

# SixTen and Associates

## Mandate Reimbursement Services

Exhibit F

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May 5, 2004

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COMMISSION ON  
STATE MANDATES

Re: Test Claim 02-TC-31  
Santa Monica Community College District  
Minimum Conditions for State Aid

Dear Ms. Higashi:

I have received the comments of the Chancellor's Office of the California Community Colleges ("CCC") dated March 11, 2004, to which I now respond on behalf of the test claimant.

### **The Comments of CCC are Incompetent and Should be Excluded**

Test claimant objects to the comments of CCC, in total, as being legally incompetent and move that they be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

"...written response, opposition, or recommendations and supporting documentation shall 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 or information or belief."

Furthermore, the test claimant objects to any and all assertions or representations of fact made in the response since CCC has failed to comply with Title 2, California Code of Regulations, Section 1183.02(c)(1) which requires:

"If assertions or representations of fact are made (in a response), they must be supported by documentary evidence which shall be submitted with the state agency's response, opposition, or recommendations. All documentary evidence shall be authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so and must be based on the declarant's personal knowledge or information or belief."

In addition, CCC has cited numerous federal statutes and regulations without attaching a copy thereof, and without identifying specific chapters, articles, sections or page numbers, in violation of Title 2, California Code of Regulations Section 1183.02, subdivision (c)(2), which requires that written responses, opposition or recommendations on the test claim shall contain:

"A copy of relevant portions of...federal statutes, and executive orders that may impact the alleged mandate...unless such authorities are also cited in the test claim. The specific chapters, articles, sections, or page numbers must be identified..."

The comments of CCC do not comply with these essential requirements. Since the Commission cannot use unsworn comments or comments unsupported by declarations, but must make conclusions based upon an analysis of the statutes and facts supported in the record, test claimant requests that the comments and assertions of CCC not be included in the Staff's analysis.

Part I  
Replies Applicable to Repeated Arguments

CCC repeats several arguments to various issues throughout its response. Test Claimant will reply to these arguments in this Part I and will not repeat them in total each time the argument is made.

**A. Limited Time to Respond is not a Valid Argument**

CCC laments that, given the number of statutes and regulations, and severe cutbacks suffered, it was unable to provide a thorough response to this claim. CCC goes on to argue that it is regrettable that the lack of funding to support mandate claim reviews

could conceivably result in the payment of "unwarranted" claims.<sup>1</sup> It concludes that it must leave a comprehensive review of the issues to the Commission (i.e., the Commission staff).

The instant test claim was filed on June 19, 2003. The Commission's letter inviting comments was dated July 3, 2003. The CCC finally submitted its comments on March 16, 2004. Test claimant suggests that if CCC cannot find contradictory evidence to these issues in eight and one-half months, perhaps it does not exist.

**B. CCC Misinterprets "Kern" Relative to "Legal Compulsion"**

Citing Department of Finance v. Commission on State Mandates (2003) 30 Cal.4th 727 (hereinafter "Kern"), CCC offers an interpretation that legal compulsion is required in order to find a mandate. This is an erroneous interpretation. Legal compulsion is not necessarily required for a finding of a mandate. The controlling case law on the subject of legal compulsion *vis-a-vis* non-legal compulsion is still City of Sacramento v. State of California (1990) 50 Cal.3rd 51 (hereinafter "Sacramento II").

(1) Sacramento II Facts:

The adoption of the Social Security Act of 1935 provided for a Federal Unemployment Tax ("FUTA"). FUTA assesses an annual tax on the gross wages paid by covered private employers nationwide. However, employers in a state with a federally "certified" unemployment insurance program receive a "credit" against the federal tax in an amount determined as 90 percent of contributions made to the state system. A "certified" state program also qualifies for federal administrative funds.

California enacted its unemployment insurance system in 1935 and has sought to maintain federal compliance ever since.

In 1976, Congress enacted Public Law number 94-566 which amended FUTA to require, for the first time, that a "certified" state plan include coverage of public employees. States that did not alter their unemployment compensation laws accordingly faced a loss of both the federal tax credit and the administrative subsidy.

In response, the California Legislature adopted Chapter 2, Statutes of 1978 (hereinafter

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<sup>1</sup> There is perhaps something to be said about the mind-set of CCC when it can declare a claim to be "unwarranted" before it has the time or resources to analyze the claim.

chapter 2/78), to conform to Public Law 94-566, and required the state and all local governments to participate in the state unemployment insurance system on behalf of their employees.

(2) Sacramento I Litigation

The City of Sacramento and the County of Los Angeles filed claims with the State Board of Control seeking state subvention of the costs imposed on them by chapter 2/78. The State Board denied the claim. On mandamus, the Sacramento Superior Court overruled the Board and found the costs to be reimbursable. In City of Sacramento v. State of California (1984) 156 Cal.App.3d 182 (hereinafter Sacramento I) the Court of Appeal affirmed concluding, *inter alia*, that chapter 2/78 imposed state-mandated costs reimbursable under section 6 of article XIII B. It also held, however, that the potential loss of federal funds and tax credits did not render Public Law 94-566 so coercive as to constitute a "mandate of the federal government" under Section 9(b).<sup>2</sup>

In other words, Sacramento I concluded, *inter alia*, that the loss of federal funds and tax credits did not amount to "compulsion."

(3) Sacramento II Litigation

After remand, the case proceeded through the courts again. In Sacramento II, the Supreme Court held that the obligations imposed by chapter 2/78 failed to meet the "program" and "service" standards for mandatory subvention because it imposed no "unique" obligation on local governments, nor did it require them to provide new or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, was overruled.

However, the court also overruled that portion of Sacramento I which held that the loss of federal funds and tax credits did not amount to "compulsion."

(4) Sacramento II "Compulsion" Reasoning

Plaintiffs argued that the test claim legislation required a clear legal compulsion not

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<sup>2</sup> Section 1 of article XIII B limits annual "appropriations". Section 9(b) provides that "appropriations subject to limitation" do not include "appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly."

present in Public Law 94-566. Defendants responded that the consequences of California's failure to comply with the federal "carrot and stick" scheme were so substantial that the state had no realistic "discretion" to refuse.

In disapproving Sacramento I, the court explained:

"If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments." (Opinion, at page 74)

Plaintiffs argued that California was not compelled to comply because it could have chosen to terminate its own unemployment insurance system, leaving the state's employers faced only with the federal tax. The court replied to this suggestion:

"However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends. (¶) ...The alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards." (Opinion, at page 74, emphasis supplied)

In other words, terminating its own system was not an acceptable option because it was so far beyond the realm of practical reality so as to be a draconian response, leaving the state without discretion. The only reasonable alternative was to comply with the new legislation, since the state was practically "without discretion" to do otherwise.

The Supreme Court in Sacramento II concluded by stating that there is no final test for a determination of "mandatory" versus "optional":

"Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (Opinion, at page 76)

(5) The "Kern" Case Did Not Change the Standard

In Kern, at page 736, the Supreme Court first made it clear that the decision did not

hold that legal compulsion was necessary in order to find a reimbursable mandate:

"For the reasons explained below, although we shall analyze the legal compulsion issue, we find it unnecessary in this case to decide whether a finding of legal compulsion is necessary in order to establish a right to reimbursement under article XIII B, section 6,<sup>3</sup> because we conclude that even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate." (Emphasis in the original, underlining supplied)

After concluding that the facts in *Kern* did not rise to the standard of non-legal compulsion, the court reaffirmed that either double taxation or other draconian consequences could result in non-legal compulsion:

"In sum, the circumstances presented in the case before us do not constitute the type of non-legal compulsion that reasonably could constitute, in claimants' phrasing, a 'de facto' reimbursable state mandate. Contrary to the situation that we described in (*Sacramento II*), 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 (citation), but simply must adjust to the withdrawal of grant money along with the lifting of program obligations." (Opinion, at page 754, emphasis supplied to illustrate holding is limited to facts presented)

The test for determining the existence of a mandate is whether compliance with the test claim legislation is a matter of true choice, that is, whether participation is truly voluntary. *Hayes v. Commission on State Mandates*, (1992) 11 Cal.App.4th 1564, 1582 Under the "carrot and stick" analysis of both *Kern* and *Hayes*, community college districts' acceptance of state aid is not truly voluntary. The carrot is too large and the stick is too short.

The process for such a determination is found in *Sacramento II*, that is, the determination in each case must depend on such factors as the nature and purpose of

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<sup>3</sup> This *Kern* disclaimer that "we find it unnecessary in this case to decide whether a finding of legal compulsion is necessary in order to establish a right to reimbursement" refutes CCC's interpretation that legal compulsion is always necessary for a finding of a mandate.

the program; whether its design suggests an intent to coerce; when district participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. ("Sacramento II", at page 76)

CCC has not applied this crucial test to any of the test claim activities. Therefore, it cannot properly claim that the test claim activities are discretionary.

**C. CCC Misinterprets "Kern" Relative to "Receipt of State Funding"**

CCC argues that claimant can use funds it has already received from the state to satisfy any costs of complying with the test claim legislation and regulations, again citing "Kern". CCC has the facts of "Kern" badly mistaken:

"Real parties in interest - - two public school districts and a county (hereafter claimants) - - participate in various education-related programs that are funded by the state and, in some instances, by the federal government. Each of these underlying funded programs in turn requires participating public school districts to establish and utilize specified school councils and advisory committees. Statutory provisions enacted in the mid-1990's require that such school councils and advisory committees provide notice of meetings, and post agendas for those meetings. (citations) We granted review to determine whether claimants have a right to reimbursement from the state for their costs in complying with these statutory notice and agenda requirements." (Opinion, at pages 730-731, underlining supplied to show that the funding referred to was provided for the underlying education-related programs.)

At page 731 of the opinion, the court summarized its later holding:

"...we conclude that as to *eight* of the nine underlying funded programs here as issue, claimants have not been legally compelled to participate..., assuming (without deciding) that claimants have been legally compelled to participate in *one* of the nine programs, we conclude that claimants nonetheless have no entitlement to reimbursement from the state for such [notice and agenda] expenses,<sup>4</sup> because they have been

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<sup>4</sup> The court found these costs to be "rather modest". (Opinion, at page 747)

free at all relevant times to use funds provided by the state<sup>5</sup> for that [underlying education-related] program to pay required program expenses - - including the notice and agenda costs here at issue, (Emphasis in the original, underlining and bracketed clarification added.)

It is only in the context of those facts, that the court held:

“We therefore conclude that because claimants are and have been free to use funds from the [underlying education-related] Chacon-Moscone Bilingual-Bicultural Education program to pay required program expenses (including the notice and agenda costs here at issue), claimants are not entitled under article XIII B, section 6, to reimbursement from the state for such expenses.” (Opinion at page 748, parenthetical notation in the original, bracketed clarification added.)

Therefore, “*Kern*” is factually distinguishable. In the test claim now before the Commission there is no funding provided in any statute or regulations cited. Here, there are no “funds that have already been obtained from the state.”

**D. CCC Confuses Minimum Standards with Minimum Conditions**

CCC uses the term “minimum standards” interchangeably with the term “minimum conditions”. The two terms have different meanings and different applications.

Immediately prior to 1975, former Education Code Section 25510 (as amended by Chapter 989, Statutes of 1974, Section 23<sup>6</sup>) read:

“The Board of Governors of the California Community Colleges shall adopt rules and regulations fixing minimum standards entitling districts to receive state aid for the support of community colleges.”

Former Education Code Section 25510 was recodified and renumbered as section

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<sup>5</sup> The court found the underlying program funding to be “substantial”. (Opinion, at page 732)

<sup>6</sup> A copy of Chapter 989, Statutes of 1974, Section 23 is attached hereto in Exhibit “A”.

71025 by Chapter 1010, Statutes of 1976, section 2<sup>7</sup>. As recodified, section 71025 also read:

"The Board of Governors of the California Community Colleges shall adopt rules and regulations fixing minimum standards entitling districts to receive state aid for the support of community colleges."

Former Section 71025 was repealed by Chapter 973, Statutes of 1988, section 12.1. It was reenacted as Section 70901, by Chapter 973, Statutes of 1988, section 8<sup>8,9</sup>. As

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<sup>7</sup> A copy of Chapter 1010, Statutes of 1976, Section 2, which includes Education Code Section 71025 is attached hereto in Exhibit "A".

<sup>8</sup> A copy of Chapter 973, Statutes of 1988, Section 8, is attached hereto in Exhibit "A".

<sup>9</sup> Education Code Section 70901, added by Chapter 973, Statutes of 1988, Section 8:

"(a) The Board of Governors of the California Community Colleges shall provide leadership and direction in the continuing development of the California Community Colleges as an integral and effective element in the structure of public higher education in the state. The work of the board of governors shall at all times be directed to maintaining and continuing, to the maximum degree permissible, local authority and control in the administration of the California Community Colleges.

(b) Subject to, and in furtherance of, subdivision (a), and in consultation with community college districts and other interested parties as specified in subdivision (e), the board of governors shall provide general supervision over community college districts, and shall, in furtherance thereof, perform the following functions:

(1) Establish minimum standards as required by law, including, but not limited to, the following:

(A) Minimum standards to govern student academic standards relating to graduation requirements and probation, dismissal, and readmission policies.

(B) Minimum standards for the employment of academic and administrative staff in community colleges.

(C) Minimum standards for the formation of community colleges and districts.

(D) Minimum standards for credit and noncredit classes.

(E) Minimum standards governing procedures established by

governing boards of community college districts to ensure faculty, staff, and students the right to participate effectively in district and college governance, and the opportunity to express their opinions at the campus level and to ensure that these opinions are given every reasonable consideration, and the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards.

(2) Evaluate and issue annual reports on the fiscal and educational effectiveness of community college districts according to outcome measures cooperatively developed with those districts, and provide assistance when districts encounter severe management difficulties.

(3) Conduct necessary systemwide research on community colleges and provide appropriate information services, including, but not limited to, definitions for the purpose of uniform reporting, collection, compilation, and analysis of data for effective planning and coordination, and dissemination of information.

(4) Provide representation, advocacy, and accountability for the California Community Colleges before state and national legislative and executive agencies.

(5) Administer state support programs, both operational and capital outlay, and those federally supported programs for which the board of governors has responsibility pursuant to state or federal law. In so doing, the board of governors shall do the following:

(A) Annually prepare and adopt a proposed budget for the California Community Colleges. The proposed budget shall, at a minimum, identify the total revenue needs for serving educational needs within the mission, the amount to be expended for the state general apportionment, the amounts requested for various categorical programs established by law, the amounts requested for new programs and budget improvements, and the amount requested for systemwide administration.

The proposed budget for the California Community Colleges shall be submitted to the Department of Finance in accordance with established timelines for development of the annual Budget Bill.

(B) To the extent authorized by law, establish the method for determining and allocating the state general apportionment.

(C) Establish space and utilization standards for facility planning in order to determine eligibility for state funds for construction purposes.

(6) Establish minimum conditions entitling districts to receive state aid for support of community colleges. In so doing, the board of governors shall establish and carry out a periodic review of each community college district to

determine whether it has met the minimum conditions prescribed by the board of governors.

(7) Coordinate and encourage interdistrict, regional, and statewide development of community college programs, facilities, and services.

(8) Facilitate articulation with other segments of higher education with secondary education.

(9) Review and approve comprehensive plans for each community college district. The plans shall be submitted to the board of governors by the governing board of each community college district.

(10) Review and approve all educational programs offered by community college districts, and all courses that are not offered as part of an educational program approved by the board of governors.

(11) Exercise general supervision over the formation of new community college districts and the reorganization of existing community college districts, including the approval or disapproval of plans therefor.

(12) Notwithstanding any other provision of law, be solely responsible for establishing, maintaining, revising, and updating, as necessary, the uniform budgeting and accounting structures and procedures for the California Community Colleges.

(13) Establish policies regarding interdistrict attendance of students.

(14) Advise and assist governing boards of community college districts on the implementation and interpretation of state and federal laws affecting community colleges.

(15) Carry out other functions as expressly provided by law.

(c) Subject to, and in furtherance of, subdivision (a), the board of governors shall have full authority to adopt rules and regulations necessary and proper to execute the functions specified in this section as well as other functions that the board of governors is expressly authorized by statute to regulate.

(d) Wherever in this section or any other statute a power is vested in the board of governors, the board of governors, by a majority vote, may adopt a rule delegating that power to the chancellor, or any officer, employee, or committee of the California Community Colleges, or community college district, as the board of governors may designate. However, the board of governors shall not delegate any power that is expressly made nondelegable by statute. Any rule delegating authority shall prescribe the limits of delegation.

(e) In performing the functions specified in this section, the board of governors shall establish and carry out a process for consultation with institutional representatives of community college districts so as to ensure their participation in the development and review of policy proposals. The consultation process shall also afford community

enacted, the new section 70901 is greatly expanded and different from its pre-1975 predecessor<sup>10</sup>. CCC has overlooked this important change. Without discussing the entire statute, the following relevant observations are made:

The "minimum standards" language is now found in subdivision (b)(1):

"(b) Subject to, and in furtherance of, subdivision (a), and in consultation with community college districts and other interested parties as specified in subdivision (e), the board of governors shall provide general supervision over community college districts, and shall, in furtherance thereof, perform the following functions:

(1) Establish minimum standards as required by law, including, but not limited to, the following:..." (emphasis supplied)

and, these "minimum standards" are only applicable to:

(A) Minimum standards to govern student academic standards relating to graduation requirements and probation, dismissal, and readmission policies.

(B) Minimum standards for the employment of academic and administrative staff in community colleges.

(C) Minimum standards for the formation of community colleges and districts.

(D) Minimum standards for credit and noncredit classes.

(E) Minimum standards governing procedures established by governing boards of community college districts to ensure faculty, staff, and students the right to participate effectively in district and college governance, and the opportunity to express their opinions at the campus level and to ensure that these opinions are given every reasonable consideration, and the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards."

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college organizations, as well as interested individuals and parties, an opportunity to review and comment on proposed policy before it is adopted by the board of governors."

<sup>10</sup> Section 70901 was amended again by Chapter 1023, Statutes of 1998, Section 1, to add a new subdivision (b)(15) which allows contracting for the procurement of goods and services, which is not relevant to this test claim. The chapter also renumbered former subdivision (b)(15) as (b)(16).

The language concerning "state aid" has now been shifted to subdivision (b)(6) and is subject to minimum conditions, not minimum standards.

"(6) Establish minimum conditions entitling districts to receive state aid for support of community colleges. In so doing, the board of governors shall establish and carry out a periodic review of each community college district to determine whether it has met the minimum conditions prescribed by the board of governors." (Emphasis supplied)

Therefore, when discussing "minimum standards," minimum standards are limited to those found in Education Code Section 70901, subdivisions (b)(1)(A) through (E). This test claim is about the "minimum conditions" for the receipt of state aid which were established in 1988.

#### **E. CCC Misconstrues the Attorney General Opinion**

CCC cites an Opinion of the California Attorney General (83 Opinions of the California Attorney General 111 (2000)) and makes a quantum leap to conclude that the "minimum standards" of the Board of Governors do not constitute either a new program or a higher level of service so long as the Board was obligated to set minimum standards in those areas prior to 1975. As will be shown, this misconstrues the Attorney General Opinion. (Please note also that the argument goes to "minimum standards" and not to "minimum conditions". Therefore, it has no relevance to this test claim.)

Before embarking on a discussion of the opinion of the Attorney General, test claimant must remind the Commission that such an opinion is subject to three rules of interpretation.

1. Although an opinion of the California Attorney General is entitled to considerable weight, if relevant, it is not binding.
2. The opinion will be found unpersuasive when the Attorney General has aligned himself with one of the parties.<sup>11</sup>
3. Dissimilar facts are another basis to conclude the opinion to be unpersuasive. *People ex rel. Foundation for Taxpayer & Consumer Rights v. Duque* (2003) 105

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<sup>11</sup> In this regard, test claimant requests the Commission to take notice of the fact that the Attorney General, at the time of its opinion, and now, often represents the Department of Finance in matters opposing the adoption of test claims.

Cal.App.4th 259, 267-268<sup>12</sup>

The facts presented to the Attorney General related to Welfare & Institutions Code Sections 210 and 210.2. Section 210 provided:

“The Board of Corrections shall adopt minimum standards for the operation and maintenance of juvenile halls for the confinement of minors.”

The Attorney General was asked for an opinion as to two questions, the second of which was:

“When a local agency brings a particular juvenile facility into compliance with the minimum standards established by the Board of Corrections, is the state required to reimburse the local agency for the costs incurred in meeting the standards?” (AG Opinion, at page 111)

At page 119 of the opinion, the Attorney General noted that:

“Counties have been required to maintain a ‘suitable’ place for the detention of minors since at least 1915 (citations) Setting the minimum standards for what is ‘suitable’ does not create a ‘higher’ level of service – it has long been the level of service required of local agencies.”

Stated more succinctly, prior to 1975, local agencies were required to provide a “suitable” place for the detention of juveniles. Therefore, any regulations establishing what constitutes “suitable” are not new.

Contrary to the interpretation of CCC, the opinion only went so far as to determine the effect of minimum standards for suitability, it did not render an opinion on minimum standards for every other conceivable activity of the juvenile court system. It certainly did not opine that regulations issued pursuant to a pre-1975 general authority of a state agency to set minimum standards could never constitute either a new program or a higher level of service.

#### **F. Unidentified Regulations**

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<sup>12</sup> Pursuant to Title 2, California Code of Regulations, Section 1183.03(2), a copy of People ex rel. Foundation for Taxpayer & Consumer Rights v. Duque is attached hereto as Exhibit “B”.

At section 4 of its comments, CCC by its unsworn and unverified statement asserts that many of the regulations that are the subject of this claim existed prior to January 1, 1975, under different section numbers. Therefore, the argument continues that to the extent any mandates predated January 1, 1975, they are not eligible for reimbursement.

CCC in this argument does not identify either the pre-1975 regulations or the test claim regulations to which it refers. As such, these comments must be disregarded.

**G. Unidentified Federal Laws**

At section 5 of its comments, CCC by its unsworn and unverified statement asserts that a number of the regulations address areas that are already required by federal laws that claimant must follow.

CCC in this argument does not identify either the regulations or the federal laws to which it refers. As such, these comments must be disregarded.

**H. Unidentified Laws of General Application**

CCC, in section 6, argues that claimant is a California business enterprise (!) and required to follow general laws that apply to all such employers and enterprises, concluding that actions required by general law cannot be the basis for reimbursement.

CCC in this argument does not identify the test claim statutes or regulations<sup>13</sup> which it contends are laws of general application. As such, these comments must also be disregarded.

Part II

Replies Applicable to Minimum Conditions for State Aid

Prologue

In a section entitled "Regulatory Background", CCC states that it is attaching copies of early regulation packages (Attachments 1, 2, 3 and 4) and encourages the Commission's (i.e., Commission staff's) thorough review of the early provisions in the

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<sup>13</sup> Any argument that a claim is not reimbursable because it is based upon a law of general application must show that the test claim statute or regulations is a law of general application. Reference to some other "general law" is not relevant.

hope that the search will discover that many of the issues addressed in the test claim regulations preexisted January 1, 1975.

First of all, this reply cannot, obviously, respond to this "scavenger hunt" approach to legal analysis. Secondly, the copy of the comments (sent by e-mail) received by test claimant did not have attachments. Therefore, test claimant reserves the right to respond, if needed, when the attachments may be received in the future.

### **Condition 1 - Standards of Scholarship**

CCC relies on the contents of Attachment 1 and Attachment 2 as the basis for its argument that all of the Standards of Scholarship existed prior to 1975.

Since test claimant did not receive a copy of Attachment 1 or Attachment 2, it will reserve its reply to those attachments to when they are received.

Government Code Section 17514 defines "costs mandated by the state" as any increased costs which a local agency or school district is required to incur as a result of any statute or executive order implementing any statute which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

"Even if" CCC is correct in its assertions relative to the attachments, its descriptions fall far short of the new programs or higher levels of service required by the current regulations. For example, the summary by CCC of these purported pre-1975 regulations do not include:<sup>14</sup>

- (1) A requirement to file a copy of its own regulations with the Chancellor pursuant to Title 5, California Code of Regulations Section 51002(b);<sup>15</sup>
- (2) A requirement to determine and implement a uniform grading practice including grades given in accordance with an adopted grading scale, pursuant to section 55751;

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<sup>14</sup> The following summary is a portion of the new duties alleged in the test claim in the section for Standards of Scholarship. The summary is not intended to be all-inclusive. For a more detailed listing, please refer to the test claim at pages 164-188.

