the Vehicle Code, or are entitled to special parking through the DSPS program. Subdivision (c) allows community college districts to require the display of handicapped license plates or placards issued by the Department of Motor Vehicles, or by a sticker issued by the college. Section 54100 of the regulations requires community college districts to perform the following activities:

- Each community college district that provides parking shall, consistent with the requirements of this section and Education Code section 67301, provide parking at each of its colleges or centers to students with disabilities and those providing transportation for disabled students in those parking areas which are most accessible to facilities that the district finds are most used by students. Students with disabilities may be required to pay parking permit fees under Education Code section 72247 (renumbered 76360 by Stats. 1993, ch. 8) that are required of all students. But disabled students shall not be required to pay any other charge or be subjected to time limitations or other restrictions as specified. (Cal. Code Regs., tit. 5, § 54100, subds. (a), (d), (e).)

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[110] Test Claim Filing, pages 90-91.

[111] Added by Statutes 1995, chapter 758 (AB 446), amended by Statutes 2001, chapter 745 (SB 1191) (urgency oper. Oct. 12, 2001). The section was derived from former section 67311.5, which was added by Statutes 1990, chapter 1066, and repealed by Statutes 1995, chapter 758.

[112] As added by Register 92, number 12, operative February 18, 1992.

- Where parking is located in an area where access is controlled by a mechanical gate, the district shall ensure that accommodations are made for students with disabilities who are unable to operate the gate controls. Accommodations may be provided by an attendant assigned to assist in operation of the gate or by any other effective means deemed appropriate by the district. (Cal. Code Regs., tit. 5, § 54100, subd. (g).)
- Each community college district shall post in conspicuous places notice that parking is available to students with disabilities and those providing transportation for disabled students. (Cal. Code Regs., tit. 5, § 54100, subd. (f).)

Revenue from parking fees collected pursuant to Education Code section 72247 (renumbered 76360) "may" be used to offset the cost of implementing section 54100. (Cal. Code Regs., tit. 5, § 54100, subd. (h).) Education Code section 76360 permits community colleges to charge up to $40 per semester and $20 per intersession, to students, employees and others, for campus parking services. The fee may be increased for funding on-campus parking construction if both the number of students per available parking space, and the local cost per square foot of land, exceed statewide averages. Even if such higher charges are allowed, the fee may not exceed the actual cost of constructing a parking structure. Students receiving financial aid may not be charged more than $20 per semester for parking. Fees collected must be deposited in a designated fund, and may only be expended for public transportation subsidies and parking services. Parking services is defined as "the purchase, construction, and operation and maintenance of parking facilities."

In addition, funding received by community college districts under the DSPS program may be used to offset the costs for disabled parking. (Ed. Code, § 67311; Cal. Code Regs., tit. 5, § 56026.)

A. Providing accessible parking

As indicated above, section 54100, subdivisions (a), (d), and (e), of the Chancellor's regulations require community college districts to provide parking to students with disabilities and those providing transportation for disabled students in parking areas that are most accessible to facilities that the district finds are most used by students. The community college districts may not charge disabled students any extra fees for these activities.

Federal law and existing state law also address the provision of disabled parking for public entities, including community colleges. This law is summarized below.

Existing Federal Law

The Rehabilitation Act and Title II of the ADA require public entities, including community colleges, [113] to take reasonable measures to make their programs, services, and activities accessible to disabled individuals.[114] The courts have found that "mandating physical accessibility and the removal and amelioration of architectural barriers is an important purpose of each statute."[115] Although the Rehabilitation Act applies to recipients of federal financial aid,

[113] 34 Code of Federal Regulations, Subpart E, sections 104.42 and 104.43; 28 Code of Federal Regulations section 35.104.

[114] 29 United States Code section 794; 42 United States Code section 12132.