<sup>15</sup> Unless otherwise noted, all citation of "regulations" shall be to Title 5, California Code of Regulations.

- (3) A requirement to ensure that all units earned on a "credit-no credit" basis in other California institutions and equivalent out-of-state institutions are counted in satisfaction of community college curriculum, pursuant to section 55752(b);
- (4) A requirement to ensure that units earned on a "credit-no credit" basis are not used to calculate grade point averages, pursuant to section 55752(c);
- (5) A requirement to consider units attempted for which "NC" is recorded in probation and dismissal procedures, pursuant to section 55752(c);
- (6) A requirement to allow independent study courses to be graded on a "credit-no credit" basis, pursuant to section 55752(d);
- (7) A requirement to use the "CR/NC" grading system when offering courses in which there is a single standard of performance, pursuant to section 55752(e);
- (8) A requirement to establish and implement policies and procedures for faculty to follow in determining an "articulated high school course", pursuant to 55753.5;
- (9) A requirement to adopt policies regarding advanced placement examinations, pursuant to section 55753.7;
- (10) A requirement to adopt, publish and implement procedures and conditions for probation and the appeal of probation, pursuant to section 55755;
- (11) A requirement to adopt, publish and implement procedures and conditions for an appeal of dismissal and the request for reinstatement, pursuant to section 55756(c);
- (12) A requirement to implement and comply with standards regarding remedial coursework, pursuant to section 55756.5;
- (13) A requirement to utilize a statewide grading scale established on the basis of point equivalencies, pursuant to section 55758;
- (14) A requirement to adopt and implement a withdrawal policy, pursuant to section 55758(e);
- (15) A requirement to ensure that grades earned in nondegree credit courses are not included in calculating students' grade point averages, pursuant to section 55758.5;

- (16) A requirement to make a reasonable effort to notify a student subject to academic probation or dismissal, pursuant to section 55759;
- (17) A requirement to ensure that the instructor of any course determine the grade to be awarded to each student, pursuant to section 55760;
- (18) A requirement to adopt, publish and implement procedures or regulations pertaining to the repetition of courses, pursuant to section 55761;
- (19) A requirement to adopt procedures or regulations pertaining to the repetition of course for which substandard work has not been recorded, pursuant to section 55761; or
- (20) A requirement to adopt, publish and implement procedures or regulations pertaining to the alleviation of previously recorded substandard academic performance which is not reflective of a student's demonstrated ability, pursuant to sections 55764 and 55765.

### **Condition 2 - Degrees and Certificates**

The response of CCC to this condition is based primarily on Attachments 1 and 3. Test claimant reserves the right to respond, if needed, when the attachment may be received in the future.

### **Condition 3 - Open Courses**

#### **(A) CCC's Statutory History is Incorrect**

CCC contends that the Title 5, California Code of Regulations Section 51006 was preceded by former (pre-1975) Education Code Section 5754<sup>16</sup>. The correct citation is former Education Code Section 5753 which read, in part:

"No class for adults shall be maintained by any district...(2) if such classes are not open to the general public..." (Emphasis supplied)

Chapter 1010, Statutes of 1976, Section 2 recodified and renumbered former section 5753 as new Education Code Section 78450. Section 78450 was repealed by Chapter

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<sup>16</sup> Section 5754 regulated classes for adults in dancing or recreational physical education.

36, Statutes of 1977, Section 610, operative April 30, 1977.

CCC then states that section 5754 was replaced by section 84500.1. It was not. Section 5754 was recodified and renumbered as new section 78451<sup>17</sup> and was repealed by Chapter 470, Statutes of 1981, Section 169.

Section 84500.1 was actually added by Chapter 909, Statutes of 1978, Section 24, and related to reports of average daily attendance for the purpose of apportionment. It was repealed by Chapter 1372, Statutes of 1990, Section 678.

- (B) The response of CCC to the condition for Open Courses is also based Attachments 1 and 2. Test claimant reserves the right to respond, if needed, when the attachments may be received in the future.
- (C) The Test Claim Requires Activities Which Constitute New Programs or Higher Levels of Service

Government Code Section 17514 defines "costs mandated by the state" as any increased costs which a local agency or school district is required to incur as a result of any statute or executive order implementing any statute which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Former pre-1975 Education Code Section 5753, required classes for adults to be open to the general public. The attachments as described by CCC are limited in scope. They did not include the following new programs or higher levels of service<sup>18</sup> now required by the minimum conditions for Open Courses:

- (1) Adopting a statement which provides that every course reported for state aid shall be fully open to enrollment and participation by any person, and
  - a) to publish the open enrollment policy statement in the official catalog, schedule of classes, and addenda to the schedule of classes; and

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<sup>17</sup> Section 78451 still continued to regulate classes for adults in dancing or recreational physical education.

<sup>18</sup> For a more detailed statement of the new programs or higher levels of service required by the minimum conditions for open courses, see the test claim, at pages 193-200.

- b) to file a copy of such policy with the Chancellor.
- (2) Publishing a clear description of each course in the official catalog, and/or schedule of classes, and/or addenda.
  - (3) Establishing and implementing procedures to ensure, if a course description indicates a course is designed to meet certain specialized needs, that the district affirms the availability of the course to all qualified students.
  - (4) Describing all courses in the official general catalog and/or addenda and listing such courses in the schedules of classes, and
    - a) ensuring that any courses which are established or conducted after publication of the general catalog or regular schedule of classes are reasonably well publicized, and
    - b) ensuring that any announcements of course offerings are not limited to a specialized clientele, and
    - c) ensuring that no one receives notice prior to the general public for the purposes of preferential enrollment, limiting accessibility, or exclusion of qualified students.
  - (5) Ensuring that all community college courses are open to enrollment by any student unless the course qualifies for a limitation, such as,
    - a) Permitting enrollment to be limited to students meeting prerequisites and corequisites that have been established, or
    - b) Ensuring that any other limitation used by the district falls into one of acceptable reasons for enrollment limitations, or
    - c) Adopting and implementing policies ensuring fair and equitable procedures for determining who may enroll in affected courses or programs, such as:
      - i) Limiting enrollment to a "first-come, first-served" basis or other nonevaluative selection techniques, or
      - ii) Limiting enrollment using an authorized method, or
      - iii) In the case of intercollegiate completion, honors courses, or public performance courses, allocating available seats to those students judged most qualified, or
      - iv) Limiting enrollment in one or more sections of a course to a cohort of students enrolled in one or more other courses, or
      - v) With respect to students on probation or subject to dismissal, limiting enrollment to a total number of units or to selected courses, or require students to follow a prescribed

educational plan.

- (6) Establishing and implementing procedures for, and responding to, a student challenge to an enrollment limitation, including:
  - (a) Permitting students to challenge an enrollment limitation on any of the following grounds:
    - i) Unlawful discrimination,
    - ii) Failure of the district to follow it's own enrollment limitation policy,
    - iii) An argument that the basis upon which the district has established an enrollment limitation does not in fact exist, and
    - iv) Any other criteria established by the district.
  - (b) Handling such enrollment limitation challenges in a timely manner.
  - (c) Waiving the enrollment limitation with respect to any student whose challenge is upheld.
  - (d) Advising any student who has challenged an enrollment limitation based on the theory of unlawful discrimination that he or she may also file a formal complaint of unlawful discrimination once the challenge procedure has been completed.
- (7) Ensuring that any public funds used in connection with community college athletic programs are used only for those programs which provide facilities and opportunities for participation by both sexes on an equitable basis.
- (8) Ensuring that all procedures for registration and standards for enrollment in any course are consistent with all sections of Title 5 of the California Code of Regulations and
  - a) Ensuring that such procedures and standards are uniformly administered by appropriately authorized employees of the district,
  - b) Ensuring that, except as otherwise provided by state law, no student shall be required to do any of the following:
    - i) To confer or consult with or be required to receive permission to enroll in any class from any person other than those employed by the college in the district;
    - ii) To be required to participate in any preregistration activity not uniformly required;
    - iii) To be subjected to non-academic requisites, imposed by anyone, as barriers to enrollment in or the successful completion of a class;
    - iv) To be subjected to any registration procedures that result in

- restricting enrollment to a specialized clientele; or
- v) To be required to make any special effort not required of all students to register in any class or course section.
- c) Ensuring that, once enrolled in a class, all students have equal access to the site.

The above summary clearly demonstrates that the test claim legislation and regulations relative to minimum conditions for Open Courses require new programs or higher levels of service.

#### **Condition 4 - Comprehensive Plans**

##### **(A) CCC's Statutory History is Incomplete**

CCC cites former Education Code Section 199 which provided:

"The board of governors shall review and approve academic master plans and master plans for facilities for each community college district. Such plans shall be submitted to the board of governors by the local governing board of each community college district...Each district shall annually submit changes in its approved academic master plan for approval by the board of governors."

CCC fails to note that section 199 was recodified and renumbered as new section 71028 by Chapter 1010, Statutes of 1976, Section 2. Section 71028 was repealed by Chapter 973, Statutes of 1988, Section 12.4.

CCC also cites former Education Code Section 25427 which provided:

"The district governing board shall:

- (a) Establish policies for, and approve, current and long-range education plans and programs and promote orderly growth and development of the community colleges within the district.
- (b) Establish policies for, and approve, academic master plans and long-range master plans for facilities. The district governing board shall submit such master plans to the board of governors for review and approval."

CCC fails to note that section 25427 was recodified and renumbered as new section 72231.5 by Chapter 1010, Statutes of 1976, Section 2. Section 72231.5 was repealed by Chapter 973, Statutes of 1988, Section 14.3.

CCC cites these two repealed sections in support of its conclusion that "[T]he foregoing confirmed (sic) the obligations of districts to establish academic and facility master plans well in advance of January 1, 1975." CCC fails to offer evidence that the new regulations published after the repeal dates of the statutes are not new programs.

- (B) The response of CCC to this condition is also based on Attachment 4. Test claimant reserves the right to respond, if needed, when the attachment may be received in the future.
- (C) The Test Claim Requires Activities Which Constitute New Programs or Higher Levels of Service

Government Code Section 17514 defines "costs mandated by the state" as any increased costs which a local agency or school district is required to incur as a result of any statute or executive order implementing any statute which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

The repealed Education Code Sections and Attachment 4 requirements as described by CCC are limited in scope. They did not include the following new programs or higher levels of service<sup>19</sup> now required by the minimum conditions for Comprehensive Plans:

Comprehensive Master Plan

- (1) For the governing board to create, establish policies for, approve and implement comprehensive master plans for their facilities to meet the following requirements:
  - a) The plan must include both academic master plans and long range master plans for facilities;
  - b) The plan must address planning requirements which meet the specifications issued by the Board of Governors;
  - c) The plans, as well as any annual updates or changes to the plans, must be submitted to the Chancellor's Office for review and approval.

Capital Construction Master Plans:

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<sup>19</sup> For a more detailed statement of the new programs or higher levels of service required by the minimum conditions for Comprehensive Plans, see the test claim, at pages 200-206.

- (1) To annually prepare, update and submit to the Board of Governors a plan for capital construction covering a five-year time period.
- (2) Ensuring that the five-year plan sets out the estimated capital construction needs of the district with reference to elements including at least all of the following information:
  - a) The plans of the district concerning its future academic and student services programs, and the effect on estimated construction needs which may arise because of particular courses of instruction or subject matter areas or student services to be emphasized.
  - b) The enrollment projections for each district formulated by the Department of Finance expressed in terms of weekly student contact hours, and enrollment projections for each individual college and educational center within a district made cooperatively by the Department of Finance and the community college district.
  - c) The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the Board of Governors.
  - d) District office, library, and supporting facility capacities as derived from standards adopted by the Board of Governors.
  - e) An annual inventory of all facilities and land of the district using definitions, forms, and instructions adopted by the Board of Governors.
  - f) An estimate of district funds which must be made available for capital outlay matching purposes pursuant to regulations adopted by the Board of Governors.
- (3) For a community college district that submits an additional capital construction plan, to prepare and include documentation justifying that students will be better served by such a plan due to the existence of either of the following circumstances:
  - a) The isolation of students within a district in terms of either the distance of students from the location of an educational program or the inadequacy of transportation and student financial inability to meet costs of transportation; or
  - b) The inability of existing colleges and educational centers in the district to meet the unique educational and cultural needs of a significant number of ethnic students.

Educational Master Plans:

- (1) To establish and implement policies for, and to approve, current and long range educational plans and programs for each Community College which it maintains and for the district as a whole.
- (2) Annually submit to the Chancellor an educational master plan for each Community College which it maintains and for the district as a whole.
- (3) To submit each educational master plan to the Chancellor on a form provided by the Chancellor, and to contain all information that the Chancellor requires.
- (4) Ensuring that each educational master plan contains all of the following information:
  - a) The educational objectives of the Community College or district;
  - b) The future plans for transfer programs; occupational programs; continuing education courses; and remedial and developmental programs; and
  - c) Plans for the development and expansion of all of the following: library; counseling; placement; and financial aid.

The above summary and more detailed activities set forth in the test claim at pages 200-206 clearly demonstrate that the test claim legislation and regulations relative to minimum conditions for Comprehensive Plans require new programs or higher levels of service.

#### **Condition 5 - Equal Employment Opportunity**

CCC names a number of federal constitutional and statutory provisions, including the federal Equal Protection Clause, Title VII, the Americans with Disabilities Act and section 504 of the Rehabilitation Act of the Rehabilitation Act and claims that test claimant is subject to these provisions, which, arguably, precludes the finding of a reimbursable mandate.

Although naming all of these fine provisions of law, CCC not only fails to include copies of relevant portions of these federal laws, it also fails to cite specific chapters, articles, sections or page numbers. There are no citations whatsoever. Besides being a violation of Title 2, California Code of Regulations Section 1183.02, subdivision (c)(2), it also makes it impossible to respond to this chimera of a response.

CCC then cites Government Code section 12940, identifies it as part of the California Fair Employment and Housing Act, argues that it is applicable to claimant and, therefore, is a law of general application barring any basis for reimbursement.

CCC is sadly confused as to laws of general application. When making that determination, one must focus on the test claim legislation, not some other law. In other words, as to the statutes and regulations governing Condition 5, one must look at what is required by those provisions, not by Government Code section 12940. For example, the activities alleged in the test claim include:<sup>20</sup>

- (1) A requirement that each community college district employer commit to a sustained action to devise recruiting, training and advancement opportunities that will result in equal employment opportunities for all qualified applicants and employees.
- (2) A requirement to periodically submit to the board of governors an affirmation of compliance as a condition for the receipt of funds.
- (3) A requirement to adopt and implement a district policy which describes its equal employment opportunity program.
- (4) A requirement to incorporate the definitions for the following terms within the district's policies and procedures: "adverse impact"; "business necessity"; "equal employment opportunity"; "equal employment opportunity plan"; "equal employment opportunity programs", "ethnic minorities"; "ethnic group identification"; "goals for persons with disabilities"; "in-house or promotional only hiring"; "monitored group"; "person with a disability"; "projected representation"; "reasonable accommodation"; "screening or selection procedure"; "significantly underrepresented group"; "target date" and "timetable".
- (5) A requirement to adopt and implement a policy statement setting forth the district's commitment to an equal employment opportunity program.
- (6) A requirement to develop, adopt and implement a district-wide written equal employment opportunity plan to implement its equal employment opportunity program, and to:
  - a) Submit such plans and any revisions to the Chancellor's Office for review and approval.
  - b) Review, and if necessary, revise such plans at least every three

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<sup>20</sup> For a more detailed statement of the new programs or higher levels of service required by the minimum conditions for equal employment opportunity, see the test claim, at pages 206-231.

- years.
- c) Notify the Chancellor at least 30 days prior to adopting any other amendments to the plan.
  - d) For the plan to include the designation of the district employee or employees who have been delegated responsibility and authority for implementing the plan and assuring compliance with the plan; the procedure for filing complaints and the person with whom such complaints are to be filed; a process for notifying all district employees of the provisions of the plan and the policy statement; a process for ensuring that district employees who are to participate on screening or selection committees receive appropriate training on the requirements of state and federal nondiscrimination laws; a process for providing annual written notice to appropriate community-based and professional organizations concerning the district's plan and the need for assistance from the community and such organizations in identifying qualified applicants; an analysis of the number of persons from monitored groups who are employed in the district's work force and those who have applied for employment in each of listed job categories; an analysis of the degree to which monitored groups are underrepresented in comparison to the numbers of persons available and qualified to perform the work required for each such job category and whether or not the underrepresentation is significant; methods for addressing any identified underrepresentation; additional steps consistent to remedy any significant underrepresentation identified in the plan; any other measures necessary to further equal employment opportunity throughout the district; and any goals for hiring persons with disabilities.
- (7) A requirement to make a continuous good faith effort to comply with the requirements of the plan.
  - (8) A requirement to survey its employees on an annual basis and to monitor applicants for employment on an ongoing basis in order to evaluate the implementation of its equal employment opportunity plan and to provide data needed for required analyses.
  - (9) A requirement that each community college district establish an Equal Employment Opportunity Advisory Committee that includes a diverse membership whenever possible, to assist the district in developing and implementing the plan.

- (10) A requirement that a district take additional steps to ensure equal employment opportunity if it determines that a particular monitored group is significantly underrepresented with respect to one or more job categories.
- (11) A requirement that the governing board implement policies and procedures to ensure that it is ultimately responsible for proper implementation of equal employment opportunity at all levels of district and college operation and for making measurable progress toward equal employment opportunity by the methods described in the district's equal employment opportunity plan.
- (12) A requirement to implement policies and procedures to actively recruit from both within and outside the district work force to attract qualified applicants for all new openings.
- (13) A requirement to ensure that job announcements clearly state job specifications and set forth the knowledge, skills, and abilities necessary to job performance.
- (14) A requirement to implement policies and procedures to analyze the applicant pool for open positions.
- (15) A requirement to implement policies and procedures pertaining to screening or selection procedures in the hiring process.
- (16) A requirement to implement policies and procedures to afford persons with disabilities equal employment opportunity in community college districts.
- (17) A requirement for each community college district to establish and implement a process permitting any person to file a complaint alleging that the requirements of equal employment opportunity have been violated.
- (18) A requirement for districts to timely provide the data required or to request and receive an extension of the deadline from the Chancellor, as a condition for receipt of any funds under the Equal Employment Opportunity fund base.
- (19) A requirement for districts to submit a report on the use of Equal Employment Opportunity funds to the Chancellor's Office.

Only if it can be said that each of the requirement listed in the 19 paragraphs above, and each of the more detailed requirements listed in the test claim at pages 206-231, also apply to all state residents and entities, can it be said that the test claim legislation and regulations are laws of general application. County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56-58

**Condition 6 - Student Fees**

CCC refers to former Education Code Section 1010.10 and argues that the obligation contained in Title 5, California Code of Regulations Section 51012 has continued to apply "without lapse to the present."

Former section 1010.10 was recodified and renumbered as section 72289 by Chapter 1010, Statutes of 1976, Section 2. Section 72289 was repealed by Chapter 973, Statutes of 1988, Section 14.11.

**Condition 7 - Approval of New Colleges and Educational Centers**

CCC argues that claimant does not allege that it has ever been affected by Title 5, California Code of Regulations Section 51014, that claimant does not allege costs arising from complying with section 51014, and, therefore, any claim under this section should be rejected.

A test claimant acts as a representative of all community college districts in the State. There is no requirement that the test claimant has incurred all or any of the costs alleged.

The regulations for test claims are found in Title 2, California Code of Regulations Section 1183. Subdivision (e) sets forth the requirements for the content of a test claim. Under subparagraph (3), a written narrative must contain what activities were required under prior law or executive order and what new program or higher level of service is required under the statute or executive alleged to contain or impact a mandate. There is no requirement that the test claim statute or executive order impose a new program or higher level of service solely on the test claimant, only that a narrative describes what new program or higher level of service is required of potential claimants.

Under subparagraph (5) of Title 2, California Code of Regulations Section 1183, subdivision (e), a test claim is required to contain a statement that actual and/or estimated costs which result from the alleged mandate exceed a minimum amount. There is no requirement that the test claimant has personally incurred any costs, only that the alleged mandate will result in the minimum cost.

This argument of CCC must fail.

**Condition 8 - Accreditation**

CCC argues that there was an "expectation" that colleges would be accredited prior to January 1, 1975 and cites former Education Code Section 25522 as its authority.

Former section 25522 read in relevant part:

"The governing board of a district maintaining a community college may pay the costs of accreditation of the community colleges within the district by the regional accreditation association serving California..." (Emphasis supplied)

Whereas, prior to 1975 districts were permitted to pay the costs of accreditation, they were not required to be accredited. Now:

"Each community college within a district shall be an accredited institution. The Accrediting Commission for Community and Junior Colleges shall determine accreditation." (Title 5, California Code of Regulations Section 51016) (Emphasis supplied)

Therefore, all of the activities set forth in the test claim at pages 236-256 are new programs and increased levels of service.

**Condition 9 - Counseling**

- (A) The response of CCC to this condition is based, partially, on Attachment 1. Test claimant reserves the right to respond, if needed, when the attachment may be received in the future.
- (B) The Test Claim Requires Activities Which Constitute New Programs or Higher Levels of Service

Government Code Section 17514 defines "costs mandated by the state" as any increased costs which a local agency or school district is required to incur as a result of any statute or executive order implementing any statute which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

The Attachment 1 requirements, as described by CCC, are limited in scope. They did

not include the following new programs or higher levels of service<sup>21</sup> now required by the minimum conditions for Counseling:

- (1) To establish and implement regulations and procedures to provide counseling programs for students in each college within the district.
- (2) To file a copy of the community college district's regulations regarding counseling programs with the Chancellor's Office.
- (3) To publicize the counseling program.
- (4) To ensure the counseling program is organized and functioning and meets the needs of average students and those with special needs.
- (5) To ensure the counseling program includes at least all of the following services:
  - a) academic counseling;
  - b) career counseling;
  - c) personal counseling;
  - d) skills testing programs;
  - e) financial assistance programs; and
  - f) job placement services.
- (6) To ensure that academic, career and personal counseling services are provided to all of the following students:
  - a) First-time students enrolled for more than six units,
  - b) Students enrolled provisionally, and
  - c) Students on academic or progress probation.

The above summary and the more detailed activities set forth in the test claim at pages 256-257 clearly demonstrate that the test claim legislation and regulations relative to minimum conditions for Counseling require new programs or higher levels of service.

#### **Condition 10 - Objectives**

The response of CCC to this condition is based on Attachment 1. Test claimant

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<sup>21</sup> For a more detailed statement of the new programs or higher levels of service required by the minimum conditions for Counseling, see the test claim, at pages 256-257.

reserves the right to respond, if needed, when the attachment may be received in the future.

### **Condition 11 - Curriculum**

CCC again cites subdivision (a) of former Education Code Section 25427 which provided:

“The district governing board shall:

(a) Establish policies for, and approve, current and long-range education plans and programs and promote orderly growth and development of the community colleges within the district...”

From this, CCC argues that “[I]t can fairly be assumed that such long-range education plans and programs addressed curriculum.” CCC errs in believing that the determination of mandated activities can be based upon “assumptions.”

CCC also cites pre-1975 Education Code Section 200.9 which relates to criteria and standards for graded and nongraded classes, which, of course, has nothing to do with curriculum.

Finally, CCC quotes from former (1969) Title 5, California Code of Regulations Section 51002(b) which required community colleges to establish programs of education and courses as will permit the realization of the objectives and functions of the community college.

None of these limited and non-relevant statutes and regulations are as extensive and all-inclusive as the test claim legislation, which.<sup>22</sup>

- (1) Requires the establishment and implementation of educational programs and courses that will further the objectives of the community college and meet the approval of the Chancellor.
- (2) Requires districts to incorporate in district documents and policies the definitions contained in Section 55000 and 55200 for described terms.