[115] *Pace v. Bogalusa City School Board* (2005) 403 F.3d 272, 291.

and the ADA more broadly applies to all public entities, the accessibility requirements under both federal laws are virtually the same and the courts have analyzed accessibility challenges under both laws using the same standards.[116]

The regulations implementing the Rehabilitation Act and the ADA state that "no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity."[117]

With respect to public entity facilities, the regulations do not require that each *existing* building or facility be accessible to individuals with disabilities *if* its program as a whole is readily accessible and usable by individuals with disabilities.[118] Thus, for facilities (defined to include parking lots) that existed when the Rehabilitation Act and ADA regulations became effective (June 3, 1977,[119] and January 26, 1992, respectively), compliance with federal law could be accomplished by moving the program to an accessible location, assigning aides to assist students with disabilities in accessing the services, or providing some other reasonable and effective way to make the service, program or activity readily accessible to an individual with a disability.[120] Comments to section 104.22 of the Rehabilitation Act regulations state that "a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities." When choosing the method for meeting the requirements of the Rehabilitation Act and the ADA, the public entity is required to "give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate."[121]

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[116] *Ibid.*

[117] 34 Code of Federal Regulations, section 104.22(a); 28 Code of Federal Regulations, section 35.149.

[118] 34 Code of Federal Regulations, section 104.22(a), (b); 28 Code of Federal Regulations, section 35.150(a). In this respect, public entity facilities are treated differently than facilities owned by private entities that provide public accommodations (i.e., restaurants, theaters, etc.). Title III of the ADA requires all private entities providing public accommodation to remove architectural barriers from existing facilities where such removal is "readily achievable."

[119] The Rehabilitation Act regulations were first promulgated in 1977 by the Department of Health, Education, and Welfare (45 C.F.R. pt. 84.) In 1979, the Department of Health, Education, and Welfare split into two separate agencies; the Department of Health and Human Services and the Department of Education. The Rehabilitation Act regulations were transferred to the Department of Education in 1979 (34 C.F.R. §§ 100.7 and 104.61). (See *Rogers v. Bennett* (1989) 873 F.2d 1387, 1390; *Southeastern Community College, supra*, 442 U.S. 397, 404.)

[120] 34 Code of Federal Regulations, sections 104.3(i), 104.22(b); 28 Code of Federal Regulations, sections 35.104, 35.150(b).

[121] 34 Code of Federal Regulations, section 104.22(b); 28 Code of Federal Regulations, section 35.150(b)(1).

Structural changes to existing facilities and parking lots are required only where there is no other feasible way to make the public entity's program accessible to individuals with disabilities.[122]

Thus there is some flexibility in federal law with regard to public facilities and parking lots *existing* on the effective dates of the Rehabilitation Act and ADA regulations. Nevertheless, the federal government anticipated public entities to provide reserved parking spaces for disabled individuals near the entrances to buildings that have parking lots open to the public. The commentary accompanying the ADA regulations states that "a public entity *should* provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction" since "some disabled people will find it difficult, if not impossible, to gain access to public facilities safely if they do not have enough room to unload a wheelchair from their vehicle, or if they must traverse the full length of a parking lot." (Emphasis added.)[123]

The Rehabilitation Act and the ADA, however, do require public entities to provide accessible parking to persons with disabilities pursuant to specific building and architectural standards if a parking lot is constructed or altered after the effective dates of the Rehabilitation Act and the ADA regulations.[124] Under these circumstances, the lack of accessible parking has the effect of denying persons with disabilities access to programs and activities under the federal law.[125]

Pursuant to the Rehabilitation Act, parking lots that were first constructed or altered after June 3, 1977, were required to comply with the building and architectural standards of the American National Standards Institute, Inc. (ANSI A117.1-1961), or other method that provided equivalent access to the facility. The Rehabilitation Act regulations were amended, effective, January 18, 1991, to require compliance with the specific architectural accessibility standards of the Uniform Federal Accessibility Standards (UFAS).[126] Under the ADA, parking lots constructed or altered after January 26, 1992, must comply with either the UFAS or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG).[127] Both standards of the UFAS and ADAAG specify the number of required parking spaces reserved for disabled parking depending on the size of the lot.[128] Parking spaces for disabled individuals and accessible passenger loading zones that serve a particular building are required by these standards to be the spaces or zones located closest to the nearest accessible

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[122] *Tennessee v. Lane* (2004) 541 U.S. 509, 532; *Martin v. City of Los Angeles* (1984) 162 Cal.App.3d 559, 564-565.

[123] *Klinger v. Director, Dept. of Revenue, State of Mo.* (2006) 433 F.3d 1078, 1080-1081 (citing 28 C.F.R. Ch. I, Pt. 35, and the appendix to that part, and the Americans with Disabilities Act Title II Technical Assistance Manual published by the federal Department of Justice.)

[124] 34 Code of Federal Regulations, section 104.23; 28 Code of Federal Regulations, section 35.151.

[125] U.S. Department of Education, Office for Civil Rights, Letter: University of Massachusetts-Amherst. (Item 3, Sept. 26, 2008 Commission Hearing, Ex. I, p. 1185.)

[126] 34 Code of Federal Regulations, section 104.23, (55 FR 52141, Dec. 19, 1990).

[127] 28 Code of Federal Regulations, section 35.151.

[128] UFAS, section 4.1.1(5); ADAAG, section 4.1.1(5). (Item 3, Sept. 26, 2008 Commission Hearing, Ex. I, pp. 1219 et seq., 1283 et seq.)

entrance on an accessible route. In separate parking structures or lots that do not serve a particular building, parking spaces for disabled people shall be located on the shortest possible circulation route to an accessible pedestrian entrance of the parking facility.[129] The dimensions of the disabled parking are also specified in the standards.[130]

According to the U.S. Department of Justice, altering a parking lot occurs if a public entity repaves or restripes the parking area. If a parking area is repaved or restriped, the entity is required by the ADA and the Rehabilitation Act to add as many accessible parking spaces as needed based on the standards contained in the UFAS and ADAAG.[131]

Moreover, the ADA regulations specifically prohibit public entities from placing a surcharge on disabled individuals or on any group of individuals with disabilities to cover the costs of program accessibility that is required to provide the disabled with the nondiscriminatory treatment required by the Act.[132] The intent of this surcharge provision is "to prevent disabled persons from being denied access to ADA- mandated benefits or services because they do not have the funds to pay for them, and to spread the costs of such benefits or services to all taxpayers."[133]

Existing State Law

Since 1978, state law has contained equal protection accessibility requirements similar to the Rehabilitation Act and the ADA. Government Code section 11135, as originally enacted by Statutes 1977, ch. 972, provided the following:

> No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color, or physical or mental disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state.

Subsequent amendments to Government Code section 11135 specify that programs and activities provided by entities that receive financial assistance from the state shall meet the minimum protections and prohibitions of the ADA. Where state law prescribes stronger protections and prohibitions than the ADA, however, state programs and activities shall meet the stronger protections of state law. (Stats. 1992, ch. 913.)

Regulations to implement Government Code section 11135 were enacted in 1980, with the relevant provisions regarding program accessibility fully set forth in an appendix to the case of *Martin v. City of Los Angeles* (1985) 162 Cal.App.3d 559, 569-570. These regulations can now be found in the California Code of Regulations, title 22, sections 98250 et seq. The court in

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[129] UFAS, section 4.6.2; ADAAG, section 4.6.2.

[130] UFAS, section 4.6.3 et seq; ADAAG, section 4.6.3 et seq.

[131] "*Americans with Disabilities Act, Technical Assistance, Common Questions: Readily Achievable Barrier Removal, Design Details: Van Accessible Parking Spaces*" (Aug. 1996, U.S. Dept. of Justice, Civil Rights Division). (Item 3, Sept. 26, 2008 Commission Hearing, Ex. I, p. 1195.)

[132] 28 Code of Federal Regulations, section 35.130(f); *Klinger, supra*, 433 F.3d 1078.

[133] *Marcus v. State of Kansas, Dept. of Revenue* (1999) 170 F.3d 1305, 1306.

Martin determined that the state regulations were consistent with and similar to the Rehabilitation Act regulations on program accessibility.[134] Section 98254, subdivision (a), of the regulations state in relevant part the following:

> …[I]t is a discriminatory practice where a qualified disabled person, because a recipient's facilities are inaccessible to or unusable by such person, is denied the benefits or, or excluded from participation in, or otherwise subjected to discrimination under any program or activity to which this Division applies. It is a discriminatory practice for a recipient to fail to operate each program or activity to which this Division applies in such a manner that the program or activity, when viewed in its entirety, is readily accessible to disabled persons. This section does not require a recipient to make each of its existing facilities or every part accessible to and usable by disabled persons.