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<sup>22</sup> For a more detailed statement of the new programs or higher levels of service required by the minimum conditions for curriculum, see the test claim, at pages 257-296.

- (3) Requires districts to adopt and implement policies and procedures to comply with a Handbook issued by the Chancellor's Office.
- (4) Requires districts to report the classification of all courses, classes and activities offered to the Chancellor's Office and for such information to include all described data.
- (5) Requires districts to establish and implement detailed standards and criteria for associate degree credit courses and classes.
- (6) Requires districts to establish and implement detailed standards and criteria for nondegree credit courses and classes.
- (7) Requires districts to establish and implement detailed standards and criteria for noncredit courses and classes.
- (8) Requires districts to establish and implement policies and procedures to ensure that all community services classes meet detailed minimum requirements.
- (9) Requires implementation of policies and procedures to establish standards regarding credit hours.
- (10) Requires districts to ensure that courses of instruction in social sciences include a study of the (1) role, (2) participation, and (3) contribution of all of detailed groups to the (a) economic, (b) political, and (c) social development of both California and the United States of America.
- (11) Requires districts to ensure that, for each course offered, detailed facts are made available to students through college publications before the students enroll in the course.
- (12) Requires the authorities of each community college maintaining credit and non-credit courses and community services classes and activities to keep and submit current records and reports concerning their total activities as may be required by the Chancellor.
- (13) Requires districts to submit each course to be offered for approval on forms provided by the Chancellor's Office.
- (14) Requires district governing boards to prepare and submit to the

Chancellor an application for approval, on forms provided by the Chancellor, before offering any course as part of an educational program at a college.

- (15) Requires submission of all courses or programs offered for noncredit to the Chancellor for approval.
- (16) Requires districts to implement policies for the approval and classification of any community services classes conducted by the district and to report the classification of all such classes to the Chancellor.
- (17) Requires districts to ensure that approval of the class is obtained in the manner provided for classes of the same type if the district claims state support for a contract class.
- (18) Requires the district governing board to apply specific criteria and procedures if reinstating any course which was deleted from the credit or noncredit curriculum during the 1982-83 fiscal year in response to the Budget Act of 1982.
- (19) Requires the district's curriculum committee to assess each associate degree credit course to determine if prerequisite or corequisite courses are necessary.
- (20) Requires districts to adopt and implement policies for any prerequisites, corequisites, and "advisories on recommended preparation" required by the district.
- (21) Requires districts to apply specific additional rules to the establishment of prerequisites and corequisites.
- (22) Requires districts to adopt and implement policies and procedures pertaining to distance education that ensure specific conditions.
- (23) Requires districts to adopt and implement policies and procedures regarding independent study courses that ensure specific conditions.
- (24) Requires districts to adopt and implement policies and procedures to comply with the curriculum standards and criteria for curriculum approval set forth by the Chancellor's Office in the "Program and Course Approval Handbook".

Therefore, the activities summarized in paragraphs (1) through (24), above, and the more detailed activities set forth in the test claim at pages 257-296 are new programs or higher levels of service.

**Condition 12 - Instructional Programs**<sup>23</sup>

CCC cites three pre-1975 statutes which required districts to have "academic master plans"<sup>24</sup>, to have "current and long-range education programs"<sup>25</sup>, and to have "educational programs and classes for adults"<sup>26</sup> and concludes that the existence of these statutes indicates "districts would necessarily have developed policies for the establishment, modification, and discontinuance of educational programs.

CCC errs in reading the title to the condition rather than reading the conditions. Had it done so, it would have realized that "Instructional Programs" actually provide the requirements for vocational and occupational training programs:

"(a) The governing board of each community college district shall, no later than July 1, 1984, develop, file with the Chancellor, and carry out its policies for the establishment, modification, or discontinuance of courses or programs. Such policies shall incorporate statutory responsibilities regarding vocational or occupational training program review as specified in section 78016 of the Education Code.

(b)..." (Subdivision (b) will be discussed below in reply to Condition 13)  
(Title 5, California Code of Regulations Section 51022)

Section 78016 of the Education Code provides:

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<sup>23</sup> Described in the Test Claim as "Vocational Education Programs".

<sup>24</sup> Former Education Code Section 199 was recodified and renumbered as section 71028 by Chapter 1010, Statutes of 1976, Section 2. Section 71028 was repealed by Chapter 973, Statutes of 1988, Section 12.4.

<sup>25</sup> Former Education Code Section 25427 was recodified and renumbered as section 72231.5 by Chapter 1010, Statutes of 1976, Section 2. Section 72231.5 was repealed by Chapter 973, Statutes of 1988, Section 14.3.

<sup>26</sup> Former Education Code Section 1010.4 was recodified and renumbered as section 72283 by Chapter 1010, Statutes of 1976, Section 2. Section 72283 was repealed by Chapter 1372, Statutes of 1990, Section 331.

“(a) Every vocational or occupational training program offered by a community college district shall be reviewed every two years by the governing board of the district to ensure that each program, as demonstrated by the California Occupational Information System, including the State-Local Cooperative Labor Market Information Program established in Section 10533 of the Unemployment Insurance Code, or if this program is not available in the labor market area, other available sources of labor market information, does all of the following:

(1) Meets a documented labor market demand.

(2) Does not represent unnecessary duplication of other manpower training programs in the area.

(3) Is of demonstrated effectiveness as measured by the employment and completion success of its students.

(b) Any program that does not meet the requirements of subdivision (a) and the standards promulgated by the governing board shall be terminated within one year.

(c) The review process required by this section shall include the review and comments by the local Private Industry Council established pursuant to Division 8 (commencing with Section 15000) of the Unemployment Insurance Code, which review and comments shall occur prior to any decision by the appropriate governing body.

(d) This section shall apply to each program commenced subsequent to July 28, 1983.

(e) A written summary of the findings of each review shall be made available to the public.”

It is with this distinction in mind, that the test claim alleges activities, summarized as follows:<sup>27</sup>

- (1) A requirement to develop and implement policies for the establishment, modification, or discontinuance of courses or programs, which incorporate statutory responsibilities regarding vocational or occupational training program review.
- (2)) A requirement to conduct a job market study of the labor market focusing on whether the anticipated employment demand for students in the

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<sup>27</sup> For a more detailed statement of the new programs or higher levels of service required by the minimum conditions for Vocational Education Programs, see the test claim, at pages 296-306.

- proposed program justifies the establishment of the proposed course of instruction prior to establishing a vocational educational program.
- (3) A requirement for the governing board of the community college district to review every vocational or occupational training program offered by a district every two years to ensure the programs are effective, meet a documented labor market demand, and do not unnecessarily duplicate other manpower training programs in the area.
  - (4) A requirement to incorporate the definitions contained in Section 55600, for all of the following terms, into district policies, procedures and documents: "Vocational Educational Contract"; "The California State Plan for Vocational Education"; "Contractor"; and "Eligible Cost".
  - (5) A requirement for the governing board of each district to appoint and supervise a vocational education advisory committee.
  - (6) A requirement for any community college district that contracts with a private post secondary school, an activity center, work activity center, or sheltered work shop, to implement policies and procedures to ensure all of the following:
    - a) All contracts must be approved by the Chancellor.
    - b) All contracts must provide that the amount contracted for per student must not exceed the amount it costs to provide the same training in community colleges or the tuition charged in postsecondary schools;
    - c) Those students who are currently enrolled in community colleges and are receiving training in another institution, must not be charged additional tuition;
    - d) All programs, courses and classes of instruction must meet the standards set forth in the California State Plan for Vocational Education or a course of study for adult schools approved by the Department of Education.
  - (7) A requirement that the governing board of the community college district must approve of and supervise all instruction when the district enters into a contract with a private or public entity for the education of students whose capacity to function is impaired by physical deficiency or injury in vocational education classes
  - (8) A requirement to adopt and implement policies and procedures to ensure

that contractors provide (1) vocational, (2) technical, and (3) occupational instruction related to attainment of (a) skills, (b) knowledge, and (c) attitudes so that students may be prepared for gainful employment in the occupational area for which training has been provided; or occupational upgrading so students will have higher level skills required by new and changing technology and employment practices; or enrollment in more advanced training programs.

- (9) A requirement that vocational education contracts entered into with contractors meet specific conditions:
- (10) A requirement to ensure each contract expressly includes listed specific provisions.

The activities summarized in paragraphs (1) through (10), above, and the more detailed activities set forth in the test claim at pages 296-306 provide new programs or higher levels of service.

**Condition 13 - Course Articulation - Local**

CCC refers to former Education Code Section 200.13<sup>28</sup> which provided:

“The board of governors shall facilitate articulation with other segments of higher education and with secondary education.”

Condition 13, Course Articulation, is required by Subdivision (b), of Title 5, California Code of Regulations Section 51022 which provides:

“(b) The governing board of each community college district shall, no later than July 1, 1984, develop, file with the Chancellor, and carry out its policies and procedures to provide that its courses and programs are articulated with proximate four-year colleges and high schools.”

CCC argues “[T]herefore, the Board of Governors has been statutorily required to act in this specific area since before January 1, 1975.” The error of its argument is that the

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<sup>28</sup> CCC also mistakenly states that section 200.13 was renumbered as section 71071 by Chapter 1010, Statutes of 1976. Actually, it was recodified and renumbered as section 71070. It was then repealed by Chapter 973, Statutes of 1988, Section 12.11.

test claim regulation requires the governing board of each community college to act.

**Condition 14 - Academic Freedom**

CCC cites from former Education Code Sections 200.22 and 1010.13 to argue that the board of governors were required to establish minimum procedures to allow faculty and students the opportunity to "express their opinions" at the campus level and, in turn, require districts to establish procedures not inconsistent with the board of governors.

The test claim alleges<sup>29</sup> the following required activities:

For community college districts to adopt and implement a policy statement on academic freedom, which includes:

- (1) A requirement to make such policy available to faculty;
- (2) A requirement to file the policy with the Chancellor; and
- (3) A requirement for the district to substantially comply with the adopted policies and procedures.

Therefore, the test claim mandates new programs or higher levels of service.

**Condition 15 - Shared Governance**

(A) Faculty Shared Governance (Academic Senate)

The response of CCC to this portion of the condition is based on Attachment 1. Test claimant reserves the right to respond, if needed, when the attachment may be received in the future.

(B) Staff Shared Governance

CCC admits that the activities relative to staff shared governance "appear to have developed recently", but stating, without citation of authority, that the Attorney General has determined that a reimbursable mandate has not been created.

Test claimant assumes that CCC is referring to 83 Opinions of the California Attorney

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<sup>29</sup> Test claim, page 306

General 111 (2000), for which a reply has already been made commencing at page 13, above. It is repeated here by reference.

(C) Student Shared Governance

CCC again refers to former Education Code Section 1010.13 which permitted students the opportunity "to express their opinions at the campus level."

The test claim activities go far beyond the right to express an opinion at the campus level. The test claim activities can be summarized<sup>30</sup> as follows:

- (1) A requirement to adopt and implement policies and procedures to provide students the opportunity to participate effectively in district and college governance, including:
  - a) Providing students with the opportunity to participate in the formulation and development of district and college policies and procedures that have or will have a significant effect on students, including the opportunity to participate in processes for jointly developing recommendations to the governing board regarding such policies and procedures.
  - b) Providing students an opportunity to participate in the formulation and development of any matter significantly affecting students, prior to taking action on any such matter, unless an unforeseeable, emergency situation exists.
  - c) Ensuring that, at the district and college levels, recommendations and positions developed by students are given every reasonable consideration.
  - d) Ensuring that the selection of student representatives to serve on college or district committees, task forces, or other governance groups are made, after consultation with designated parties, by the appropriate officially recognized associated student organization(s) within the district.

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<sup>30</sup> For a more detailed statement of the new programs or higher levels of service required by the minimum conditions for Student Shared Governance, see the test claim,

- e) Classifying the following as matters that have or will have a "significant effect on students", which thereby require providing students with prior notice and opportunity to participate in the development of any action to be taken on the matter:
- 1) grading policies;
  - 2) codes of student conduct;
  - 3) academic disciplinary policies;
  - 4) curriculum development;
  - 5) courses or programs which should be initiated or discontinued;
  - 6) processes for institutional planning and budget development;
  - 7) standards and policies regarding student preparation and success;
  - 8) student services planning and development;
  - 9) student fees within the authority of the district to adopt; and
  - 10) any other district and college policy, procedure, or related matter that the district governing board determines will have a significant effect on students.
- f) Ensuring that reasonable consideration is given to recommendations and positions developed by students regarding district and college policies and procedures pertaining to the hiring and evaluation of faculty, administration, and staff.

Reviewing the summary presented above and the more detailed list of activities in the test claim at pages 315-317 leaves no doubt that the test claim regulations create new programs or higher levels of service.

**Condition 16 - Matriculation Services**

There are two sources which require community college districts to provide matriculation services. The Seymour-Campbell Matriculation Act of 1986 and the Title 5 regulations set forth in the test claim.

A. The Seymour-Campbell Matriculation Act of 1986

The Seymour-Campbell Matriculation Act of 1986 is found in the Education Code, at Sections 78210 through 78218.

Section 78218 provides that the Board of Governors of the California Community Colleges shall initially provide for full implementation of the matriculation services specified in Section 78212 in as many community colleges as the funds appropriated for this purpose allow. Section 78212, subdivision (b) requires that these services shall include, but are not limited to, all of the following:

- (1) Processing of the application for admission.
- (2) Orientation and preorientation services designed to provide to students, on a timely basis, information concerning campus procedures, academic expectations, financial assistance, and any other matters the college or district finds appropriate.
- (3) Assessment and counseling upon enrollment, which shall include, but not be limited to, all of the following:
  - a) Administration of assessment instruments to determine student competency in computational and language skills.
  - b) Assistance to students in the identification of aptitudes, interests and educational objectives, including, but not limited to, associate of arts degrees, transfer for baccalaureate degrees, and vocational certificates and licenses.
  - c) Evaluation of student study and learning skills.
  - d) Referral to specialized support services as needed, including, but not limited to, federal, state, and local financial assistance; health services; campus employment placement services; extended opportunity programs and services provided pursuant to Article 8 (commencing with Section 69640) of Chapter 2 of Part 42; campus child care services provided pursuant to Article 4 (commencing with Section 8225) of Chapter 2 of Part 6; programs that teach English as a second language; and disabled student services provided pursuant to Chapter 14 (commencing with Section 67300) of Part 40.
  - e) Advisement concerning course selection.
- (4) Postenrollment evaluation of each student's progress, and required advisement or counseling for students who are enrolled in remedial courses, who have

not declared an educational objective as required, or who are on academic probation, as defined by standards adopted by the Board of Governors of the California Community Colleges and community college districts.

Section 78214, subdivision (a), requires that all participating districts shall, with the assistance of the Chancellor, establish and maintain institutional research to evaluate the effectiveness of the matriculation services described by this article and of programs and services designed to remedy students' skills deficiencies. Subdivision (b) provides that the data base for this research shall include, but not be limited to:

- (1) Prior educational experience, including transcripts when appropriate, as determined by the chancellor.
- (2) Educational objectives.
- (3) Criteria for exemption from assessment or required counseling or advisement, if applicable.
- (4) Need for financial assistance.
- (5) Ethnicity, sex, and age.
- (6) Academic performance.

Subdivision (c) of section 78214 requires that the evaluation provided for by this section shall include an assessment of the effectiveness of the programs and services in attaining at least the following objectives:

- (1) Helping students to define their educational goals.
- (2) Assisting institutions in the assessment of students' educational needs.
- (3) Matching institutional resources with students' educational needs.
- (4) Providing students with specialized support services as referred to in subdivision (b) of Section 78212.

Section 78216, subdivision (b), requires the board of governors to develop a formula for funding student matriculation services at community colleges. The formula shall include the requirement that the districts or colleges contribute matching funds in an amount to be established by the board of governors in each case, and shall reflect, but not be

limited to, all of the following considerations:

- (1) The number of students to receive matriculation services at each college.
- (2) The levels of support for matriculation services provided at each college prior to July 1, 1985, and the need for funding assistance in the implementation of the program set forth in this article.
- (3) The relative needs for matriculation services, based on special student populations such as low-income students, students with language differences, students with physical and learning disabilities, and students in need of remedial instruction.
- (4) The requirement that funds for matriculation services be expended only for services approved by the board of governors.
- (5) The requirement that any district or college receiving funding pursuant to this section agree to implement this article during the period in which it receives that funding.
- (6) The need for computer hardware and software to provide approved matriculation services, and for institutional research personnel for ongoing evaluation.

Subdivision (c) of section 78216 requires the board of governors to require participating colleges to develop a plan for student matriculation that reflects all of the following:

- (1) A method for providing the services specified in Section 78212.
- (2) The college budget for the matriculation services pursuant to Sections 78212 and 78214.
- (3) The development and training of staff and faculty to implement the matriculation services.
- (4) In multicampus districts, the coordination of the college matriculation plan with other college plans.
- (5) Computerized information services and institutional research and evaluation necessary for implementation of this article.

Section 78218 provides that the article, including the instant section, shall only be operative in any given fiscal year, "if funds are specifically appropriated for the

purposes of this article."

Therefore, standing alone, community college districts are required to provide the services detailed in section 78218, establish and maintain research as provided in section 78214, and to develop a plan as required in subdivision (c) of section 78216. However, pursuant to section 78218, districts are only required to perform these mandated duties when funds are specifically appropriated for these purposes.

CCC contends that there are no reimbursable costs when funds are appropriated.

Government Code Section 17556 provides:

"The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:...

(e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate..."

CCC has not presented any competent evidence to show that the additional revenue, when and if received, is in an amount sufficient to fund the cost of the state mandate. In fact, section 78216 requires the Board of Governors to develop a "formula" for funding that varies from district to district based upon variable factors and is not intended to reimburse districts for their actual cost of implementation.

CCC also suggests that there is nothing that prohibits districts from spending matriculation funding or the matching money from other state resources to satisfy the requirements of Title 5 section 55530. CCC misses the point. Districts will spend matriculation funding and their own matching money to provide matriculation services. But their "own matching money" is a cost mandated by the test claim legislation and is reimbursable by the state. To the extent the cost of mandated matriculation services exceed the formula funding received and their "own matching money", it is also a cost mandated by the test claim legislation and is reimbursable by the state. And, as for administrative costs of compliance, only the board of governors may allocate a portion of the total funds appropriated for state administrative operations, not district operations. Education Code Section 78216, subdivision (d)

In summary, and limited to when the Seymour-Campbell Matriculation Act of 1986 is operative, community college districts are required to comply with the act and the

"formula funding", if and when received, would be an offset to the costs of compliance.

B. Title 5, California Code of Regulations Sections

Independently of the Seymour-Campbell Matriculation Act of 1986, community college districts are required to comply with the Title 5 regulations mandating matriculation services. These requirements are not contingent upon state apportionment.

The Title 5 Regulations are found in Article 3, Sections 55520 through 55526:

Section 55520 provides that each district shall provide matriculation services. Section 55521 provides that districts shall not do proscribed activities relative to assessments. Section 55522 provides that matriculation services for ethnic and language minority student and student with disabilities shall be appropriate to their needs. Section 55523 provides that districts (unless otherwise required) shall do activities relative to counseling and advisement. Section 55525 provides that each district shall establish a process for assisting students with educational goals. Section 55526 provides that each district shall establish a student follow-up process.

Therefore, any argument proffered by CCC to the effect that compliance with the test claim legislation and regulations is discretionary, is without merit because districts are required to comply with the Title 5 regulations requiring them to provide matriculation services, regardless of Seymour-Campbell Matriculation Act of 1986.

**Condition 17 - Full-time/Part-Time Faculty**

CCC argues that funding has already been provided by the Legislature's "intent" to provide funding by way of future appropriations found in AB 1725 (Chapter 973, Statutes of 1988).

AB 1725, Statutes of 1988, Chapter 973 Programs

At Section 70 (an uncodified section), subdivision (b) (2), states: "It is the intent of the Legislature that moneys appropriated during Phase II fully fund any state mandate created pursuant to this section." At subdivision (e): "Based on estimates provided... the Legislature finds and declares that its estimate of this funding amount is seventy million dollars (\$70,000,000), in addition to the seventy million dollars (\$70,000,000) estimated under subdivision (d) [for Phase I]."

The appropriations referenced in the Section 70 intent language are assigned to

specific priorities in Education Code section 84755<sup>31</sup> (added by Statutes of 1988,

<sup>31</sup> Education Code section 84755, as added by Chapter 973/88, Section 21.7

“(a) The Legislature finds and declares that program-based funding, once implemented, will more adequately and accountably fund the costs of providing quality community college education. Given that program-based funding will not be implemented until fiscal year 1991-92, given that community colleges will be entering a period of major reform and incurrence of new state mandates commencing in January 1989, and given that community colleges will be entering this period of reform having lost purchasing power since the 1977-78 fiscal year, the Legislature recognizes the need to create a transitional funding mechanism for program improvement and mandate funding that can operate until program-based funding is implemented.

(b) For the purpose of improving the quality of community college educational programs and services, for the purpose of reimbursing state-mandated local program costs imposed by this act, and for the purposes of initially implementing specified reforms, the board of governors shall, from amounts appropriated for purposes of this section, allocate program improvement revenues to each district on the basis of an amount per unit of average daily attendance funded in the prior fiscal year. However, this amount shall be increased or decreased to provide for equalization in a manner determined by the Board of Governors, consistent with Sections 84703 to 84705, inclusive.

Each community college district shall use its allocation to initially reimburse state-mandated local program costs, and then to implement specified reforms and make authorized program and service improvements as follows:

- (1) Developing articulated programs provided for in Section 69 of Chapter 973 of the Statutes of 1988 with school districts and campuses of the University of California and California State University.
- (2) Applying minimum qualifications to all newly hired faculty and administrators, including candidates for these positions as required by Section 87356.
- (3) Developing and administering a process for waiver of minimum qualifications as required by Section 87359.
- (4) Establishing and applying local hiring criteria as required by Section 87360.
- (5) Establishing and applying faculty service areas and competency criteria as required by Sections 87743 to 87743.5, inclusive.
- (6) Evaluating temporary employees, instituting peer review evaluation, and widely distributing evaluation procedures as required by Section 87663.
- (7) Establishing and applying new processes for tenure evaluation

required by Section 87610.1.

(8) Establishing and applying the tenure denial grievance procedure required by Section 87610.1.

(9) Establishing and applying a process for moving administrators into faculty positions as required by Sections 87454 to 87458, inclusive.

(10) Publishing and distributing a report on the affirmative action success rate as required by Section 87102.

(11) Improving instruction by reducing the ratio of full-time equivalent students to full-time equivalent instructors.

(12) Improving instruction by increasing the hiring of full-time instructors and limiting the practice of hiring part-time instructors.

(13) Augmenting budgets for college libraries and learning resources.

(14) Augmenting budgets for plant maintenance and operations.

(15) Adding new courses or programs to serve community need.

(16) Making progress towards affirmative action goals and timetables established by the district.

(17) Developing and maintaining programs and services authorized by Section 78212.5.

(18) Augmenting budgets for student services in the areas of greatest need.

(19) Providing for release time for faculty and staff as deemed appropriate by the governing board of each community college district, to enable faculty and staff participation in implementing reforms.

(c) Except as provided by Section 87482.6, and except as necessary to reimburse the costs of new state mandates, district governing boards shall have full authority to expend program improvement allocations for any or all of the authorized purposes specified in subdivision (b).

(d) As required by the board of governors, the governing board of each community college district shall submit to the board of governors a plan for using the resources allocated pursuant to this section. The board of governors shall review each plan to ensure that proposed expenditures are consistent with the listing of authorized expenditures provided in this section, and the board of governors shall approve all plans to the full extent that expenditures are authorized by this section. To the extent that a community college district expends its program improvement allocation consistent with its plan, the board of governors shall include the district's allocation as part of the district's base budget for subsequent years.

(e) The board of governors, through the annual systemwide budget submitted pursuant to paragraph (5) of subdivision (b) of Section 70901, shall request necessary resources for the purposes of this section. It is the intent of the Legislature that the

Chapter 973, Section 21.7), including Section 87610.1 which is referenced at subdivision (b), items (7) and (8). However, in a preamble, subdivision (b) states that the new funds will be allocated to "each district on the basis of an amount per unit of average daily attendance funded in the prior fiscal year," but only after the amount is "increased or decreased to provide for equalization." This effectively negates any concept of cost reimbursement, which is the actual cost of the increased level of service, it is merely a general funding device disguised as a mandate reimbursement apportionment.