Facilities that were newly constructed or altered since the effective date of the regulations in 1980, are required to make the facility readily accessible to and usable by disabled persons.[135] Design, construction, and alteration of facilities in conformity with ANSI standards or Building Code standards contained in the regulations of the Office of the State Architect constitute compliance with the program accessibility standard.[136] Section 1129B et seq. of the Building Code standards address accessible parking requirements and are similar to the parking standards identified in federal law.[137]

Section 54100, subdivisions (a), (d), and (e), do not constitute a reimbursable state-mandated program.

Section 54100, subdivisions (a), (d), and (e), require each community college district that provides parking, to provide parking at each of its colleges or centers to students with disabilities and those providing transportation for disabled students in those parking areas which are most accessible to facilities that the district finds are most used by students. Students with disabilities may be required to pay parking permit fees under Education Code section 76360 that are required of all students. But disabled students shall not be required to pay any other charge or be subjected to time limitations or other restrictions as specified. Section 54100 was added on January 16, 1992, and became effective on February 18, 1992.

"When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[138]

The accessibility requirements of the Rehabilitation Act are imposed directly on community colleges receiving federal financial assistance. And, in 1990, Congress passed the ADA, which

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[134] *Martin, supra,* 162 Cal.App.3d at p. 303.

[135] California Code of Regulations, title 22, sections 98260, 98261.

[136] California Code of Regulations, title 22, section 98262.

[137] Item 3, September 26, 2008 Commission Hearing, Exhibit I, page 1381 et seq.

[138] *Hayes, supra,* 11 Cal.App.4th 1564, 1593, citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; see also, Government Code sections 17513, 17556, subdivision (c).

mandates the same accessibility requirements as the Rehabilitation Act on all public entities, including community college districts, regardless of whether they receive federal financial assistance. Thus, as analyzed earlier in this analysis, community colleges are mandated by federal law to comply with the requirements, including the accessibility requirements, of the Rehabilitation Act and the ADA.

As indicated above, federal law mandates community college districts to provide accessible parking to all persons with disabilities pursuant to specific building and architectural standards if the community college constructed a new parking lot or altered an existing parking lot (including repaving or restriping the parking area) since June 1977. Similar state law has been in place since 1980. Under these existing laws, the reserved parking spaces must be located in the most accessible area, closest to the building or pedestrian walkway the lot serves. Moreover, federal law prohibits community colleges from charging special fees on individuals with disabilities to provide accessible parking. These are the same requirements imposed by subdivisions (a), (d), and (e) of the test claim regulation, section 54100.

Thus, section 54100, subdivisions (a), (d), and (e), of the Chancellor's Office regulations do not mandate a new program or higher level of service on community colleges to provide accessible parking to disabled individuals, including students and those who provide them transportation, if the community college has constructed or altered (including repaving and restriping) a parking area since June 1977. Under these circumstances, reimbursement is not required.

However a different mandates analysis applies if a community college that existed before 1977 and offered parking, but did not repave, restripe, or in any way alter any portion of its parking area when section 54100 of the Chancellor's Office regulations became operative on February 18, 1992. With respect to existing facilities, federal law and existing state law provided flexibility to public entities when making their existing facilities accessible to individuals with disabilities. Although, as noted above, the federal government anticipated the use of reserved parking spaces for disabled individuals near the entrances to buildings that have parking lots open to the public, there is no existing federal or state requirement to provide accessible parking spaces for disabled individuals as long as the program provided was accessible. Public entities under these circumstances could satisfy the program accessibility requirements in a number of "reasonable" and "effective" ways, including relocating services to alternative, accessible sites and assigning aides to assist students with disabilities in accessing services.[139]

In *Long Beach Unified School Dist., supra,* 225 Cal.App.3d 155, the court held that a state-mandated higher level of service exists where federal law suggests certain steps and approaches to satisfy federal law, but subsequent state law requires a specific action. The court stated the following:

> However, although school districts are required to "take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of cause" [citations omitted], the courts have been wary of requiring specific steps in advance of a demonstrated need for intervention.

[139] 34 Code of Federal Regulations, sections 104.3(i), 104,22(b); 28 Code of Federal Regulations, sections 35.104, 35.150(b).