Notwithstanding, this funding scenario, to the extent actually implemented, does not meet the Government Code section 17556, subdivision (e) exception to a finding of "costs mandated by the state," since the statute (Chapter 973/88) did not provide for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or *include additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate*. The funding, to the extent it actually was later provided, was provided by *subsequent* legislation, and *the sufficiency* of the funding remains a question of fact (note that Section 70 declares that it is an "estimate"). More to the point, at Section 67 of Chapter 973, Statutes of 1988, the Legislature leaves it to the Commission on State Mandates to determine if there are any reimbursable mandated costs.

To the extent that funding was made available, and continues to be made available each subsequent year, such funding might reduce the reimbursable costs, but does not preclude an initial determination of whether a reimbursable mandate exists. The test claimant is informed and believes that the Chancellor of the California Community Colleges on or about 1991 prepared an AB 1725 cost questionnaire to obtain from each community college the cost of implementing the provisions of AB 1725, that the cost data was specific to each new program enacted, that most of the community colleges provided this data to the Chancellor, and that the Chancellor is in possession of this information. This information can be utilized to establish base-period cost and revenue information.

### **Condition 18 - Student Equity**

CCC again recites a litany of federal law and regulations without citing any specific

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appropriation and allocation of program improvement money not otherwise provided pursuant to subdivision (b) shall be accomplished through the annual state budget process beginning with the 1989-90 fiscal year. After June 30, 1991, if Section 84750 is implemented, it is the intent of the Legislature to fund the ongoing operations of community college districts pursuant to Section 84750."

reference to any portion of these laws. Test claimant has already answered this shotgun type of response in reply to Condition 5 and in paragraph G commencing above at page 15.

This time, CCC does reference the general provisions of 34 Code of Federal Regulations, the implementing provisions for Title IX.

(1) The Requirements of the Test Claim Legislation and Regulations Exceed the Requirements of Title IX and 34 Code of Federal Regulations, Part 106

CCC claims that the requirements of Title IX, a federal law that prohibits sex discrimination and sexual harassment and its implementing regulations appearing at 34, Code of Federal Regulations, part 106, sections 106.1 through 106.71<sup>32</sup> prohibit a finding that the test claim legislation and regulations create a new program or higher level of service.

As authority for this claim, CCC cites subdivision (c) of Government Code section 17556, which provides:

"The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:...

(c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation." (Emphasis supplied)

CCC does not direct the Commission to any specific part of Part 106 which establishes a federal requirement or duplicates any of the activities of the test claim legislation or regulations. A possible relevant citation might be section 106.9 of part 106 of 34 CFR where:

- (a) Paragraph (a)(1) requires each recipient to implement specific and continuing steps to notify applicants for admission and employment (and others) that it does not discriminate on the basis of sex in educational programs or activities.

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<sup>32</sup> Since CCC has not complied with the Title 2 Regulations that require a copy of these federal regulations be provided, a copy is attached hereto as Exhibit "C".

- (b) Paragraph (a)(1) also requires that the notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and this part.
- (c) Paragraph (a)(2) requires each recipient to make the initial notification required by paragraph (a)(1) within 90 days of the effective or applicable date in newspapers or other written communications distributed to every student and employee.
- (d) Paragraph (b)(1) requires each recipient to prominently include a statement of the policy described in paragraph (a)<sup>33</sup> to be prominently included in each announcement, bulletin, catalog, or application form which it makes available to any person of a type described in paragraph (a)<sup>34</sup>, or which is otherwise used in connection with the recruitment of students or employees.  
(Emphasis supplied)
- (e) Paragraph (c) requires each recipient to distribute each publication described in paragraph (b) and to apprise each of its admission and employment recruitment representatives of the policy and require such representatives to adhere to such policy.

In addition to these federal requirements, the test claim alleges<sup>35</sup> the following additional state mandated activities:

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<sup>33</sup> Paragraph (a) describes a policy of nondiscrimination on the basis of sex, but does not otherwise require it to be in writing or be adopted by the governing board.

<sup>34</sup> Paragraph (a) describes applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions and professional organizations holding collective bargaining or professional agreements with the recipient.

<sup>35</sup> For a more detailed statement of the new programs or higher levels of service required by the minimum conditions for Student Equity, see the test claim at pages 348-366.

- (A) A requirement to establish and implement policies and procedures and to conduct staff training to ensure that a general prohibition against discrimination exists in community colleges. This includes requirements:, pursuant to Education Code Sections 72010-72014, 221.5, 221.7, 66016 and 66030.
- (1) To provide access to its services, classes, and programs without regard to race, religious creed, color, national origin, ancestry, handicap, or sex.
  - (2) To establish and implement policies and procedures to ensure that community colleges are in compliance with Education Code Sections 221.5 (policy of the state; prohibited discrimination), 221.7 (school-sponsored athletic programs; prohibited discrimination) and 66016 (equal opportunity; participation in athletics), relating to sex discrimination.
  - (3) To incorporate into district policies and procedures regarding matters within Division 6 of the Education Code, that with respect to access to community college district services, classes, and programs, and with respect to all references within this division, "handicap" and "disability" have the same meaning.
  - (4) To establish and implement policies and procedures to ensure that no funds under the control of the community college district are ever used for membership or for any participation involving a financial payment or contribution, on behalf of the district or any individual employed by or associated therewith, in any private organization whose membership practices are discriminatory on the basis of race, creed, color, sex, religion, or national origin.
  - (5) To require all classes and courses to be conducted without regard to the sex of the student enrolled, in the following ways:
    - a) Districts must ensure that no student is prohibited from enrolling in any class course based upon the sex of the pupil.
    - b) Districts must ensure that if students of one sex are required to enroll in a particular course, the same course is also required of students of the opposite sex.
    - c) Districts must ensure that no school counselor, teacher, instructor, administrator, or aide offers any of the following types of guidance to students of one sex that is different from that offered to students

of the opposite sex, based on that student's sex:

- (i) vocational;
  - (ii) school program;
  - (iii) career; or
  - (iv) higher education opportunity guidance.
- d) Districts must require any school personnel acting in a career counseling or course selection capacity to any student, to affirmatively explore with the student the possibility of careers, or courses leading to careers, that are nontraditional for the student's sex.
- e) Districts must notify the parents or legal guardian of a pupil at least once, in advance of career counseling and course selection, and allow such parents to participate in the counseling sessions and decisions (for minor students).
- f) Districts must make participation in physical education activities or sports available to students of both sexes if it is required of students of one sex.
- (6) To ensure that public funds for athletic programs are only used for those programs that provide equal opportunity to both sexes for participation and for use of facilities.
- (7) For the governing boards of community college districts to apportion public funds available for athletics in a manner that ensures that equitable amounts are allocated for all students, insofar as practicable.
- (8) To ensure that opportunities for participation in intercollegiate athletic programs be provided on as equal a basis as is practicable to both male and female students.
- (9) For the governing boards of the community colleges to ensure and maintain multicultural learning environments free from all forms of discrimination and harassment.
- (B) To create and implement a Comprehensive Mission Statement to identify common educational missions shared by educational institutions in California, which includes:

- (1) For the Community Colleges to provide the following:
  - a) Access to education to all qualified Californians, particularly for those who have been underrepresented in both their graduation rates from secondary institutions and in their attendance at higher educational institutions;
  - b) Quality teaching and programs of excellence for their students; and
  - c) Educational equity through a diverse student body and faculty, and an environment in which each person, regardless of race, gender, age, disability, or economic circumstances, has a reasonable chance to fully develop his or her potential.
- (2) For Community Colleges to establish and implement policies and procedures for intersegmental collaboration and coordination when it can do any of the following:
  - a) Enhance the achievement of the institutional missions shared by the segments;
  - b) Provide more effective planning of postsecondary education on a statewide basis;
  - c) Facilitate achievement of the goals of educational equity;
  - d) Enable public and independent higher education to meet more effectively the educational needs of a geographic region;
  - e) Facilitate student progress from one segment to another, particularly with regard to preparation of students for higher education as well as the transfer from the California Community Colleges to four-year institutions.
- (3) For the leaders of community colleges and the Superintendent of Public Instruction to work together to promote and facilitate the development of intersegmental programs and other cooperative efforts aimed at improving the progress of students through the educational systems and at strengthening the teaching profession at all levels.
- (4) For the community colleges to make available and for the California

Postsecondary Education Commission to review and evaluate the effectiveness of intersegmental activities in accomplishing the established goals, and report its findings to the Governor and Legislature biennially.

- (C) To establish and implement policies and procedures to comply with the Sex Equity in Education Act of 1988, including requirements:
- (1) To ensure that equal rights and opportunities in the community colleges are afforded to all persons, regardless of their sex, ethnic group identification, race, national origin, religion, mental or physical disability, color, ancestry, sexual orientation, or perception by others that a person has any of the above characteristics.
  - (2) To affirmatively combat racism, sexism, and other forms of bias.
  - (3) To incorporate specified terms and definitions into district policies and procedures relating to sex equity in education.
  - (4) To ensure that no person in the community colleges is subject to discrimination on the basis of their sex, ethnic group identification, race, national origin, religion, mental or physical disability, color, ancestry, sexual orientation, or perception by others that a person has any of the above characteristics.
  - (5) To establish and implement a written policy on sexual harassment that includes information on where to obtain the specific rules and procedures for reporting charges of sexual harassment and for pursuing available remedies.
  - (6) To display a copy of the community college's written policy on sexual harassment in all of the following places and manners:
    - (a) In a prominent location in the main administrative building or other area of the campus or schoolsite.
    - (b) The policy, as it pertains to students, must be provided as part of any orientation program conducted for new students at the beginning of each quarter, semester, or summer session, as applicable.
    - (c) The policy must be provided to each faculty member, all members

of the administrative staff, and all members of the support staff at the beginning of the first quarter or semester of the school year, or at the time that there is a new employee hired.

- (d) The policy must appear in any publication of the institution that sets forth the comprehensive rules, regulations, procedures, and standards of conduct for the institution.
- (7) To provide assurance to any agency administering state funds that the activity conducted by the community college will be in compliance with the Sex Equity in Education Act and any other applicable provisions of state law prohibiting discrimination on the basis of sex.
- (8) To prepare and submit compliance reports to the Chancellor's office, as that entity may require.
- (9) To make all reports submitted pursuant to section 66291(a) available for public inspection during regular business hours.
- (10) For the governing board of a community college district to ensure that programs and activities are free from discrimination based on ethnic group identification, religion, age, sex, color, or physical or mental disability.
- (11) To allow a party to a written complaint of prohibited discrimination to appeal any action taken by the governing board of a community college district.
- (12) To advise any person who files a complaint of prohibited discrimination that civil law remedies may also be available to such complainants.
- (13) To publish in appropriate informational materials the fact that civil law remedies may be available to complainants of prohibited discrimination.
- (D) To establish and implement a Student Equity Plan and:
  - (1) For the governing board of community college districts to adopt and implement a student equity plan prior to receipt of state aid.
  - (2) For Community College districts to adopt and implement a student equity plan which includes the following for each college in the district:

- (a) Campus-based research as to the extent of student equity in (1) access, (2) retention, (3) degree and certificate completion, (4) ESL and basic skills completion, and (5) transfer and the determination of what activities are most likely to be effective, and
  - (i) To periodically review the data compiled, and
  - (ii) To make efforts to address any problems that are identified, pursuant to Chancellor's Revised Guidelines and Information.
  
- (b) Goals for (1) access, (2) retention, (3) degree and certificate completion, (4) ESL and basic skills completion, and (5) transfer; for the overall student population and for each population group of students, as appropriate, and
  - (i) For these goals to meet the following standards: (1) be written; (2) include specific measures for determining progress toward achieving the desired outcomes; (3) identify the baseline data findings that forms the basis for noting an equity issue; (4) identify the amount and direction of change expected to reflect the desired outcome or amount of progress to be achieved; (5) include target dates and/or timetables to establish a time frame for assessing the effectiveness in achieving expected outcomes.
  
- (c) Race-neutral measures, or, when legally appropriate, race-conscious measures, implemented in accordance with standards adopted by the Board of Governors, to address any disparity in student population if significant underrepresentation of a particular group is found to exist, and
  - (i) To implement race/gender neutral measures when working to eliminate any noted underrepresentation.
  - (ii) To take active steps, beyond compliance with nondiscrimination laws, to promote student equity when significant underrepresentation exists.
  - (iii) To implement the following procedures when significant underrepresentation exists: (1) review its practices and procedures and identify and implement any additional

measures which might reasonably be expected to address the needs of significantly underrepresented groups in the success indicator areas in question; (2) consider various other means of reducing the underrepresentation, which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective; and (3) establish target dates for achieving expected outcomes,

- (iv) To use race/gender neutral methods to rectify underrepresentation for at least 3 years before considering mechanisms that take race or gender into account.
- (d) Implementation activities designed to attain the goals, including a means of coordinating existing student equity related programs;
- (e) Sources of funds for the activities in the plan;
- (f) A schedule and process for evaluation, and
  - (i) To conduct an annual survey of the college's student population and gather ethnicity, gender and disability data for use in evaluating the progress in implementing the goals set forth in its plan.
  - (ii) For the evaluation schedule to contain specific information about who is doing what and when and how often the plan itself will be evaluated.
- (g) An executive summary that includes, at a minimum, (1) the groups for whom goals have been set; (2) the goals; (3) the initiatives that the college or district will undertake to achieve these goals; (4) the resources that have been budgeted for that purpose; and (5) the district official to contact for further information, and
  - (i) For the designated contact person to be responsible for the following: (1) monitoring, review, and evaluation of student success for all students; (2) guiding the planning and development process to promote student success; (3) compiling the results of the periodic review process to determine effective success strategies; (4) reporting these

findings to the success/equity advisory committee on an annual basis; (5) submitting a copy of this report along with any resulting committee board action to the Chancellor's Office.

- (3) To develop the student equity plan with the active involvement of all groups on campus and with the involvement of appropriate people from the community. To implement this requirement, the governing board must determine who may qualify as "appropriate people from the community" and give notice to such people and also to all groups on campus of any meetings or activities regarding the development of the student equity plan.
  - (4) For the governing board to submit the Board-adopted plan to the Office of the Chancellor.
- (E) Community Colleges must ensure that their student equity plans adhere to the Chancellor's criteria for reviewing and evaluating student equity plans.

The activities summarized above in paragraphs (A) through (E) and the more detailed activities of the test claim set forth at pages 348-366 far exceed those required in part 106 of title 34, Code of Federal Regulations and fall within the exception of subdivision (c) of Government Code Section 17556, that is, when "the statute or executive order mandates costs which exceed the mandate in that federal law or regulation."

(2) The Requirements of the Test Claim Legislation and Regulations Exceed the Few Requirements Found in the "Revised Guidance"

CCC also cites general provisions of "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," (hereinafter referred to as the "Revised Guidance") published in January 2001 by the Office for Civil Rights of the U.S. Department of Education.<sup>36</sup> Simply citing this additional publication does not resolve the issue of whether the activities alleged in the test claim exceed those required in the "Revised Guidance", if any.

The "Revised Guidance" reaffirms the compliance standards that OCR applies in

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<sup>36</sup> Since CCC has not complied with the Title 2 Regulations that require a copy of this Revised Sexual Harassment Guidance be provided, a copy is attached hereto as Exhibit "D".

investigations and administrative enforcement of Title IX and provides the principles that a school should use to recognize and effectively respond to sexual harassment of students. ("Revised Guidance," Preamble, page i) The "Revised Guidance" provides many examples of "what to do," but provides very little directions on "how to do" them.

For example, at page 14:

"Schools are required by the Title IX regulations to adopt and publish grievance procedures<sup>37</sup> providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination." (Emphasis supplied)

The specific test claim allegations summarized above at subparagraphs (A) through (E), above, go far beyond the generalized requirement to "disseminate a policy."

At page 19, the "Revised Guidance" continues to explain, with lack of specificity:

"Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints. However, its nondiscrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment." (Emphasis supplied)

Most importantly, the "Revised Guidance" states that the adoption of a policy prohibiting sexual harassment is not required. Again, lots of "what to's" (e.g., "provide effective means") but no "how to's" (such as, "how" to provide "effective means"). At pages 19-20, the "Revised Guidance" does indicate:

"...if, because of a lack of policy...specifically addressing sexual harassment, students are unaware of what kind of conduct constitutes sexual harassment or that such conduct is prohibited sex discrimination, a school's general policy and procedures relating to sex discrimination complaints will not be considered effective."

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<sup>37</sup> The "Revised Guidance" and CCC use the terms "grievance procedures" and "complaint procedures" interchangeably. Test claimant assumes that their use of "grievance procedures" does not refer to any collective bargaining process.

In other words, if it doesn't work, it's not good enough, but no required "how to's" are included to make it work. The only specificity put forth by OCR are several elements in evaluating whether a school's grievance procedures will not be considered effective, including an unspecific notice to students, parents and employees where complaints may be filed. This, of course, is different from the more specific requirements, above, which requires the inclusion of information in the written policy on where to obtain the rules and procedures for reporting sexual harassment charges and the available remedies.

Then, at page 20, OCR again becomes non specific:

"Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience."

Finally, OCR concludes this discussion by commenting:

"Many schools ensure adequate notice to students by having copies of the procedures available at various locations throughout the school or campus; publishing the procedures as a separate document; including a summary of the procedures in major publications issued by the school, such as handbooks and catalogs for students, ...faculty and staff; and identifying individuals who can explain how the procedures work."

This observation by OCR is no more than that, an observation, perhaps a suggestion. They are not executive orders. The activities of the test claim legislation and regulations mandate costs which exceed any suggestions found in the "Revised Guidance."

Finally, as its last argument against finding the minimum conditions of Student Equity to be a reimbursable mandate, CCC cites Civil Code Section 51 (Unruh Act) for the proposition that the test claim legislation is a law of general application. CCC cites County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56-57 as its authority.

CCC errs because the test must be applied to the test claim legislation and not to the Unruh Act. The summary of the test claim legislation above in paragraphs (A) through (E) and the more detailed requirements set forth at pages 348-366 of the test claim show why it is not a law which applies generally to all residents and entities in the state.

The decision in County of Los Angeles v. State of California was further relied upon and

explained in Sacramento II. (supra) There, the California Supreme Court explained its County of Los Angeles decision:

"Most private employers in the state already were required to provide unemployment protection to their employees. Extension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies 'indistinguishable in this respect from private employers.'" (Opinion, at page 67)

The above summary of the test claim at paragraphs (A) through (E) and the more detailed requirements set forth at pages 348-366 of the test claim show that community colleges, when complying with the minimum conditions for state aid are, in fact, "distinguishable from private employers" when those private employers are complying with the Unruh Act. The situation is similar to that discussed by the court in Long Beach Unified School District v. State of California (1990) 225 Cal.App.3d 155, 172 where the court held that "although numerous private schools exist, education in our society is considered to be a peculiarly governmental function."

#### **Condition 19 - Transfer Centers**

No new argument is presented by CCC in opposition to a finding that the minimum conditions relating to Transfer Centers are not new programs or higher levels of service.

#### **Condition 20 - Compliance Enforcement**

No new argument is presented by CCC in opposition to a finding that the minimum conditions relating to Compliance Enforcement are not new programs or higher levels of service.

### **CERTIFICATION**

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information or belief.

Sincerely,



Keith B. Petersen

C: Per Mailing List Attached

## DECLARATION OF SERVICE

RE: Minimum Conditions for State Aid 02-TC-31  
CLAIMANT: Santa Monica Community College District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant(s). I am 18 years of age or older and not a party to the within entitled matter.

On the date indicated below, I served the attached: letter of May 5, 2004, addressed as follows:

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

AND per mailing list attached

FAX: (916) 445-0278

**U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

**FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

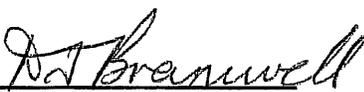
**OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

\_\_\_\_\_  
(Describe)

**PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 5/5/04, at San Diego, California.

  
\_\_\_\_\_  
Diane Bramwell

# Commission on State Mandates

Original List Date: 6/26/2003  
Last Updated:  
List Print Date: 10/17/2003  
Claim Number: 02-TC-31  
Issue: Minimum Conditions for State Aid

Mailing Information: Other

## Mailing List

### TO ALL PARTIES AND INTERESTED PARTIES:

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

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**EXHIBIT "A"**  
**ADDITIONAL STATUTES CITED**

electors of the district to authorize the issuance of bonds for such purpose at an election held for such purpose and if the district is unable to obtain adequate facilities within the district with the funds available to the district for such purpose.

SEC. 21. Section 25509.5 of the Education Code is amended to read:

25509.5. The governing board of a community college district may establish and maintain community college classes outside of the state, comprising a part of an aircraft pilot training program conducted by the district under an agreement with the federal government or any agency thereof, during the time that it is unlawful by reason of any law or order of the federal government or any agency thereof for such classes to be maintained within the district.

The governing board may make such expenditures and do such things in connection with the establishment and maintenance of classes under this section as it could do were the classes established and maintained within the district.

SEC. 22. Section 25509.6 of the Education Code is amended to read:

25509.6. The governing board of a community college district may enter into a contract on a full-cost basis with the federal government or any agency of the federal government to provide community college courses and classes to persons in the military service of the United States at any military camp, post, installation, base, vessel, or location, whether within or outside the district or the state.

SEC. 23. Section 25510 of the Education Code is amended to read:

25510. The Board of Governors of the California Community Colleges shall adopt rules and regulations fixing minimum standards entitling districts to receive state aid for the support of community colleges.

SEC. 24. Section 25510.5 of the Education Code is amended to read:

25510.5. The chancellor's office shall annually investigate each community college to determine whether it has met the standards. As part of such investigation, representatives of the chancellor's office may participate in the accreditation visits conducted by the regional accrediting agency, and one representative of the chancellor's office, who may be appointed by the chancellor, may serve as a member of the accrediting commission which accredits the public community colleges.

SEC. 25. Section 25511 of the Education Code is amended to read:

25511. The Board of Governors of the California Community Colleges shall establish criteria and standards for graded classes in grades 13 and 14.

SEC. 26. Section 25513 of the Education Code is amended to read:

25513. The president of any two-year community college may admit 11th and 12th grade students to vocational education classes

may exclude from any such meeting, whether public or closed to the public, during the examination of a witness, any or all other witnesses in the matter being investigated.

71023. It is the intent of the Legislature that the Board of Governors of the California Community Colleges shall provide leadership and direction in the continuing development of community colleges as an integral and effective element in the structure of public higher education in the state. The work of the board shall at all times be directed to maintaining and continuing, to the maximum degree permissible, local autonomy and control in the administration of the community colleges.

71024. The Board of Governors of the California Community Colleges has the duties, powers, purposes, responsibilities, and jurisdiction heretofore vested in the State Board of Education, Superintendent of Public Instruction, the Department of Education, and the Director of Education with respect to the management, administration, and control of the community colleges.

Whenever in any law other than a provision of the Education Code, enacted prior to January 1, 1977, relating to the management, administration and control of the community colleges reference is made to the State Board of Education, Superintendent of Public Instruction, the Department of Education, or the Director of Education, such reference shall be deemed to mean the Board of Governors of the California Community Colleges.

71025. The Board of Governors of the California Community Colleges shall adopt rules and regulations fixing minimum standards entitling districts to receive state aid for the support of community colleges.

71026. The chancellor's office shall annually investigate each community college to determine whether it has met the standards prescribed pursuant to Section 71025. As part of such investigation, representatives of the chancellor's office may participate in the accreditation visits conducted by the regional accrediting agency, and one representative of the chancellor's office, who may be appointed by the chancellor, may serve as a member of the accrediting commission which accredits the public community colleges.

71027. The Board of Governors of the California Community Colleges shall establish criteria and standards for graded classes in grades 13 and 14.

71028. The board of governors shall review and approve academic master plans and master plans for facilities for each community college district. Such plans shall be submitted to the board of governors by the local governing board of each community college district. Master plans for facilities submitted pursuant to Chapter 4 (commencing with Section 81800) of Part 49 of Division 7 of this title shall satisfy the requirements of this section in relation to master plans for facilities. Each district shall annually submit changes in its approved academic master plan for approval by the

(b) Whether the program provides preventative, proactive, social, or educational services.

(c) Whether there is a need to expand the program to a statewide basis, and whether the services provided by the program are duplicative of other state or local services.

(d) The direct and indirect program benefits to the parents and children who are participants in the program.

(e) The effectiveness of the program in preventing family crises, child abuse, and neglect.

(f) The characteristics of the targeted service population.

8219. This article shall become inoperative on June 30, 1992, and, as of January 1, 1993, is repealed, unless a later enacted statute, which becomes effective on or before January 1, 1993, deletes or extends the dates on which it becomes inoperative and is repealed.

SEC. 2. The sum of thirty-seven thousand five hundred dollars (\$37,500) is hereby appropriated from the General Fund to the State Department of Education for the purposes of Article 2.5 (commencing with Section 8216) of Chapter 2 of Part 6 of the Education Code for the period of January 1, 1989, to June 30, 1989, inclusive. It is the intent of the Legislature that funds necessary in future years for the purpose of the Parent-Child Information Pilot Project as added to Article 2.5 (commencing with Section 8216) of Chapter 2 of Part 6 of the Education Code, be appropriated in the Budget Act of subsequent fiscal years.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to initiate the system provided for under Section 1 of this act in response to current critical needs related to child care and development, it is necessary that this act take effect immediately.

## CHAPTER 973

An act to amend Sections 66701, 71000, 71001, 78205, 84381, 84713, 87102, 87104, 87454, 87457, 87602, 87663, and 87743 of, to add Sections 71020.5, 71090.5, 78212.5, 84750, 84755, 87001, 87107, 87482.6, 87608.5, 87610.1, 87615, 87743.1, 87743.2, 87743.3, 87743.4, and 87743.5 to, to add Article 5 (commencing with Section 87150) to Chapter 1 of Part 51 of, to add Chapter 9.2 (commencing with Section 66720) to Part 40 of, and Chapter 2.5 (commencing with Section 87350) to Part 51 of, to add Part 43.5 (commencing with Section 70900) to Division 7 of, to repeal and add Sections 71020, 72411.5, 87458, 87605, 87608, 87609, 87610, and 87611 of, to repeal Sections 71023, 71025, 71026, 71027, 71028, 71062, 71063, 71064, 71066, 71068, 71069, 71070, 71071, 71072, 71073, 71075, 71076, 71079, 71080, 71091, 72201, 72230, 72231.5, 72233, 72282, 72284, 72285, 72286, 72287, 72288, 72289, 72290, 72291, 72292,

Trustees of the California State University, with appropriate consultation with the Academic Senates of the respective segments, shall jointly develop, maintain, and disseminate a common core curriculum in general education courses for the purposes of transfer. Any person who has successfully completed the transfer core curriculum, shall be deemed to have thereby completed all lower division general education requirements for the University of California and the California State University.

66721. Upon development of the transfer core curriculum pursuant to Section 66720, and upon any subsequent joint revision of that curriculum, the Board of Governors of the California Community Colleges, the Regents of the University of California, and the Trustees of the California State University shall jointly cause the curriculum to be published and distributed to each public school in this state that provides instruction in any of the grades 7 to 12, inclusive, and to each community college in this state, with an emphasis on the communication of that information to each school or college having a high proportion of students who are members of one or more ethnic minorities. In addition, the Board of Governors shall distribute that transfer core curriculum to the State Board of Education, which shall apply that information to ensure, through its curriculum development activities, that public school pupils enrolled in any of the grades 9 to 12, inclusive, are aware of the academic requirements for preparation for higher education and may receive any necessary academic remediation in a timely manner.

66723. No provision of this chapter shall apply to the University of California except to the extent that the Regents of the University of California, by appropriate resolution, makes that provision applicable.

SEC. 8. Part 43.5 (commencing with Section 70900) is added to Division 7 of the Education Code, to read:

#### PART 43.5. THE CALIFORNIA COMMUNITY COLLEGES

70900. There is hereby created the California Community Colleges, a postsecondary education system consisting of community college districts heretofore and hereafter established pursuant to law and the Board of Governors of the California Community Colleges. The board of governors shall carry out the functions specified in Section 70901 and local districts shall carry out the functions specified in Section 70902.

70901. (a) The Board of Governors of the California Community Colleges shall provide leadership and direction in the continuing development of the California Community Colleges as an integral and effective element in the structure of public higher education in the state. The work of the board of governors shall at all times be directed to maintaining and continuing, to the maximum degree permissible, local authority and control in the administration of the California Community Colleges.

(b) Subject to, and in furtherance of, subdivision (a), and in consultation with community college districts and other interested parties as specified in subdivision (e), the board of governors shall provide general supervision over community college districts, and shall, in furtherance thereof, perform the following functions:

(1) Establish minimum standards as required by law, including, but not limited to, the following:

(A) Minimum standards to govern student academic standards relating to graduation requirements and probation, dismissal, and readmission policies.

(B) Minimum standards for the employment of academic and administrative staff in community colleges.

(C) Minimum standards for the formation of community colleges and districts.

(D) Minimum standards for credit and noncredit classes.

(E) Minimum standards governing procedures established by governing boards of community college districts to ensure faculty, staff, and students the right to participate effectively in district and college governance, and the opportunity to express their opinions at the campus level and to ensure that these opinions are given every reasonable consideration, and the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards.

(2) Evaluate and issue annual reports on the fiscal and educational effectiveness of community college districts according to outcome measures cooperatively developed with those districts, and provide assistance when districts encounter severe management difficulties.

(3) Conduct necessary systemwide research on community colleges and provide appropriate information services, including, but not limited to, definitions for the purpose of uniform reporting, collection, compilation, and analysis of data for effective planning and coordination, and dissemination of information.

(4) Provide representation, advocacy, and accountability for the California Community Colleges before state and national legislative and executive agencies.

(5) Administer state support programs, both operational and capital outlay, and those federally supported programs for which the board of governors has responsibility pursuant to state or federal law. In so doing, the board of governors shall do the following:

(A) Annually prepare and adopt a proposed budget for the California Community Colleges. The proposed budget shall, at a minimum, identify the total revenue needs for serving educational needs within the mission, the amount to be expended for the state general apportionment, the amounts requested for various categorical programs established by law, the amounts requested for new programs and budget improvements, and the amount requested for systemwide administration.

The proposed budget for the California Community Colleges shall be submitted to the Department of Finance in accordance with

established timelines for development of the annual Budget Bill.

(B) To the extent authorized by law, establish the method for determining and allocating the state general apportionment.

(C) Establish space and utilization standards for facility planning in order to determine eligibility for state funds for construction purposes.

(6) Establish minimum conditions entitling districts to receive state aid for support of community colleges. In so doing, the board of governors shall establish and carry out a periodic review of each community college district to determine whether it has met the minimum conditions prescribed by the board of governors.

(7) Coordinate and encourage interdistrict, regional, and statewide development of community college programs, facilities, and services.

(8) Facilitate articulation with other segments of higher education with secondary education.

(9) Review and approve comprehensive plans for each community college district. The plans shall be submitted to the board of governors by the governing board of each community college district.

(10) Review and approve all educational programs offered by community college districts, and all courses that are not offered as part of an educational program approved by the board of governors.

(11) Exercise general supervision over the formation of new community college districts and the reorganization of existing community college districts, including the approval or disapproval of plans therefor.

(12) Notwithstanding any other provision of law, be solely responsible for establishing, maintaining, revising, and updating, as necessary, the uniform budgeting and accounting structures and procedures for the California Community Colleges.

(13) Establish policies regarding interdistrict attendance of students.

(14) Advise and assist governing boards of community college districts on the implementation and interpretation of state and federal laws affecting community colleges.

(15) Carry out other functions as expressly provided by law.

(c) Subject to, and in furtherance of, subdivision (a), the board of governors shall have full authority to adopt rules and regulations necessary and proper to execute the functions specified in this section as well as other functions that the board of governors is expressly authorized by statute to regulate.

(d) Wherever in this section or any other statute a power is vested in the board of governors, the board of governors, by a majority vote, may adopt a rule delegating that power to the chancellor, or any officer, employee, or committee of the California Community Colleges, or community college district, as the board of governors may designate. However, the board of governors shall not delegate any power that is expressly made nondelegable by statute. Any rule

delegating authority shall prescribe the limits of delegation.

(e) In performing the functions specified in this section, the board of governors shall establish and carry out a process for consultation with institutional representatives of community college districts so as to ensure their participation in the development and review of policy proposals. The consultation process shall also afford community college organizations, as well as interested individuals and parties, an opportunity to review and comment on proposed policy before it is adopted by the board of governors.

70901.5. (a) The board of governors shall establish procedures for the adoption of rules and regulations governing the California Community Colleges. Among other matters, the procedures shall implement the following requirements:

(1) Written notice of a proposed action shall be provided to each community college district and to all other interested parties and individuals, including the educational policy and fiscal committees of the Legislature and the Department of Finance, at least 45 days in advance of adoption. The regulations shall become effective no earlier than 30 days after adoption.

(2) The proposed regulations shall be accompanied by an estimate, prepared in accordance with instructions adopted by the Department of Finance, of the effect of the proposed regulations with regard to the costs or savings to any state agency, the cost of any state-mandated local program as governed by Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code, any other costs or savings of local agencies, and the costs or savings in federal funding provided to state agencies.

(3) The board of governors shall ensure that all proposed regulations of the board meet the standards of "necessity," "authority," "clarity," "consistency," "reference," and "nonduplication," as those terms are defined in Section 11349 of the Government Code. A district governing board or any other interested party may challenge any proposed regulatory action regarding the application of these standards.

(4) Prior to the adoption of regulations, the board of governors shall consider and respond to all written and oral comments received during the comment period.

(5) The effective date for a regulation shall be suspended if, within 30 days after adoption by the board of governors, at least two-thirds of all governing boards vote, in open session, to disapprove the regulation. With respect to any regulation so disapproved, the board of governors shall provide at least 45 additional days for review, comment, and hearing, including at least one hearing before the board itself. After the additional period of review, comment, and hearing, the board may do any of the following:

- (A) Reject or withdraw the regulation.
- (B) Substantially amend the regulation to address the concerns raised during the additional review period, and then adopt the revised regulation. The regulation shall be treated as a newly

adopted regulation, and shall go into effect in accordance with those procedures.

(C) Readopt the regulation as originally adopted, or with those nonsubstantive, technical amendments deemed necessary to clarify the intent of the original regulation. If the board of governors decides to readopt a regulation, with or without technical amendments, it shall also adopt a written declaration and determination regarding the specific state interests it has found necessary to protect by means of the specific language or requirements of the regulation. A readopted regulation may then be challenged pursuant to existing law in a court of competent jurisdiction, and shall not be subject to any further appeal within the California Community Colleges.

(6) As to any regulation which the Department of Finance determines would create a state-mandated local program cost, the board of governors shall not adopt the regulation until the Department of Finance has certified to the board of governors and to the Legislature that a source of funds is available to reimburse that cost.

(7) Any district or other interested party may propose a new regulation or challenge any existing regulation.

(b) Except as expressly provided by this section, and except as provided by resolution of the board of governors, the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code shall not apply to regulations adopted by the board of governors.

70902. (a) Every community college district shall be under the control of a board of trustees, which is referred to herein as the "governing board." The governing board of each community college district shall establish, maintain, operate, and govern one or more community colleges in accordance with law. In so doing, the governing board may initiate and carry on any program, activity, or may otherwise act in any manner that is not in conflict with or inconsistent with, or preempted by, any law and that is not in conflict with the purposes for which community college districts are established.

The governing board of each community college district shall establish rules and regulations not inconsistent with the regulations of the board of governors and the laws of this state for the government and operation of one or more community colleges in the district.

(b) In furtherance of the provisions of subdivision (a), the governing board of each community college district shall do all of the following:

(1) Establish policies for, and approve, current and long-range academic and facilities plans and programs and promote orderly growth and development of the community colleges within the district. In so doing, the governing board shall, as required by law, establish policies for, develop, and approve, comprehensive plans. The governing board shall submit the comprehensive plans to the

board of governors for review and approval.

(2) Establish policies for and approve courses of instruction and educational programs. The educational programs shall be submitted to the board of governors for approval. Courses of instruction that are not offered in approved educational programs shall be submitted to the board of governors for approval. The governing board shall establish policies for, and approve, individual courses that are offered in approved educational programs without referral to the board of governors.

(3) Establish academic standards, probation and dismissal and readmission policies, and graduation requirements not inconsistent with the minimum standards adopted by the board of governors.

(4) Employ and assign all personnel not inconsistent with the minimum standards adopted by the board of governors and establish employment practices, salaries, and benefits for all employees not inconsistent with the laws of this state.

(5) To the extent authorized by law, determine and control the district's operational and capital outlay budgets. The district governing board shall determine the need for elections for override tax levies and bond measures and request that those elections be called.

(6) Manage and control district property. The governing board may contract for the procurement of goods and services as authorized by law.

(7) Establish procedures not inconsistent with minimum standards established by the board of governors to ensure faculty, staff, and students the opportunity to express their opinions at the campus level and to ensure that these opinions are given every reasonable consideration, and the right to participate effectively in district and college governance, and the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards.

(8) Establish rules and regulations governing student conduct.

(9) Establish student fees as it is required to establish by law, and, in its discretion, fees as it is authorized to establish by law.

(10) In its discretion, receive and administer gifts, grants, and scholarships.

(11) Provide auxiliary services as deemed necessary to achieve the purposes of the community college.

(12) Within the framework provided by law, determine the district's academic calendar, including the holidays it will observe.

(13) Hold and convey property for the use and benefit of the district. The governing board may acquire by eminent domain any property necessary to carry out the powers or functions of the district.

(14) Participate in the consultation process established by the board of governors for the development and review of policy proposals.

(c) In carrying out the powers and duties specified in subdivision

(b) or other provisions of statute, the governing board of each community college district shall have full authority to adopt rules and regulations, not inconsistent with the regulations of the board of governors and the laws of this state, that are necessary and proper to executing these prescribed functions.

(d) Wherever in this section or any other statute a power is vested in the governing board, the governing board of a community college district, by majority vote, may adopt a rule delegating the power to the district's chief executive officer or any other employee or committee as the governing board may designate; provided, however, that the governing board shall not delegate any power that is expressly made nondelegable by statute. Any rule delegating authority shall prescribe the limits of the delegation.

SEC. 9. Section 71000 of the Education Code is amended to read:  
71000. There is in the state government a Board of Governors of the California Community Colleges, consisting of all of the following:

(a) Thirteen members, who are appointed by the Governor with the advice and consent of two-thirds of the Senate. Of the members appointed by the Governor, two shall be current or former elected members of local community college district governing boards. The Governor shall appoint the current or former members of the governing board of a community college district for staggered six-year terms. The voting members who are current or former members of the governing board of a community college district shall first be appointed no later than January 15, 1990, and January 15, 1992, respectively.

(b) One voting student who is enrolled in a community college with a minimum of five semester units, or its equivalent, at the time of the appointment and throughout the period of his or her term of appointment, or until a replacement has been named. A student member shall be enrolled in a community college at least one semester prior to his or her appointment and shall meet and maintain the minimum standards of scholarship prescribed for community college students. The student member shall be appointed by the Governor for a one-year term commencing on June 1.

(c) Two voting tenured faculty members from a community college, who shall be appointed by the Governor for two-year terms. The Governor shall appoint each faculty member from a list of names of at least three persons furnished by the Academic Senate of the California Community Colleges. The first voting tenured faculty member appointed to the board shall occupy the seat on the board that is made available by the next full-term vacancy of a four-year term that exists after January 1, 1984. The first voting tenured faculty member appointed to the additional voting tenured faculty member seat on the board provided by the amendments to this section enacted by the Statutes of 1987 shall occupy the second seat on the board that is made available by the next full-term vacancies that exist after January 1, 1988. Thereafter, each seat shall be designated as a

the Education Code, the adoption of regulations as required by Sections 70901.5, 87356, 87359, 87107, and 87482.6 of the Education Code and Section 69 of this act, the development of a list of disciplines, as required by Section 87357 of the Education Code, and the review required by Section 87359.5 of the Education Code .....	\$300,000
(d) For purposes of commencing implementation of Section 84750 of the Education Code, during the period of January 1, 1989, through June 30, 1990 .....	\$300,000
(e) For purposes of subdivision (b) of Section 87104 of the Education Code .....	\$300,000
(f) For purposes of Section 71020.5 of the Education Code.....	\$150,000
(g) To the Community College Fund for instructional improvement pursuant to Section 84381 of the Education Code.....	\$200,000

CHAPTER 974

An act to amend and supplement Section 2.00 of the Budget Act of 1988 by augmenting Items 0540-001-001, 2200-001-001, 2240-001-001, 3360-001-465, 3720-001-001, 4170-101-001, 4200-101-001, 4260-101-001, 4260-111-001, 4260-121-001, 4440-101-001, 4440-111-001, 5240-001-001, 5450-001-001, 5460-001-001, 7980-111-001, 7980-121-001, 8260-001-001, 8300-001-001, 8570-001-001, 9800-001-001, 9800-001-494, and 9800-001-988 thereof, amending Items 6440-025-001 and 6610-025-001 thereof, and adding Items 0820-301-001, 2200-001-036, 2200-101-036, and 9210-102-001 thereto, relating to the support of the State of California, and making an appropriation therefor, to take effect immediately, usual current expenses.

[Approved by Governor September 19, 1988. Filed with Secretary of State September 19, 1988.]

I am deleting the \$3 million transfer to the General Fund contained in Section 17 of Assembly Bill No. 1903. This action is necessary due to the lack of funds in the Special Account for Capital Outlay.

With this deletion, I approve Assembly Bill No. 1903.

GEORGE DEUKMEJIAN

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

SECTION 1. Item 0820-301-001 is added to Section 2.00 of the Budget Act of 1988, to read:

**EXHIBIT "B"**  
**PEOPLE EX.REL. ETC V. DUQUE (2003)**  
**105 Cal.App.4th 259; 129 Cal.Rptr.2d 298**

[No. A098863. First Dist., Div. Five. Jan. 10, 2003.]

THE PEOPLE ex rel. FOUNDATION FOR TAXPAYER AND  
CONSUMER RIGHTS, Plaintiff and Respondent, v.  
HENRY DUQUE, Defendant and Appellant.

#### SUMMARY

The trial court entered a judgment that a Public Utilities Commission (PUC) commissioner forfeited his office pursuant to Pub. Util. Code, § 303, subd. (a), for having owned stock in a corporation that was regulated by the PUC. (Superior Court of the City and County of San Francisco, No. 318146, Alfred G. Chiantelli, Judge.)

The Court of Appeal reversed. The court held that because the trial court correctly ruled that defendant held his interest in the stock voluntarily, and since the forfeiture language set forth in the statute applies only when a commissioner acquires an interest in a regulated company "other than voluntarily," the statute, by its terms, did not apply under the facts of the case. The court could not supply an implied remedy to fill the statutory gap. It is particularly appropriate to honor forfeiture limitations where the issue is whether a state constitutional officer has forfeited his or her office. A court must limit itself to interpreting the law as written and leave for the people and the Legislature the task of revising it as they deem wise. Moreover, a commissioner who voluntarily owns stock in a regulated company arguably has neglected his statutory duty under Pub. Util. Code, § 303, subd. (a), and thus would be subject to removal under Cal. Const., art. XII, § 1. (Opinion by Jones, P. J., with Stevens and Simons, JJ., concurring.)

#### HEADNOTES

Classified to California Digest of Official Reports

**(1a-1d) Public Officers and Employees § 29—Duration and Termination of Tenure—Forfeiture—Public Utilities Commissioner—Voluntary Ownership of Stock in Regulated Company.**—The trial court erred in ruling that a Public Utilities Commission (PUC) commissioner forfeited his office pursuant to Pub. Util. Code, § 303, subd. (a), for

having owned stock in a corporation that was regulated by the PUC. Because the trial court correctly ruled that defendant held his interest in the stock voluntarily, and since the forfeiture language set forth in the statute applies only when a commissioner acquires an interest in a regulated company "other than voluntarily," the statute, by its terms, did not apply under the facts of the case. The court could not supply an implied remedy to fill the statutory gap. It is particularly appropriate to honor forfeiture limitations where the issue is whether a state constitutional officer has forfeited his or her office. A court must limit itself to interpreting the law as written and leave for the People and the Legislature the task of revising it as they deem wise. Moreover, a commissioner who voluntarily owns stock in a regulated company arguably has neglected his statutory duty under Pub. Util. Code, § 303, subd. (a), and thus would be subject to removal under Cal. Const., art. XII, § 1.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1989) Constitutional Law, § 889; West's Key Number Digest, Public Utilities ⇌ 142.]

- (2) **Statutes § 30—Construction—Language—Plain Meaning.**—In construing a statute a court ascertains the Legislature's intent in order to effectuate the law's purpose. The court must look to the statute's words and give them their usual and ordinary meaning. The statute's plain meaning controls the court's interpretation unless its words are ambiguous.
- (3) **Public Officers and Employees § 29—Duration and Termination of Tenure—Forfeiture.**—Public office forfeiture provisions are disfavored because they encroach on the fundamental right to hold office. The right to hold public office, either by election or appointment, is one of the valuable rights of citizenship. The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Furthermore, the law traditionally disfavors forfeitures, and statutes imposing them are to be strictly construed.
- (4) **Statutes § 30—Construction—Language—Plain Meaning.**—Courts are obligated to interpret the language in a statute in accordance with its plain meaning, and may not, under the guise of construction, rewrite a law or give the words an effect different from the plain and direct import of the terms used.
- (5) **Statutes § 39—Construction—Conformation of Parts.**—While a court must, if possible, avoid interpreting a statute in an absurd manner, when deciding what is absurd the court is required to read the statute

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with reference to the entire scheme of law of which it is part so that the whole may be harmonized.

- (6) **State of California § 10—Attorney General—Opinions—Weight.**—An opinion of the Attorney General authorizing a quo warranto action against a Public Utilities Commission commissioner was not controlling on the commissioner's appeal from an adverse judgment. Given that the Attorney General aligned himself with plaintiff, citing the Attorney General's opinion as controlling is analogous to one party arguing that an amicus curiae brief submitted in support of his or her position mandates how an appeal must be resolved. In any event, while opinions of the Attorney General are entitled to considerable weight, they are not binding.

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#### COUNSEL

Remcho, Johansen & Purcell, Joseph Remcho and Thomas A. Willis for Defendant and Appellant.

Harvey Rosenfield, Pamela M. Pressley; Bill Lockyer, Attorney General, and Anthony Davigo, Deputy Attorney General, for Plaintiff and Respondent.

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#### OPINION

**JONES, P. J.**—The People of the State of California, through relator the Foundation for Taxpayer and Consumer Rights (FTCR) filed a quo warranto action against Commissioner Henry Duque of the Public Utilities Commission (PUC), contending Duque must be removed from office pursuant to Public Utilities Code section 303,<sup>1</sup> subdivision (a), because he formerly held stock in a corporation that was regulated by the PUC. The trial court agreed and ruled Duque had forfeited his office. Duque now appeals claiming the judgment must be reversed because (1) section 303, subdivision (a), is unconstitutional, and (2) the statute, by its terms, did not apply to his conduct. We agree with the second of these arguments and reverse the judgment.

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<sup>1</sup>Unless otherwise indicated, all further section references will be to the Public Utilities Code.

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## I. FACTUAL AND PROCEDURAL BACKGROUND

On April 3, 1995, former Governor Pete Wilson appointed Duque a commissioner on the PUC. The position is a constitutionally mandated office.<sup>2</sup> In December 1996, Governor Wilson reappointed Duque to a full six-year term. His appointment was confirmed by the state senate. Duque's term of office ended on January 1, 2003.

While Duque was a commissioner, his personal investment account was managed by his long-term stockbroker, Michael Golub. Golub made investment decisions for Duque pursuant to a power of attorney without seeking input from Duque. When Duque became a commissioner, he told Golub he could not own stock in companies that were regulated by the PUC.