> …[a] review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. Where courts have suggested that certain steps and approaches may be helpful, the Executive Order and guidelines require specific actions.[140]

Thus, section 54100, subdivisions (a), (d), and (e), mandates a higher level of service on community colleges that existed before 1977 and offered parking, but did not repave, restripe, or in any way alter any portion of its parking area by February 18, 1992. The mandated higher level of service is the one-time activity of altering existing parking areas, which are most accessible to facilities that the district finds are most used by students, to provide reserved parking spaces for students with disabilities and those providing transportation for disabled students. Any subsequent alteration of the parking area (including repaving and restriping) would be governed by federal law.

However, the reimbursement period for this test claim begins in July 2001, more than nine (9) years after section 54100 became effective. There is no evidence in the record that the claimant, or any other community college district, waited nine years to comply with section 54100 and incurred the one-time cost of altering existing parking areas during the reimbursement period of this claim. Therefore, the Commission finds that there is no evidence of costs mandated by the state.

Accordingly, section 54100, subdivisions (a), (d), and (e), do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution,

B. Making accommodations where access to parking is controlled by a mechanical gate

Section 54100, subdivision (g), of the Chancellor's Office regulations states that where parking is located in an area where access is controlled by a mechanical gate, the district shall ensure that accommodations are made for students with disabilities who are unable to operate the gate controls. Accommodations may be provided by an attendant assigned to assist in operation of the gate or by any other effective means deemed appropriate by the district.

When the federal government imposes costs on local entities, those costs are not mandated by the state and do not require reimbursement from the state under article XIII B, section 6 of the California Constitution.[141]

As indicated above, the regulations implementing the Rehabilitation Act and the ADA state that "no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity."[142] When these regulations became effective in 1977 and 1992, public entities, including community colleges, were not required to make structural

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[140] *Long Beach Unified School Dist., supra,* 225 Cal.App.3d 155, 173.

[141] *Hayes, supra*, 11 Cal.App.4th 1564, 1593, citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; see also, Government Code sections 17513, 17556, subdivision (c).

[142] 34 Code of Federal Regulations, section 104.22(a); 28 Code of Federal Regulations, section 35.149.

changes to their facilities and parking lots as long as their "program as a whole [was] readily accessible and usable" by individuals with disabilities.

Section 54100, subdivision (g), imposes the same requirement as federal law; community colleges must ensure that reasonable accommodations are made for disabled students who are unable to operate the gate controls of a parking lot so that the student has access to the community college's program and services.

Accordingly, the Commission finds that section 54100, subdivision (g), does not impose a reimbursable state-mandated program.

C. Notice of availability of accessible parking

Finally, the claimant alleges that a reimbursable state-mandated program is imposed by the requirements of title 5, section 54100, subdivision (f):[143]

> Each community college district shall post in conspicuous places notice that parking is available to students with disabilities and those providing transportation for such students.

The ADA requires that all public entities provide signage directing users to accessible entrances to facilities. As stated above, the definition of "facility" includes parking.[144] 28 Code of Federal Regulations, section 35.163, provides:

> (a) A public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.
>
> (b) A public entity shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility[145] shall be used at each accessible entrance of a facility.

As stated above, *Hayes* specifies that when federal law "imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention."[146] The Commission finds that by posting the accessibility signage necessary to comply with the federal law, a community college district will meet the state requirement to post conspicuous notice on the availability of accessible parking; therefore, section 54100, subdivision (f) has not imposed a state-mandated program.

Based upon all of the above, the Commission finds that Education Code section 67301, and California Code of Regulations, title 5, section 54100, do not impose a state-mandated program on community college districts.

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[143] Test Claim Filing at pages 90-91.

[144] 28 Code of Federal Regulations, section 35.104.

[145] I.e., the blue-and-white wheelchair symbol.

[146] *Hayes, supra,* 11 Cal.App.4th 1564, 1593.

CONCLUSION

The Commission concludes that the test claim statutes, regulations, and "Implementing Guidelines for Title 5 Regulations, *Disabled Student Programs and Services*," do not impose a reimbursable state-mandated program on community college districts subject to article XIII B, section 6.