On May 12, 1999, Golub purchased stock in Nextel Communications, Inc., a wireless communication carrier, and allocated 700 shares to Duque's account. At the time of the purchase, Duque believed that wireless carriers such as Nextel were regulated by the Federal Communications Commission (FCC), and not by the PUC. Golub had a similar understanding. Duque disclosed his ownership of the Nextel stock in his 1999 and 2000 statements of economic interests.

In fact, while states are precluded from regulating the rates charged by wireless carriers (see 47 U.S.C. § 332(c)(3)(A)), other aspects of Nextel's business were and are regulated by the PUC. Three months after Duque acquired his stock, Nextel and all other phone companies in California filed a joint petition seeking an allocation of phone numbers in the 310 area code. The PUC, with Duque voting in dissent, adopted an allocation plan. Duque voted against the interests of Nextel and the other petitioning parties.

In February 2000, the PUC noticed rulemaking proceedings to establish consumer protection rules applicable to telecommunication companies. The rules would apply to all communication companies, including Nextel.

In March 2000, the PUC approved an interconnection agreement between Pacific Bell and Nextel. The agreement was part of a larger consent item agenda that included several similar agreements. All the agreements were approved en masse.

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<sup>2</sup>California Constitution, article XII, section 1, states: "The Public Utilities Commission consists of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for staggered 6-year terms. . . . The Legislature may remove a member for incompetence, neglect of duty, or corruption, two thirds of the membership of each house concurring."

On August 16, 2000, Duque received a phone call from Todd Wallack, a reporter for the San Francisco Chronicle, who had reviewed Duque's statements of economic interests. Wallack questioned Duque's ownership of Nextel stock, asserting it was a regulated company whose stock Duque was not permitted to own. Duque contacted the general counsel of the PUC to ask him whether Nextel was regulated by the PUC. The general counsel did not call back.

Duque believed that Wallack sounded knowledgeable. He decided to sell his stock because there was, at a minimum, a perception of conflict. On August 18, 2000, Duque directed his stockbroker to sell his remaining Nextel stock. Duque earned almost \$70,000 as the result of his ownership of the stock.

On October 4, 2000, respondent FTCCR sought permission from the California Attorney General to file an action against Duque. The Attorney General granted permission in an opinion dated November 29, 2000. (See 83 Ops.Cal.Atty.Gen. 263 (2000).)

In January 2001, FTCCR, acting in the name of the People of the State of California, filed a quo warranto action against Duque under Code of Civil Procedure section 803 et seq. FTCCR contended that Duque had forfeited his office as a commissioner under section 303, subdivision (a), because he formerly owned a prohibited financial interest in Nextel.

In July 2001, FTCCR filed a motion for summary judgment arguing it was entitled to prevail as a matter of law. The judge hearing the motion denied it, ruling that section 303, subdivision (a), "does not provide for the removal from office of a [c]ommissioner . . . for a voluntary acquisition of stock." However, the judge ruled Nextel was in fact subject to regulation by the PUC.

The case then proceeded to a one-day court trial. At the conclusion of the trial, the court issued a statement of decision ruling Duque had forfeited his office under section 303, subdivision (a), because he had voluntarily owned stock in a company that was regulated by the PUC. The court ruled specifically that Duque had *not* been dishonest and that he had *not* acted in bad faith. Instead, the court ruled that Duque had shown poor judgment because he had "not [done] everything, which can reasonably be expected of a public utility commissioner to do in order to avoid a conflict of interest." The court ordered Duque to pay a \$5,000 fine, and ruled he must pay FTCCR's attorney fees under Code of Civil Procedure section 1021.5.

This appeal followed. While the matter was being briefed, we granted Duque's petition for writ of supersedeas and stayed the court's judgment pending our resolution of the appeal.

## II. DISCUSSION<sup>3</sup>

(1a) Duque contends the judgment must be reversed because (1) section 303, subdivision (a) is unconstitutional, and (2) the section, by its terms, did not apply under the facts of this case. Since we do not reach constitutional issues unless absolutely required to do so (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230 [45 Cal.Rptr.2d 207, 902 P.2d 225]), we turn to the second, and we believe, dispositive argument.

Section 303, subdivision (a), states: "A public utilities commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission. If any commissioner acquires a financial interest in a corporation or person subject to regulation by the commission other than voluntarily, his or her office shall become vacant unless within a reasonable time he or she divests himself or herself of the interest."

Our interpretation of this language is guided by well-settled rules of construction. (2) In construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386 [241 Cal.Rptr. 67, 743 P.2d 1323].) We must look to the statute's words and give them their usual and ordinary meaning. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [7 Cal.Rptr.2d 238, 828 P.2d 140].) "The statute's plain meaning controls the court's interpretation unless its words are ambiguous." (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 860-861 [80 Cal.Rptr.2d 803, 968 P.2d 514].)

(1b) The language used in section 303, subdivision (a), is reasonably clear. The first sentence states that commissioners are precluded from owning an interest in any company that is subject to regulation by the PUC. Here, the trial court ruled, and the evidence fully supports the conclusion, that Duque held an interest in a corporation that was regulated by the PUC.

<sup>3</sup>While this appeal was being briefed, FTICR filed a request asking this court to take judicial notice of the legislative history of the statutes and constitutional sections that are at issue in this case. We deferred ruling on the request until the merits of the appeal. (See *People v. Preslie* (1977) 70 Cal.App.3d 486, 493-494 [138 Cal.Rptr. 828].) Having now considered FTICR's request, we grant it.

It is undisputed that Duque held Nextel stock. Nextel, as a wireless carrier, was and is subject to regulation by the PUC. Indeed, Duque himself participated in a decision in which the PUC asserted its right to regulate certain aspects of the wireless communication business. (See *In re Mobile Telephone Service and Wireless Communications* (Cal.P.U.C., 1996) 174 Pub.Utl.Rep.4th (West) 543.)

The second sentence of section 303, subdivision (a), then states that if a commissioner comes to possess an interest in a regulated company "*other than voluntarily*" (or in other words involuntarily) he or she must divest himself or herself of that interest "within a reasonable time." If the commissioner fails to do so, his or her office "shall become vacant." Here the trial court held, and the parties both agree, that Duque held his interest in Nextel *voluntarily*. Since the forfeiture language set forth in section 303, subdivision (a), applies only when a commissioner acquires an interest in a regulated company "other than voluntarily," the statute, by its terms, did not apply under the facts of this case.

This application of section 303, subdivision (a), highlights a critical gap in the language of the statute. While section 303, subdivision (a), states that commissioners may not possess an interest in a regulated company, and provides a remedy for the *involuntary* acquisition of such an interest, the statute does not describe what occurs when a commissioner *voluntarily* acquires an interest in a regulated company.<sup>4</sup> The pivotal issue presented here is whether we must fill that gap with an implied remedy: i.e., that a commissioner who voluntarily acquires an interest in a regulated company must forfeit his or her office. We decline to do so.

(3) First, forfeiture provisions are disfavored because they encroach on the fundamental right to hold office. "[T]he right to hold public office, either by election or appointment, is one of the valuable rights of citizenship . . . The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. . . ." (*Helena Rubenstein Internat. v.*

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<sup>4</sup>The statute's silence as to penalty for a voluntary acquisition is mirrored in a related constitutional provision. Article XII, section 7, of the California Constitution states: "A Public Utilities Commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission." This language provides a standard of conduct applicable to public utilities commissioners, but does not provide a remedy for a violation of that standard. Article XII, section 7, also states: "A transportation company may not grant free passes or discounts to anyone holding an office in this state; and the acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office." This portion of the section mandates forfeiture of office for certain types of conduct, but states clearly that the remedy does not apply to public utilities commissioners.

*Younger* (1977) 71 Cal.App.3d 406, 418 [139 Cal.Rptr. 473], italics added in *Helena Rubenstein*, quoting *People v. Washington* (1869) 36 Cal. 658, 662; see also *Carter v. Commission on Qualifications, etc.* (1939) 14 Cal.2d 179, 182 [93 P.2d 140].) Furthermore, the "law traditionally disfavors forfeitures and statutes imposing them are to be strictly construed." (*People v. United Bonding Ins. Co.* (1971) 5 Cal.3d 898, 906 [98 Cal.Rptr. 57, 489 P.2d 1385]; see also 67 Ops.Cal.Atty.Gen. 459, 461 (1984).) (1c) We believe it is particularly appropriate to honor these limitations where, as here, the issue is whether a state constitutional officer has forfeited his office.

(4) Second, we are obligated to interpret the language in a statute in accordance with its plain meaning. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003 [111 Cal.Rptr.2d 564, 30 P.3d 57].) "We may not, under the guise of construction, rewrite [a] law or give the words an effect different from the plain and direct import of the terms used." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 [45 Cal.Rptr.2d 279, 902 P.2d 297].) (1d) Here, section 303, subdivision (a), describes what occurs when a commissioner involuntarily owns stock in a regulated company. The statute, by its terms, does not describe what occurs when a commissioner voluntarily owns stock in a company that is regulated. "[W]e must limit ourselves to interpreting the law as written and leave for the People and the Legislature the task of revising it as they deem wise." (*People v. Garcia* (1999) 21 Cal.4th 1, 15 [87 Cal.Rptr.2d 114, 980 P.2d 829].)

Our holding does not mean that commissioners may violate section 303, subdivision (a), with impunity. Article XII, section 1, of the California Constitution states that the Legislature may remove a commissioner from office "for incompetence, neglect of duty, or corruption . . ." A commissioner who voluntarily owns stock in a regulated company arguably has neglected his statutory duty under section 303, subdivision (a), and thus would be subject to removal under article XII, section 1. Furthermore, Duque concedes that commissioners who violate the public trust remain subject to civil and criminal penalties under the Political Reform Act of 1974. (See Gov. Code, § 81000 et seq.) We hold only that a commissioner who violates section 303, subdivision (a), by voluntarily owning stock, does not, under the terms of that statute, forfeit his office.<sup>5</sup>

FTCR contends the interpretation of section 303, subdivision (a), we have adopted is absurd because it would permit forfeiture of office for the

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<sup>5</sup>Having reached this conclusion, we need not decide the potentially more troubling issue of whether section 303, subdivision (a), is constitutional in light of article XII, section 1, of the California Constitution, which states: "The Legislature may remove a member [of the Public Utilities Commission] for incompetence, neglect of duty, or corruption, two thirds of the membership of each house concurring." Specifically, we need not decide whether the

involuntary acquisition of an interest in a regulated company, while providing no remedy for the more serious violation that occurs when a commissioner voluntarily acquires an interest in a regulated company. FTCR concedes this argument is premised on the assumption that a voluntary acquisition of an interest in a regulated company is, by its nature, a more serious offense. In our view, FTCR's premise is flawed. A commissioner can voluntarily but inadvertently acquire an interest in a regulated company by, for example, purchasing shares in an unregulated corporation which, unbeknownst to the commissioner, has recently acquired a regulated corporation. There is nothing particularly blameworthy about such an act and it should not necessarily trigger a more severe sanction.

(5) Furthermore, while we must, if possible, avoid interpreting a statute in an absurd manner (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 [87 Cal.Rptr.2d 222, 980 P.2d 927]), when deciding what is "absurd" we are required to read the statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized . . ." (*Ibid.*, quoting *People v. Pieters* (1991) 52 Cal.3d 894, 898-899 [276 Cal.Rptr. 918, 802 P.2d 420]). Section 303, subdivision (a), certainly has a limited scope. It mandates forfeiture of office for an involuntary acquisition of an interest in a regulated company, while stating no remedy for the conflict of interest that arises when a commissioner voluntarily obtains an interest in a regulated company. However, the omissions inherent in section 303, subdivision (a), are largely filled by the power to remove found in article XII, section 1, of the California Constitution, and by the civil and criminal penalties contained in the Political Reform Act of 1974. (See Gov. Code, § 81000 et seq.) When all the related provisions of law are considered together, our interpretation of section 303, subdivision (a), is not absurd.

FTCR also contends the trial court's interpretation of section 303, subdivision (a), is supported by two opinions issued by the California Attorney General. However, the issue in the first opinion, 80 Ops.Cal.Atty.Gen. 27 (1997) was whether the PUC is obligated to discharge an employee who marries an employee of a regulated company. That Attorney General concluded that "on its face, section 303 would prohibit continued employment by an employee of the Commission who marries an employee of a regulated utility." (*Id.* at p. 29.) The opinion does not involve a constitutional officer, does not involve stock ownership, and does not discuss the forfeiture clause

section's grant of the power to remove to the Legislature, bars the judiciary from determining whether removal is necessary or appropriate. (Cf. *In re McGee* (1951) 36 Cal.2d 592 [226 P.2d 1]; *California War Veterans for Justice v. Hayden* (1986) 176 Cal.App.3d 982 [222 Cal.Rptr. 512].)

that is pivotal here. Given these significant differences, we conclude the opinion is not persuasive. (Cf. *Andres v. Young Men's Christian Assn.* (1998) 64 Cal.App.4th 85; 90 [74 Cal.Rptr.2d 788].)

(6) The second opinion, 83 Ops.Cal.Atty.Gen. 263 (2000), is the one in which the Attorney General authorized FTCR to file the present litigation. Given that the Attorney General has aligned himself with FTCR, citing the Attorney General's opinion as controlling is analogous to one party arguing that an amicus brief submitted in support of his position mandates how an appeal must be resolved. In any event, while opinions of the Attorney General are entitled to considerable weight, they are not binding. (*State of Cal. ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 71 [44 Cal.Rptr.2d 399, 900 P.2d 648].) Here, the Attorney General stated in his opinion that "[Duque's] office became vacant immediately upon his acquisition of the 700 shares of stock in Nextel on May 12, 1999." (83 Ops.Cal.Atty.Gen., *supra*, at p. 265.) In reaching that conclusion, the Attorney General did not discuss the language of the section 303, subdivision (a), in detail and he did not acknowledge that the statute only provides for a forfeiture when a commissioner obtains stock involuntarily. Again, we conclude the Attorney General's opinion is not persuasive.

FTCR next contends the trial court's ruling was correct under the rule that courts must, if possible, give meaning to all the language of a statute. (See, e.g., *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118 [81 Cal.Rptr.2d 471, 969 P.2d 564].) According to FTCR, interpreting section 303, subdivision (a), to mean that a voluntary acquisition of an interest does not result in a forfeiture would render the second sentence of the subdivision meaningless. This is simply not true. Under our interpretation, the first sentence of section 303, subdivision (a), sets forth the general rule that commissioners may not possess an interest in a company that is regulated by the PUC. The second sentence then provides a limited remedy for a violation of the general rule. If a commissioner obtains an interest involuntarily, he must divest himself of that interest in a reasonable time. If he fails to do so, his office is vacated. Under our interpretation, all language in the statute is given meaning.

Next, FTCR contends the trial court's ruling is supported by the maxim of statutory construction, *expressio unius est exclusio alterius*, meaning the "expression of one thing is the exclusion of another." (See *People v. Anzalone* (1999) 19 Cal.4th 1074, 1078 [81 Cal.Rptr.2d 315, 969 P.2d 160].) As we understand it, FTCR's theory is that the first sentence of section 303, subdivision (a), states the general rule that a commissioner who owns an

interest in a company that is regulated by the PUC forfeits his office. The second sentence then provides for a single exception to the general rule: a commissioner who obtains his interest involuntarily, need not forfeit his office if he disposes of that interest within a reasonable time. According to FTCCR, interpreting the statute to mean that a commissioner who voluntarily obtains an interest in a regulated company faces no risk of automatic forfeiture of office would improperly add an additional exception that is not specified in the statute. We reject this argument because it is based on a false premise. Contrary to FTCCR's argument, the first sentence of section 303, subdivision (a), does not state that a commissioner who owns an interest in a regulated company forfeits his office. It merely states that a commissioner may not own an interest in a regulated company. No remedy is provided. FTCCR's argument, based on a mistaken interpretation of the statute, must fail.

FTCCR also argues that its interpretation of section 303, subdivision (a), is supported by a constitutional consideration. Specifically, FTCCR notes that the first sentence of subdivision (a) stating: "A public utilities commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission" is identical to language contained in article XII, section 7, of the California Constitution. The language in article XII, section 7, in turn, is based on former article XII, section 22, which stated in part: "no person in the employ of or holding any official relation to any person, firm or corporation, which said person, firm or corporation is subject to regulation by said Public Utilities Commission and no person owning stock or bonds of any such corporation or who is in any manner pecuniarily interested therein, shall be appointed to *or hold* the office of Public Utilities Commissioner." (See Deering's Cal. Codes (1974 ed.) Const., art. XII, § 22, p. 199, italics added.) Since current article XII, section 7, was intended to restate former article XII, section 22, without "substantive change," (see art. XII, § 9) FTCCR contends the language we have italicized in former article XII, section 22, must be interpreted to mean that a person cannot simultaneously hold the position of commissioner and possess stock in a regulated company. If a commissioner does so, his office becomes vacant. We reject this argument because it fails to distinguish between a duty and a remedy. Article XII, section 7, and former article XII, section 22, both describe a duty that is imposed on those who serve as commissioners on the PUC. A commissioner cannot hold an interest in a company that is regulated by the PUC. However, neither of those sections provides a remedy for a violation of that duty. It is simply beyond our purview, as an intermediate appellate court, to create or imply such a remedy where it is not statutorily or constitutionally compelled.

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Finally, FTCR relies on language from *Lubin v. Wilson* (1991) 232 Cal.App.3d 1422, 1429-1430 [284 Cal.Rptr. 70], where the court said: "A person holds office subject to conditions imposed by the state and, where cause for removal is provided by law, the person is deemed to have accepted the office on condition he or she could be removed for that cause and in the manner provided. [Citation.]" FTCR contends that when Duque violated section 303, subdivision (a), by voluntarily owning stock, he failed to satisfy a "condition" of his position and thus forfeited his office.

We have no quarrel with the court's holding in *Lubin*; however, the case is distinguishable. The issue in *Lubin* was whether a member of the State Board of Equalization had forfeited his office when he was convicted of several felonies in federal court. The *Lubin* court ruled the member had forfeited his office, relying in part on Government Code section 1770, subdivision (h), which states that when person is "convict[ed] of a felony" his office becomes vacant. Since the statute at issue expressly mandated forfeiture under the circumstances presented, we agree the *Lubin* court reached the correct conclusion. Here, by contrast, the statute at issue contains a forfeiture provision, however, it clearly does not apply under the facts of this case. *Lubin* is not controlling.

### III. DISPOSITION

The judgment is reversed.

Stevens, J., and Simons, J., concurred.

Respondent's petition for review by the Supreme Court was denied April 9, 2003.

**EXHIBIT "C"**  
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and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion.

(4) If an action required to comply with this section would result in that alteration or those burdens, the Department shall take any other action that would not result in the alteration or burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

**§ 105.41 Compliance procedures.**

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the Department.

(b) As provided in § 105.80, the Department shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Deputy Under Secretary for Management is responsible for coordinating implementation of this section. Complaints may be sent to the U.S. Department of Education, Office of Management, Federal Building No. 6, 400 Maryland Avenue SW., Washington, DC 20202.

(d) The Department shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The Department may extend this time period for good cause.

(e) If the Department receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The Department shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157) is not readily

accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the Department shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the Department of the letter required by § 105.41(g). The Department may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Secretary.

(j) If the Secretary determines that additional information is needed for the complainant, he or she shall notify the complainant of the additional information needed to make his or her determination on the appeal.

(k) The Secretary shall notify the complainant of the results of the appeal.

(l) The time limit in paragraph (g) of this section may be extended by the Secretary.

(m) The Secretary may delegate the authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated.

**§ 105.42 Effective date.**

The effective date of this part is October 9, 1990.

**PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE**

**Subpart A—Introduction**

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- 106.7 Effect of employment opportunities.
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- 106.21 Admission.
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- 106.31 Education programs or activities.
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- 106.34 Access to course offerings.
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- 106.36 Counseling and use of appraisal and counseling materials.
- 106.37 Financial assistance.
- 106.38 Employment assistance to students.
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- 106.61 Sex as a bona-fide occupational qualification.

### Subpart F—Procedures [Interim]

- 106.71 Procedures.

## SUBJECT INDEX TO TITLE IX PREAMBLE AND REGULATION

### APPENDIX A—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS [NOTE]

AUTHORITY: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

SOURCE: 45 FR 30955, May 9, 1980, unless otherwise noted.

## Subpart A—Introduction

### § 106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93-568, 88 Stat. 1855, and sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93-380)

### § 106.2 Definitions.

As used in this part, the term:

(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

(e) *Reviewing Authority* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *Administrative law judge* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *Federal financial assistance* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *Program or activity and program* means all of the operations of—

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or local government; or

(ii) The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of as-

sistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity that is established by two or more of the entities described in paragraph (h)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 20 U.S.C. 1687)

(i) *Recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.

(j) *Applicant* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(k) *Educational institution* means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a preschool, a private elementary or secondary school, or an applicant or recipient of the type

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defined by paragraph (l), (m), (n), or (o) of this section.

(l) *Institution of graduate higher education* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(m) *Institution of undergraduate higher education* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(n) *Institution of professional education* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(o) *Institution of vocational education* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(p) *Administratively separate unit* means a school, department or college

of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(q) *Admission* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(r) *Student* means a person who has gained admission.

(s) *Transition plan* means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980; 45 FR 37426, June 3, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

### § 106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students,

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treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c)(ii) of this section and of any remedial steps taken pursuant to paragraph (c)(iii) of this section.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

### § 106.4 Assurance required.

(a) *General.* Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used

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to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 65 FR 68056, Nov. 13, 2000]

### § 106.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of subpart B of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

### § 106.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act

(29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Authority: Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives Federal financial assistance.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

#### § 106.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

#### § 106.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.*

Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient

shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

#### § 106.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational program or activity which it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in the education program or activity extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 106.8, or to the Assistant Secretary.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in:

- (1) Local newspapers;

(ii) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(iii) Memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications*: (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution*. Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of non-discrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

### Subpart B—Coverage

#### § 106.11 Application.

Except as provided in this subpart, this part 106 applies to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 86298, Dec. 30, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

#### § 106.12 Educational institutions controlled by religious organizations.

(a) *Application*. This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption*. An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

#### § 106.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

#### § 106.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities*. This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls*. This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations*. This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of

1964 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; sec. 3(a) of P.L. 93-568, 88 Stat. 1862 amending Sec. 901)

#### § 106.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§106.16 and 106.17, and subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of subpart C.* Except as provided in paragraphs (d) and (e) of this section, subpart C applies to each recipient. A recipient to which subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980; as amended at 45 FR 86298, Dec. 30, 1980]

#### § 106.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular stu-

dents, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of subpart C unless it is carrying out a transition plan approved by the Secretary as described in §106.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

#### § 106.17 Transition plans.

(a) *Submission of plans.* An institution to which §106.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 106.16 applies shall result in treatment of applicants to or students of such recipient in violation of subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b) (3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b) (4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 106.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment which emphasizes the institution's commitment to enrolling students of the sex previously excluded.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

### Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

#### § 106.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 106.16 and 106.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

**§ 106.22 Preference in admission.**

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members, of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

**§ 106.23 Recruitment.**

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 106.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 106.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

**Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited**

**§ 106.31 Education programs or activities.**

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its stu-

dents to an education program or activity of (1) a recipient to which subpart C does not apply, or (2) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to

## § 106.32

members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aid, benefits or services not provided by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 47 FR 32527, July 28, 1982; 65 FR 68056, Nov. 13, 2000]

## § 106.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and

(ii) Comparable in quality and cost to the student.

A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Authority: Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

## § 106.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

## § 106.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and

activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

#### § 106.35 Access to schools operated by LEAs.

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

#### § 106.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

#### § 106.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities or other

services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided*, That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex

may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

**§ 106.38 Employment assistance to students.**

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates subpart E of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

**§ 106.39 Health and insurance benefits and services.**

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

**§ 106.40 Marital or parental status.**

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental,

family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.*

(1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extra-curricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student

shall be reinstated to the status which she held when the leave began.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

**§ 106.42 Textbooks and curricular material.**

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

**Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited**

**§ 106.51 Employment.**

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

- (1) Recruitment, advertising, and the process of application for employment;
- (2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;
- (3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including those that are social or recreational; and

(10) Any other term, condition, or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

#### § 106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

#### § 106.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex

in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

#### § 106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

#### § 106.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 106.61.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

**§ 106.56 Fringe benefits.**

(a) *Fringe benefits defined.* For purposes of this part, *fringe benefits* means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan; any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 106.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

**§ 106.57 Marital or parental status.**

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery

therefrom, and any temporary disability, resulting therefrom, as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

**§ 106.58 Effect of State or local law or other requirements.**

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

**§ 106.59 Advertising.**

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex

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is a *bona-fide* occupational qualification for the particular job in question.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

### § 106.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

### § 106.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

## Subpart F—Procedures [Interim]

### § 106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These pro-

cedures may be found at 34 CFR 100.6-100.11 and 34 CFR, part 101.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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**EXHIBIT "D"**  
**REVISED SEXUAL HARASSMENT GUIDANCE**

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**REVISED SEXUAL HARASSMENT GUIDANCE:  
HARASSMENT OF STUDENTS  
BY SCHOOL EMPLOYEES, OTHER STUDENTS,  
OR THIRD PARTIES**

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**TITLE IX**



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**January 2001**

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**U.S. Department of Education  
Office for Civil Rights**

## PREAMBLE

### Summary

The Assistant Secretary for Civil Rights, U.S. Department of Education (Department), issues a new document (revised guidance) that replaces the 1997 document entitled "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," issued by the Office for Civil Rights (OCR) on March 13, 1997 (1997 guidance). We revised the guidance in limited respects in light of subsequent Supreme Court cases relating to sexual harassment in schools.

The revised guidance reaffirms the compliance standards that OCR applies in investigations and administrative enforcement of Title IX of the Education Amendments of 1972 (Title IX) regarding sexual harassment. The revised guidance re-grounds these standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages and clarifying their regulatory basis as distinct from Title VII of the Civil Rights Act of 1964 (Title VII) agency law. In most other respects the revised guidance is identical to the 1997 guidance. Thus, we intend the revised guidance to serve the same purpose as the 1997 guidance. It continues to provide the principles that a school<sup>1</sup> should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance.

### Purpose and Scope of the Revised Guidance

In March 1997, we published in the Federal Register "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties." 62 FR 12034. We issued the guidance pursuant to our authority under Title IX, and our Title IX implementing regulations, to eliminate discrimination based on sex in education programs and activities receiving Federal financial assistance. It was grounded in longstanding legal authority establishing that sexual harassment of students can be a form of sex discrimination covered by Title IX. The guidance was the product of extensive consultation with interested parties, including students, teachers, school administrators, and researchers. We also made the document available for public comment.

Since the issuance of the 1997 guidance, the Supreme Court (Court) has issued several important decisions in sexual harassment cases, including two decisions specifically addressing sexual harassment of students under Title IX: Gebser v. Lago Vista Independent School District (Gebser), 524 U.S. 274 (1998), and Davis v. Monroe County Board of Education (Davis), 526 U.S. 629 (1999). The Court held in Gebser that a school can be liable for monetary damages if a teacher sexually harasses a student, an

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<sup>1</sup> As in the 1997 guidance, the revised guidance uses the term "school" to refer to all schools, colleges, universities, and other educational institutions that receive Federal funds from the Department.

official who has authority to address the harassment has actual knowledge of the harassment; and that official is deliberately indifferent in responding to the harassment. In Davis, the Court announced that a school also may be liable for monetary damages if one student sexually harasses another student in the school's program and the conditions of Gebser are met.

The Court was explicit in Gebser and Davis that the liability standards established in those cases are limited to private actions for monetary damages. See, e.g., Gebser, 524 U.S. 283, and Davis, 526 U.S. at 639. The Court acknowledged, by contrast, the power of Federal agencies, such as the Department, to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate," even in circumstances that would not give rise to a claim for money damages. See, Gebser, 524 U.S. at 292.

In an August 1998 letter to school superintendents and a January 1999 letter to college and university presidents, the Secretary of Education informed school officials that the Gebser decision did not change a school's obligations to take reasonable steps under Title IX and the regulations to prevent and eliminate sexual harassment as a condition of its receipt of Federal funding. The Department also determined that, although in most important respects the substance of the 1997 guidance was reaffirmed in Gebser and Davis, certain areas of the 1997 guidance could be strengthened by further clarification and explanation of the Title IX regulatory basis for the guidance.

On November 2, 2000, we published in the Federal Register a notice requesting comments on the proposed revised guidance (62 FR 66092). A detailed explanation of the Gebser and Davis decisions, and an explanation of the proposed changes in the guidance, can be found in the preamble to the proposed revised guidance. In those decisions and a third opinion, Oncale v. Sundowner Offshore Services, Inc. (Oncale), 523 U.S. 75 (1998) (a sexual harassment case decided under Title VII), the Supreme Court confirmed several fundamental principles we articulated in the 1997 guidance. In these areas, no changes in the guidance were necessary. A notice regarding the availability of this final document appeared in the Federal Register on January 19, 2001.

## **Enduring Principles from the 1997 Guidance**

It continues to be the case that a significant number of students, both male and female, have experienced sexual harassment, which can interfere with a student's academic performance and emotional and physical well-being. Preventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn. As with the 1997 guidance, the revised guidance applies to students at every level of education. School personnel who understand their obligations under Title IX, e.g., understand that sexual harassment can be sex discrimination in violation of Title IX, are in the best position to prevent harassment and to lessen the harm to students if, despite their best efforts, harassment occurs.

One of the fundamental aims of both the 1997 guidance and the revised guidance has been to emphasize that, in addressing allegations of sexual harassment, the good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.

A critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. If harassment has occurred, doing nothing is always the wrong response. However, depending on the circumstances, there may be more than one right way to respond. The important thing is for school employees or officials to pay attention to the school environment and not to hesitate to respond to sexual harassment in the same reasonable, commonsense manner as they would to other types of serious misconduct.

It is also important that schools not overreact to behavior that does not rise to the level of sexual harassment. As the Department stated in the 1997 guidance, a kiss on the cheek by a first grader does not constitute sexual harassment. School personnel should consider the age and maturity of students in responding to allegations of sexual harassment.

Finally, we reiterate the importance of having well-publicized and effective grievance procedures in place to handle complaints of sex discrimination, including sexual harassment complaints. Nondiscrimination policies and procedures are required by the Title IX regulations. In fact, the Supreme Court in Gebser specifically affirmed the Department's authority to enforce this requirement administratively in order to carry out Title IX's nondiscrimination mandate. 524 U.S. at 292. Strong policies and effective grievance procedures are essential to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it.

## **Analysis of Comments Received Concerning the Proposed Revised Guidance and the Resulting Changes**

In response to the Assistant Secretary's invitation to comment, OCR received approximately 11 comments representing approximately 15 organizations and individuals. Commenters provided specific suggestions regarding how the revised guidance could be clarified. Many of these suggested changes have been incorporated. Significant and recurring issues are grouped by subject and discussed in the following sections:

### **Distinction Between Administrative Enforcement and Private Litigation for Monetary Damages**

In Gebser and Davis, the Supreme Court addressed for the first time the appropriate standards for determining when a school district is liable under Title IX for money damages in a private lawsuit brought by or on behalf of a student who has been sexually harassed. As explained in the preamble to the proposed revised guidance, the Court was explicit in Gebser and Davis that the liability standards established in these cases are limited to private actions for monetary damages. See, e.g., Gebser, 524 U.S. at 283, and Davis, 526 U.S. at 639. The Gebser Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX. In Gebser, the Court was concerned with the possibility of a money damages award against a school for harassment about which it had not known. In contrast, the process of administrative enforcement requires enforcement agencies such as OCR to make schools

aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.

Commenters uniformly agreed with OCR that the Court limited the liability standards established in Gebser and Davis to private actions for monetary damages. See, e.g., Gebser, 524 U.S. 283, and Davis, 526 U.S. at 639. Commenters also agreed that the administrative enforcement standards reflected in the 1997 guidance remain valid in OCR enforcement actions.<sup>2</sup> Finally, commenters agreed that the proposed revisions provided important clarification to schools regarding the standards that OCR will use and that schools should use to determine compliance with Title IX as a condition of the receipt of Federal financial assistance in light of Gebser and Davis.

### **Harassment by Teachers and Other School Personnel**

Most commenters agreed with OCR's interpretation of its regulations regarding a school's responsibility for harassment of students by teachers and other school employees. These commenters agreed that Title IX's prohibitions against discrimination are not limited to official policies and practices governing school programs and activities. A school also engages in sex-based discrimination if its employees, in the context of carrying out their day-to-day job responsibilities for providing aid, benefits, or services to students (such as teaching, counseling, supervising, and advising students) deny or limit a student's ability to participate in or benefit from the schools program on the basis of sex. Under the Title IX regulations, the school is responsible for discrimination in these cases, whether or not it knew or should have known about it, because the discrimination occurred as part of the school's undertaking to provide nondiscriminatory aid, benefits, and services to students. The revised guidance distinguishes these cases from employee harassment that, although taking place in a school's program, occurs outside of the context of the employee's provision of aid, benefits, and services to students. In these latter cases, the school's responsibilities are not triggered until the school knew or should have known about the harassment.

One commenter expressed concern that it was inappropriate ever to find a school out of compliance for harassment about which it knew nothing. We reiterate that, although a school may in some cases be responsible for harassment caused by an employee that occurred before other responsible employees of the school knew or should have known about it, OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation. This is consistent with the Court's underlying concern in Gebser and Davis.

Most commenters acknowledged that OCR has provided useful factors to determine whether harassing conduct took place "in the context of providing aid, benefits, or services." However, some commenters stated that additional clarity and examples regarding the issue were needed. Commenters also suggested clarifying

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<sup>2</sup> It is the position of the United States that the standards set out in OCR's guidance for finding a violation and seeking voluntary corrective action also would apply to private actions for injunctive and other equitable relief. See brief of the United States as Amicus Curiae in Davis v. Monroe County.

references to quid pro quo and hostile environment harassment as these two concepts, though useful, do not determine the issue of whether the school itself is considered responsible for the harassment. We agree with these concerns and have made significant revisions to the sections “Harassment that Denies or Limits a Student’s Ability to Participate in or Benefit from the Education Program” and “Harassment by Teachers and Other Employees” to clarify the guidance in these respects.

### **Gender-based Harassment, Including Harassment Predicated on Sex-stereotyping**

Several commenters requested that we expand the discussion and include examples of gender-based harassment predicated on sex stereotyping. Some commenters also argued that gender-based harassment should be considered sexual harassment, and that we have “artificially” restricted the guidance only to harassment in the form of conduct of a sexual nature, thus, implying that gender-based harassment is of less concern and should be evaluated differently.

We have not further expanded this section because, while we are also concerned with the important issue of gender-based harassment, we believe that harassment of a sexual nature raises unique and sufficiently important issues that distinguish it from other types of gender-based harassment and warrants its own guidance.

Nevertheless, we have clarified this section of the guidance in several ways. The guidance clarifies that gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim’s failure to conform to stereotyped notions of masculinity and femininity. Although this type of harassment is not covered by the guidance, if it is sufficiently serious, gender-based harassment is a school’s responsibility, and the same standards generally will apply. We have also added an endnote regarding Supreme Court precedent for the proposition that sex stereotyping can constitute sex discrimination.

Several commenters also suggested that we state that sexual and non-sexual (but gender-based) harassment should not be evaluated separately in determining whether a hostile environment exists. We note that both the proposed revised guidance and the final revised guidance indicate in several places that incidents of sexual harassment and non-sexual, gender-based harassment can be combined to determine whether a hostile environment has been created. We also note that sufficiently serious harassment of a sexual nature remains covered by Title IX, as explained in the guidance, even though the hostile environment may also include taunts based on sexual orientation.

### **Definition of Harassment**

One commenter urged OCR to provide distinct definitions of sexual harassment to be used in administrative enforcement as distinguished from criteria used to maintain private actions for monetary damages. We disagree. First, as discussed in the preamble to the proposed revised guidance, the definition of hostile environment sexual harassment used by the Court in Davis is consistent with the definition found in the proposed guidance. Although the terms used by the Court in Davis are in some ways different from

the words used to define hostile environment harassment in the 1997 guidance (see, e.g., 62 FR 12041, “conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment”), the definitions are consistent. Both the Court’s and the Department’s definitions are contextual descriptions intended to capture the same concept — that under Title IX, the conduct must be sufficiently serious that it adversely affects a student’s ability to participate in or benefit from the school’s program. In determining whether harassment is actionable, both Davis and the Department tell schools to look at the “constellation of surrounding circumstances, expectations, and relationships” (526 U.S. at 651 (citing Oncale)), and the Davis Court cited approvingly to the underlying core factors described in the 1997 guidance for evaluating the context of the harassment. Second, schools benefit from consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose.

Several commenters suggested that we develop a unique Title IX definition of harassment that does not rely on Title VII and that takes into account the special relationship of schools to students. Other commenters, by contrast, commended OCR for recognizing that Gebser and Davis did not alter the definition of hostile environment sexual harassment found in OCR’s 1997 guidance, which derives from Title VII caselaw, and asked us to strengthen the point. While Gebser and Davis made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the Davis Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX. We also believe that the factors described in both the 1997 guidance and the revised guidance to determine whether sexual harassment has occurred provide the necessary flexibility for taking into consideration the age and maturity of the students involved and the nature of the school environment.

### **Effective Response**

One commenter suggested that the change in the guidance from “appropriate response” to “effective response” implies a change in OCR policy that requires omniscience of schools. We disagree. Effectiveness has always been the measure of an adequate response under Title IX. This does not mean a school must overreact out of fear of being judged inadequate. Effectiveness is measured based on a reasonableness standard. Schools do not have to know beforehand that their response will be effective. However, if their initial steps are ineffective in stopping the harassment, reasonableness may require a series of escalating steps.

## **The Relationship Between FERPA and Title IX**

In the development of both the 1997 guidance and the current revisions to the guidance, commenters raised concerns about the interrelation of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and Title IX. The concerns relate to two issues: (1) the harassed student’s right to information about the outcome of a sexual harassment complaint against another student, including information about sanctions imposed on a student found guilty of harassment; and (2) the due process rights of

individuals, including teachers, accused of sexual harassment by a student, to obtain information about the identity of the complainant and the nature of the allegations.

FERPA generally forbids disclosure of information from a student's "education record" without the consent of the student (or the student's parent). Thus, FERPA may be relevant when the person found to have engaged in harassment is another student, because written information about the complaint, investigation, and outcome is part of the harassing student's education record. Title IX is also relevant because it is an important part of taking effective responsive action for the school to inform the harassed student of the results of its investigation and whether it counseled, disciplined, or otherwise sanctioned the harasser. This information can assure the harassed student that the school has taken the student's complaint seriously and has taken steps to eliminate the hostile environment and prevent the harassment from recurring.

The Department currently interprets FERPA as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information directly relates to the victim. It has been the Department's position that there is a potential conflict between FERPA and Title IX regarding disclosure of sanctions, and that FERPA generally prevents a school from disclosing to a student who complained of harassment information about the sanction or discipline imposed upon a student who was found to have engaged in that harassment.<sup>3</sup>

There is, however, an additional statutory provision that may apply to this situation. In 1994, as part of the Improving America's Schools Act, Congress amended the General Education Provisions Act (GEPA) -- of which FERPA is a part -- to state that nothing in GEPA "shall be construed to affect the applicability of ... title IX of the Education Amendments of 1972...."<sup>4</sup> The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. The Department is in the process of developing a consistent approach and specific factors for implementing this provision. OCR and the Department's Family Policy Compliance Office (FPCO) intend to issue joint guidance, discussing specific areas of potential conflict between FERPA and Title IX.

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<sup>3</sup> Exceptions include the case of a sanction that directly relates to the person who was harassed (e.g., an order that the harasser stay away from the harassed student), or sanctions related to offenses for which there is a statutory exception, such as crimes of violence or certain sex offenses in postsecondary institutions.

<sup>4</sup> 20 U.S.C. 1221(d). A similar amendment was originally passed in 1974 but applied only to Title VI of the Civil Rights Act of 1964 (prohibiting race discrimination by recipients). The 1994 amendments also extended 20 U.S.C. 1221(d) to Section 504 of the Rehabilitation Act of 1973 (prohibiting disability-based discrimination by recipients) and to the Age Discrimination Act.

FERPA is also relevant when a student accuses a teacher or other employee of sexual harassment, because written information about the allegations is contained in the student's education record. The potential conflict arises because, while FERPA protects the privacy of the student accuser, the accused individual may need the name of the accuser and information regarding the nature of the allegations in order to defend against the charges. The 1997 guidance made clear that neither FERPA nor Title IX override any federally protected due process rights of a school employee accused of sexual harassment.

Several commenters urged the Department to expand and strengthen this discussion. They argue that in many instances a school's failure to provide information about the name of the student accuser and the nature of the allegations seriously undermines the fairness of the investigative and adjudicative process. They also urge the Department to include a discussion of the need for confidentiality as to the identity of the individual accused of harassment because of the significant harm that can be caused by false accusations. We have made several changes to the guidance, including an additional discussion regarding the confidentiality of a person accused of harassment and a new heading entitled "Due Process Rights of the Accused," to address these concerns.

**REVISED SEXUAL HARASSMENT GUIDANCE:  
HARASSMENT OF STUDENTS<sup>1</sup>  
BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES**

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- XI. First Amendment

## **I. Introduction**

Title IX of the Education Amendments of 1972 (Title IX) and the Department of Education's (Department) implementing regulations prohibit discrimination on the basis of sex in federally assisted education programs and activities.<sup>2</sup> The Supreme Court, Congress, and Federal executive departments and agencies, including the Department, have recognized that sexual harassment of students can constitute discrimination prohibited by Title IX.<sup>3</sup> This guidance focuses on a school's<sup>4</sup> fundamental compliance responsibilities under Title IX and the Title IX regulations to address sexual harassment of students as a condition of continued receipt of Federal funding. It describes the regulatory basis for a school's compliance responsibilities under Title IX, outlines the circumstances under which sexual harassment may constitute discrimination prohibited by the statute and regulations, and provides information about actions that schools should take to prevent sexual harassment or to address it effectively if it does occur.<sup>5</sup>

## **II. Sexual Harassment**

Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.<sup>6</sup> Sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program. Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance.

It is important to recognize that Title IX's prohibition against sexual harassment does not extend to legitimate nonsexual touching or other nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee will not be considered sexual harassment.<sup>7</sup> Similarly, one student's demonstration of a sports maneuver or technique requiring contact with another student will not be considered sexual harassment. However, in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher's repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment.

## **III. Applicability of Title IX**

Title IX applies to all public and private educational institutions that receive Federal funds, i.e., recipients, including, but not limited to, elementary and secondary schools, school districts, proprietary schools, colleges, and universities. The guidance uses the terms "recipients" and "schools" interchangeably to refer to all of those institutions. The "education program or activity" of a school includes all of the school's operations.<sup>8</sup> This means that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school,

whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

A student may be sexually harassed by a school employee,<sup>9</sup> another student, or a non-employee third party (e.g., a visiting speaker or visiting athletes). Title IX protects any "person" from sex discrimination. Accordingly, both male and female students are protected from sexual harassment<sup>10</sup> engaged in by a school's employees, other students, or third parties. Moreover, Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex.<sup>11</sup> An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.<sup>12</sup>

Although Title IX does not prohibit discrimination on the basis of sexual orientation,<sup>13</sup> sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance.<sup>14</sup> For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim's ability to participate in or benefit from the school's program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.<sup>15</sup>

Though beyond the scope of this guidance, gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping,<sup>16</sup> but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student's ability to participate in or benefit from the educational program.<sup>17</sup> For example, the repeated sabotaging of female graduate students' laboratory experiments by male students in the class could be the basis of a violation of Title IX. A school must respond to such harassment in accordance with the standards and procedures described in this guidance.<sup>18</sup> In assessing all related circumstances to determine whether a hostile environment exists, incidents of gender-based harassment combined with incidents of sexual harassment could create a hostile environment, even if neither the gender-based harassment alone nor the sexual harassment alone would be sufficient to do so.<sup>19</sup>

#### **IV. Title IX Regulatory Compliance Responsibilities**

As a condition of receiving funds from the Department, a school is required to comply with Title IX and the Department's Title IX regulations, which spell out prohibitions against sex discrimination. The law is clear that sexual harassment may constitute sex discrimination under Title IX.<sup>20</sup>

Recipients specifically agree, as a condition for receiving Federal financial assistance from the Department, to comply with Title IX and the Department's Title IX regulations. The regulatory provision requiring this agreement, known as an assurance of

compliance, specifies that recipients must agree that education programs or activities operated by the recipient will be operated in compliance with the Title IX regulations, including taking any action necessary to remedy its discrimination or the effects of its discrimination in its programs.<sup>21</sup>

The regulations set out the basic Title IX responsibilities a recipient undertakes when it accepts Federal financial assistance, including the following specific obligations.<sup>22</sup> A recipient agrees that, in providing any aid, benefit, or service to students, it will not, on the basis of sex—

- Treat one student differently from another in determining whether the student satisfies any requirement or condition for the provision of any aid, benefit, or service;<sup>23</sup>
- Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;<sup>24</sup>
- Deny any student any such aid, benefit, or service;<sup>25</sup>
- Subject students to separate or different rules of behavior, sanctions, or other treatment;<sup>26</sup>
- Aid or perpetuate discrimination against a student by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students;<sup>27</sup> and
- Otherwise limit any student in the enjoyment of any right, privilege, advantage, or opportunity.<sup>28</sup>

For the purposes of brevity and clarity, this guidance generally summarizes this comprehensive list by referring to a school's obligation to ensure that a student is not denied or limited in the ability to participate in or benefit from the school's program on the basis of sex.

The regulations also specify that, if a recipient discriminates on the basis of sex, the school must take remedial action to overcome the effects of the discrimination.<sup>29</sup>

In addition, the regulations establish procedural requirements that are important for the prevention or correction of sex discrimination, including sexual harassment. These requirements include issuance of a policy against sex discrimination<sup>30</sup> and adoption and publication of grievance procedures providing for prompt and equitable resolution of complaints of sex discrimination.<sup>31</sup> The regulations also require that recipients designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance.<sup>32</sup>

To comply with these regulatory requirements, schools need to recognize and respond to sexual harassment of students by teachers and other employees, by other students, and by third parties. This guidance explains how the requirements of the Title IX regulations apply to situations involving sexual harassment of a student and outlines measures that schools should take to ensure compliance.

## V. Determining a School's Responsibilities

In assessing sexually harassing conduct, it is important for schools to recognize that two distinct issues are considered. The first issue is whether, considering the types of harassment discussed in the following section, the conduct denies or limits a student's ability to participate in or benefit from the program based on sex. If it does, the second issue is the nature of the school's responsibility to address that conduct. As discussed in a following section, this issue depends in part on the identity of the harasser and the context in which the harassment occurred.

### A. Harassment that Denies or Limits a Student's Ability to Participate in or Benefit from the Education Program

This guidance moves away from specific labels for types of sexual harassment.<sup>33</sup> In each case, the issue is whether the harassment rises to a level that it denies or limits a student's ability to participate in or benefit from the school's program based on sex. However, an understanding of the different types of sexual harassment can help schools determine whether or not harassment has occurred that triggers a school's responsibilities under, or violates, Title IX or its regulations.

The type of harassment traditionally referred to as quid pro quo harassment occurs if a teacher or other employee conditions an educational decision or benefit on the student's submission to unwelcome sexual conduct.<sup>34</sup> Whether the student resists and suffers the threatened harm or submits and avoids the threatened harm, the student has been treated differently, or the student's ability to participate in or benefit from the school's program has been denied or limited, on the basis of sex in violation of the Title IX regulations.<sup>35</sup>

By contrast, sexual harassment can occur that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct. Harassment of this type is generally referred to as hostile environment harassment.<sup>36</sup> This type of harassing conduct requires a further assessment of whether or not the conduct is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program based on sex.<sup>37</sup>

Teachers and other employees can engage in either type of harassment. Students and third parties are not generally given responsibility over other students and, thus, generally can only engage in hostile environment harassment.

#### 1. Factors Used to Evaluate Hostile Environment Sexual Harassment

As outlined in the following paragraphs, OCR considers a variety of related factors to determine if a hostile environment has been created, i.e., if sexually harassing conduct by an employee, another student, or a third party is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's program based on sex. OCR considers the conduct from both a subjective<sup>38</sup> and objective<sup>39</sup> perspective. In evaluating the severity and pervasiveness of the conduct, OCR considers all relevant circumstances, i.e., "the constellation of surrounding circumstances, expectations, and relationships."<sup>40</sup> Schools should also use these factors to evaluate conduct in order to draw commonsense distinctions between conduct that constitutes

sexual harassment and conduct that does not rise to that level. Relevant factors include the following:

- The degree to which the conduct affected one or more students' education. OCR assesses the effect of the harassment on the student to determine whether it has denied or limited the student's ability to participate in or benefit from the school's program. For example, a student's grades may go down or the student may be forced to withdraw from school because of the harassing behavior.<sup>41</sup> A student may also suffer physical injuries or mental or emotional distress.<sup>42</sup> In another situation, a student may have been able to keep up his or her grades and continue to attend school even though it was very difficult for him or her to do so because of the teacher's repeated sexual advances. Similarly, a student may be able to remain on a sports team, despite experiencing great difficulty performing at practices and games from the humiliation and anger caused by repeated sexual advances and intimidation by several team members that create a hostile environment. Harassing conduct in these examples would alter a reasonable student's educational environment and adversely affect the student's ability to participate in or benefit from the school's program on the basis of sex.

A hostile environment can occur even if the harassment is not targeted specifically at the individual complainant.<sup>43</sup> For example, if a student, group of students, or a teacher regularly directs sexual comments toward a particular student, a hostile environment may be created not only for the targeted student, but also for others who witness the conduct.

- The type, frequency, and duration of the conduct. In most cases, a hostile environment will exist if there is a pattern or practice of harassment, or if the harassment is sustained and nontrivial.<sup>44</sup> For instance, if a young woman is taunted by one or more young men about her breasts or genital area or both, OCR may find that a hostile environment has been created, particularly if the conduct has gone on for some time, or takes place throughout the school, or if the taunts are made by a number of students. The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. For instance, if the conduct is more severe, e.g., attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks, it need not be as persistent to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.<sup>45</sup> On the other hand, conduct that is not severe will not create a hostile environment, e.g., a comment by one student to another student that she has a nice figure. Indeed, depending on the circumstances, this may not even be conduct of a sexual nature.<sup>46</sup> Similarly, because students date one another, a request for a date or a gift of flowers, even if unwelcome, would not create a hostile environment. However, there may be circumstances in which repeated, unwelcome requests for dates or similar conduct could create a hostile environment. For example, a person, who has been refused previously, may request dates in an intimidating or threatening manner.
- The identity of and relationship between the alleged harasser and the subject or subjects of the harassment. A factor to be considered, especially in cases involving allegations of sexual harassment of a student by a school employee, is the identity of

and relationship between the alleged harasser and the subject or subjects of the harassment. For example, due to the power a professor or teacher has over a student, sexually based conduct by that person toward a student is more likely to create a hostile environment than similar conduct by another student.<sup>47</sup>

- The number of individuals involved. Sexual harassment may be committed by an individual or a group. In some cases, verbal comments or other conduct from one person might not be sufficient to create a hostile environment, but could be if done by a group. Similarly, while harassment can be directed toward an individual or a group,<sup>48</sup> the effect of the conduct toward a group may vary, depending on the type of conduct and the context. For certain types of conduct, there may be “safety in numbers.” For example, following an individual student and making sexual taunts to him or her may be very intimidating to that student, but, in certain circumstances, less so to a group of students. On the other hand, persistent unwelcome sexual conduct still may create a hostile environment if directed toward a group.
- The age and sex of the alleged harasser and the subject or subjects of the harassment. For example, in the case of younger students, sexually harassing conduct is more likely to be intimidating if coming from an older student.<sup>49</sup>
- The size of the school, location of the incidents, and context in which they occurred. Depending on the circumstances of a particular case, fewer incidents may have a greater effect at a small college than at a large university campus. Harassing conduct occurring on a school bus may be more intimidating than similar conduct on a school playground because the restricted area makes it impossible for students to avoid their harassers.<sup>50</sup> Harassing conduct in a personal or secluded area, such as a dormitory room or residence hall, can have a greater effect (e.g., be seen as more threatening) than would similar conduct in a more public area. On the other hand, harassing conduct in a public place may be more humiliating. Each incident must be judged individually.
- Other incidents at the school. A series of incidents at the school, not involving the same students, could — taken together — create a hostile environment, even if each by itself would not be sufficient.<sup>51</sup>
- Incidents of gender-based, but nonsexual harassment. Acts of verbal, nonverbal or physical aggression, intimidation or hostility based on sex, but not involving sexual activity or language, can be combined with incidents of sexual harassment to determine if the incidents of sexual harassment are sufficiently serious to create a sexually hostile environment.<sup>52</sup>

It is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists. Consequently, in using the factors discussed previously to evaluate incidents of alleged harassment, it is always important to use common sense and reasonable judgement in determining whether a sexually hostile environment has been created.

## 2. Welcomeness

The section entitled “Sexual Harassment” explains that in order for conduct of a sexual nature to be sexual harassment, it must be unwelcome. Conduct is unwelcome if

the student did not request or invite it and “regarded the conduct as undesirable or offensive.”<sup>53</sup> Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome.<sup>54</sup> For example, a student may decide not to resist sexual advances of another student or may not file a complaint out of fear. In addition, a student may not object to a pattern of demeaning comments directed at him or her by a group of students out of a concern that objections might cause the harassers to make more comments. The fact that a student may have accepted the conduct does not mean that he or she welcomed it.<sup>55</sup> Also, the fact that a student willingly participated in conduct on one occasion does not prevent him or her from indicating that the same conduct has become unwelcome on a subsequent occasion. On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that he or she objects, then the evidence generally will not support a conclusion that the conduct was unwelcome.<sup>56</sup>

If younger children are involved, it may be necessary to determine the degree to which they are able to recognize that certain sexual conduct is conduct to which they can or should reasonably object and the degree to which they can articulate an objection. Accordingly, OCR will consider the age of the student, the nature of the conduct involved, and other relevant factors in determining whether a student had the capacity to welcome sexual conduct.

Schools should be particularly concerned about the issue of welcomeness if the harasser is in a position of authority. For instance, because students may be encouraged to believe that a teacher has absolute authority over the operation of his or her classroom, a student may not object to a teacher’s sexually harassing comments during class; however, this does not necessarily mean that the conduct was welcome. Instead, the student may believe that any objections would be ineffective in stopping the harassment or may fear that by making objections he or she will be singled out for harassing comments or other retaliation.

In addition, OCR must consider particular issues of welcomeness if the alleged harassment relates to alleged “consensual” sexual relationships between a school’s adult employees and its students. If elementary students are involved, welcomeness will not be an issue: OCR will never view sexual conduct between an adult school employee and an elementary school student as consensual. In cases involving secondary students, there will be a strong presumption that sexual conduct between an adult school employee and a student is not consensual. In cases involving older secondary students, subject to the presumption,<sup>57</sup> OCR will consider a number of factors in determining whether a school employee’s sexual advances or other sexual conduct could be considered welcome.<sup>58</sup> In addition, OCR will consider these factors in all cases involving postsecondary students in making those determinations.<sup>59</sup> The factors include the following:

- The nature of the conduct and the relationship of the school employee to the student, including the degree of influence (which could, at least in part, be affected by the student’s age), authority, or control the employee has over the student.
- Whether the student was legally or practically unable to consent to the sexual conduct in question. For example, a student’s age could affect his or her ability to do so. Similarly, certain types of disabilities could affect a student’s ability to do so.

If there is a dispute about whether harassment occurred or whether it was welcome — in a case in which it is appropriate to consider whether the conduct would be welcome — determinations should be made based on the totality of the circumstances. The following types of information may be helpful in resolving the dispute:

- Statements by any witnesses to the alleged incident.
- Evidence about the relative credibility of the allegedly harassed student and the alleged harasser. For example, the level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth. Another way to assess credibility is to see if corroborative evidence is lacking where it should logically exist. However, the absence of witnesses may indicate only the unwillingness of others to step forward, perhaps due to fear of the harasser or a desire not to get involved.
- Evidence that the alleged harasser has been found to have harassed others may support the credibility of the student claiming the harassment; conversely, the student's claim will be weakened if he or she has been found to have made false allegations against other individuals.
- Evidence of the allegedly harassed student's reaction or behavior after the alleged harassment. For example, were there witnesses who saw the student immediately after the alleged incident who say that the student appeared to be upset? However, it is important to note that some students may respond to harassment in ways that do not manifest themselves right away, but may surface several days or weeks after the harassment. For example, a student may initially show no signs of having been harassed, but several weeks after the harassment, there may be significant changes in the student's behavior, including difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school.
- Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred. However, failure to immediately complain may merely reflect a fear of retaliation or a fear that the complainant may not be believed rather than that the alleged harassment did not occur.
- Other contemporaneous evidence. For example, did the student claiming harassment write about the conduct and his or her reaction to it soon after it occurred (e.g., in a diary or letter)? Did the student tell others (friends, parents) about the conduct (and his or her reaction to it) soon after it occurred?

#### **B. Nature of the School's Responsibility to Address Sexual Harassment**

A school has a responsibility to respond promptly and effectively to sexual harassment. In the case of harassment by teachers or other employees, the nature of this responsibility depends in part on whether the harassment occurred in the context of the employee's provision of aid, benefits, or services to students.

## 1. Harassment by Teachers and Other Employees

Sexual harassment of a student by a teacher or other school employee can be discrimination in violation of Title IX.<sup>60</sup> Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence. A school also may be responsible for remedying the effects of the harassment on the student who was harassed. The extent of a recipient's responsibilities if an employee sexually harasses a student is determined by whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students.

A recipient is responsible under the Title IX regulations for the nondiscriminatory provision of aid, benefits, and services to students. Recipients generally provide aid, benefits, and services to students through the responsibilities they give to employees. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in sexual harassment – generally this means harassment that is carried out during an employee's performance of his or her responsibilities in relation to students, including teaching, counseling, supervising, advising, and transporting students – and the harassment denies or limits a student's ability to participate in or benefit from a school program on the basis of sex,<sup>61</sup> the recipient is responsible for the discriminatory conduct.<sup>62</sup> The recipient is, therefore, also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence. This is true whether or not the recipient has "notice" of the harassment. (As explained in the section on "Notice of Employee, Peer, or Third Party Harassment," for purposes of this guidance, a school has notice of harassment if a responsible school employee actually knew or, in the exercise of reasonable care, should have known about the harassment.) Of course, under OCR's administrative enforcement, recipients always receive actual notice and the opportunity to take appropriate corrective action before any finding of violation or possible loss of federal funds.

Whether or not sexual harassment of a student occurred within the context of an employee's responsibilities for providing aid, benefits, or services is determined on a case-by-case basis, taking into account a variety of factors. If an employee conditions the provision of an aid, benefit, or service that the employee is responsible for providing on a student's submission to sexual conduct, i.e., conduct traditionally referred to as quid pro quo harassment, the harassment is clearly taking place in the context of the employee's responsibilities to provide aid, benefits, or services. In other situations, i.e., when an employee has created a hostile environment, OCR will consider the following factors in determining whether or not the harassment has taken place in this context, including:

- The type and degree of responsibility given to the employee, including both formal and informal authority, to provide aids, benefits, or services to students, to direct and control student conduct, or to discipline students generally;
- the degree of influence the employee has over the particular student involved, including in the circumstances in which the harassment took place;
- where and when the harassment occurred;
- the age and educational level of the student involved; and

- as applicable, whether, in light of the student's age and educational level and the way the school is run, it would be reasonable for the student to believe that the employee was in a position of responsibility over the student, even if the employee was not.

These factors are applicable to all recipient educational institutions, including elementary and secondary schools, colleges, and universities. Elementary and secondary schools, however, are typically run in a way that gives teachers, school officials, and other school employees a substantial degree of supervision, control, and disciplinary authority over the conduct of students.<sup>63</sup> Therefore, in cases involving allegations of harassment of elementary and secondary school-age students by a teacher or school administrator during any school activity,<sup>64</sup> consideration of these factors will generally lead to a conclusion that the harassment occurred in the context of the employee's provision of aid, benefits, or services.

For example, a teacher sexually harasses an eighth-grade student in a school hallway. Even if the student is not in any of the teacher's classes and even if the teacher is not designated as a hall monitor, given the age and educational level of the student and the status and degree of influence of teachers in elementary and secondary schools, it would be reasonable for the student to believe that the teacher had at least informal disciplinary authority over students in the hallways. Thus, OCR would consider this an example of conduct that is occurring in the context of the employee's responsibilities to provide aid, benefits, or services.

Other examples of sexual harassment of a student occurring in the context of an employee's responsibilities for providing aid, benefits, or services include, but are not limited to -- a faculty member at a university's medical school conditions an intern's evaluation on submission to his sexual advances and then gives her a poor evaluation for rejecting the advances; a high school drama instructor does not give a student a part in a play because she has not responded to sexual overtures from the instructor; a faculty member withdraws approval of research funds for her assistant because he has rebuffed her advances; a journalism professor who supervises a college newspaper continually and inappropriately touches a student editor in a sexual manner, causing the student to resign from the newspaper staff; and a teacher repeatedly asks a ninth grade student to stay after class and attempts to engage her in discussions about sex and her personal experiences while they are alone in the classroom, causing the student to stop coming to class. In each of these cases, the school is responsible for the discriminatory conduct, including taking prompt and effective action to end the harassment, prevent it from recurring, and remedy the effects of the harassment on the victim.

Sometimes harassment of a student by an employee in the school's program does not take place in the context of the employee's provision of aid, benefits, or services, but nevertheless is sufficiently serious to create a hostile educational environment. An example of this conduct might occur if a faculty member in the history department at a university, over the course of several weeks, repeatedly touches and makes sexually suggestive remarks to a graduate engineering student while waiting at a stop for the university shuttle bus, riding on the bus, and upon exiting the bus. As a result, the student stops using the campus shuttle and walks the very long distances between her classes. In this case, the school is not directly responsible for the harassing conduct because it did not occur in the context of the employee's responsibilities for the provision

of aid, benefits, or services to students. However, the conduct is sufficiently serious to deny or limit the student in her ability to participate in or benefit from the recipient's program. Thus, the school has a duty, upon notice of the harassment,<sup>65</sup> to take prompt and effective action to stop the harassment and prevent its recurrence.

If the school takes these steps, it has avoided violating Title IX. If the school fails to take the necessary steps, however, its failure to act has allowed the student to continue to be subjected to a hostile environment that denies or limits the student's ability to participate in or benefit from the school's program. The school, therefore, has engaged in its own discrimination. It then becomes responsible, not just for stopping the conduct and preventing it from happening again, but for remedying the effects of the harassment on the student that could reasonably have been prevented if the school had responded promptly and effectively. (For related issues, see the sections on "OCR Case Resolution" and "Recipient's Response.")

## **2. Harassment by Other Students or Third Parties**

If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or reasonably should know<sup>66</sup> about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.<sup>67</sup> As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations. On the other hand, if, upon notice, the school fails to take prompt, effective action, the school's own inaction has permitted the student to be subjected to a hostile environment that denies or limits the student's ability to participate in or benefit from the school's program on the basis of sex.<sup>68</sup> In this case, the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.

Similarly, sexually harassing conduct by third parties, who are not themselves employees or students at the school (e.g., a visiting speaker or members of a visiting athletic team), may also be of a sufficiently serious nature to deny or limit a student's ability to participate in or benefit from the education program. As previously outlined in connection with peer harassment, if the school knows or should know<sup>69</sup> of the harassment, the school is responsible for taking prompt and effective action to eliminate the hostile environment and prevent its recurrence.

The type of appropriate steps that the school should take will differ depending on the level of control that the school has over the third party harasser.<sup>70</sup> For example, if athletes from a visiting team harass the home school's students, the home school may not be able to discipline the athletes. However, it could encourage the other school to take appropriate action to prevent further incidents; if necessary, the home school may choose not to invite the other school back. (This issue is discussed more fully in the section on "Recipient's Response.")

If, upon notice, the school fails to take prompt and effective corrective action, its own failure has permitted the student to be subjected to a hostile environment that limits

the student's ability to participate in or benefit from the education program.<sup>71</sup> In this case, the school is responsible for taking corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had the school responded promptly and effectively.

### **C. Notice of Employee, Peer, or Third Party Harassment**

As described in the section on "Harassment by Teachers and Other Employees," schools may be responsible for certain types of employee harassment that occurred before the school otherwise had notice of the harassment. On the other hand, as described in that section and the section on "Harassment by Other Students or Third Parties," in situations involving certain other types of employee harassment, or harassment by peers or third parties, a school will be in violation of the Title IX regulations if the school "has notice" of a sexually hostile environment and fails to take immediate and effective corrective action.<sup>72</sup>

A school has notice if a responsible employee "knew, or in the exercise of reasonable care should have known," about the harassment.<sup>73</sup> A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.<sup>74</sup> Accordingly, schools need to ensure that employees are trained so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials. Training for employees should include practical information about how to identify harassment and, as applicable, the person to whom it should be reported.

A school can receive notice of harassment in many different ways. A student may have filed a grievance with the Title IX coordinator<sup>75</sup> or complained to a teacher or other responsible employee about fellow students harassing him or her. A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, bus driver, teacher, affirmative action officer, or staff in the office of student affairs. A teacher or other responsible employee of the school may have witnessed the harassment. The school may receive notice about harassment in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media. The school also may have learned about the harassment from flyers about the incident distributed at the school or posted around the school. For the purposes of compliance with the Title IX regulations, a school has a duty to respond to harassment about which it reasonably should have known, i.e., if it would have learned of the harassment if it had exercised reasonable care or made a "reasonably diligent inquiry."<sup>76</sup>

For example, in some situations if the school knows of incidents of harassment, the exercise of reasonable care should trigger an investigation that would lead to a discovery of additional incidents.<sup>77</sup> In other cases, the pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment — if the harassment is widespread, openly practiced, or well-known to students and staff

(such as sexual harassment occurring in the hallways, graffiti in public areas, or harassment occurring during recess under a teacher's supervision.)<sup>78</sup>

If a school otherwise knows or reasonably should know of a hostile environment and fails to take prompt and effective corrective action, a school has violated Title IX even if the student has failed to use the school's existing grievance procedures or otherwise inform the school of the harassment.

#### **D. The Role of Grievance Procedures**

Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination.<sup>79</sup> (These issues are discussed in the section on "Prompt and Equitable Grievance Procedures.") These procedures provide a school with a mechanism for discovering sexual harassment as early as possible and for effectively correcting problems, as required by the Title IX regulations. By having a strong policy against sex discrimination and accessible, effective, and fairly applied grievance procedures, a school is telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences.

Without a disseminated policy and procedure, a student does not know either of the school's policy against and obligation to address this form of discrimination, or how to report harassment so that it can be remedied. If the alleged harassment is sufficiently serious to create a hostile environment and it is the school's failure to comply with the procedural requirements of the Title IX regulations that hampers early notification and intervention and permits sexual harassment to deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex,<sup>80</sup> the school will be responsible under the Title IX regulations, once informed of the harassment, to take corrective action, including stopping the harassment, preventing its recurrence, and remedying the effects of the harassment on the victim that could reasonably have been prevented if the school's failure to comply with the procedural requirements had not hampered early notification.

### **VI. OCR Case Resolution**

If OCR is asked to investigate or otherwise resolve incidents of sexual harassment of students, including incidents caused by employees, other students, or third parties, OCR will consider whether — (1) the school has a disseminated policy prohibiting sex discrimination under Title IX<sup>81</sup> and effective grievance procedures;<sup>82</sup> (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment;<sup>83</sup> and (3) the school has taken immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.<sup>84</sup> (Issues related to appropriate investigative and corrective actions are discussed in detail in the section on "Recipient's Response.")

If the school has taken, or agrees to take, each of these steps, OCR will consider the case against the school resolved and will take no further action, other than monitoring compliance with an agreement, if any, between the school and OCR. This is true in cases

in which the school was in violation of the Title IX regulations (e.g., a teacher sexually harassed a student in the context of providing aid, benefits, or services to students), as well as those in which there has been no violation of the regulations (e.g., in a peer sexual harassment situation in which the school took immediate, reasonable steps to end the harassment and prevent its recurrence). This is because, even if OCR identifies a violation, Title IX requires OCR to attempt to secure voluntary compliance.<sup>85</sup> Thus, because a school will have the opportunity to take reasonable corrective action before OCR issues a formal finding of violation, a school does not risk losing its Federal funding solely because discrimination occurred.

## **VII. Recipient's Response**

Once a school has notice of possible sexual harassment of students — whether carried out by employees, other students, or third parties — it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps

reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. These steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.<sup>86</sup> As described in the next section, in appropriate circumstances the school will also be responsible for taking steps to remedy the effects of the harassment on the individual student or students who were harassed. What constitutes a reasonable response to information about possible sexual harassment will differ depending upon the circumstances.

### **A. Response to Student or Parent Reports of Harassment; Response to Direct Observation of Harassment by a Responsible Employee**

If a student or the parent of an elementary or secondary student provides information or complains about sexual harassment of the student, the school should initially discuss what actions the student or parent is seeking in response to the harassment. The school should explain the avenues for informal and formal action, including a description of the grievance procedure that is available for sexual harassment complaints and an explanation of how the procedure works. If a responsible school employee has directly observed sexual harassment of a student, the school should contact the student who was harassed (or the parent, depending upon the age of the student),<sup>87</sup> explain that the school is responsible for taking steps to correct the harassment, and provide the same information described in the previous sentence.

Regardless of whether the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student's behalf (including in cases involving direct observation by a responsible employee), the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases the inquiry must be prompt, thorough, and impartial. (Requests by the student who

was harassed for confidentiality or for no action to be taken, responding to notice of harassment from other sources, and the components of a prompt and equitable grievance procedure are discussed in subsequent sections of this guidance.)

It may be appropriate for a school to take interim measures during the investigation of a complaint. For instance, if a student alleges that he or she has been sexually assaulted by another student, the school may decide to place the students immediately in separate classes or in different housing arrangements on a campus, pending the results of the school's investigation. Similarly, if the alleged harasser is a teacher, allowing the student to transfer to a different class may be appropriate. In cases involving potential criminal conduct, school personnel should determine whether appropriate law enforcement authorities should be notified. In all cases, schools should make every effort to prevent disclosure of the names of all parties involved -- the complainant, the witnesses, and the accused -- except to the extent necessary to carry out an investigation.

If a school determines that sexual harassment has occurred, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation.<sup>88</sup> Appropriate steps should be taken to end the harassment. For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents or both.<sup>89</sup> A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.<sup>90</sup> In some cases, it may be appropriate to further separate the harassed student and the harasser, e.g., by changing housing arrangements<sup>91</sup> or directing the harasser to have no further contact with the harassed student. Responsive measures of this type should be designed to minimize, as much as possible, the burden on the student who was harassed. If the alleged harasser is not a student or employee of the recipient, OCR will consider the level of control the school has over the harasser in determining what response would be appropriate.<sup>92</sup>

Steps should also be taken to eliminate any hostile environment that has been created. For example, if a female student has been subjected to harassment by a group of other students in a class, the school may need to deliver special training or other interventions for that class to repair the educational environment. If the school offers the student the option of withdrawing from a class in which a hostile environment occurred, the school should assist the student in making program or schedule changes and ensure that none of the changes adversely affect the student's academic record. Other measures may include, if appropriate, directing a harasser to apologize to the harassed student. If a hostile environment has affected an entire school or campus, an effective response may need to include dissemination of information, the issuance of new policy statements, or other steps that are designed to clearly communicate the message that the school does not tolerate harassment and will be responsive to any student who reports that conduct.

In some situations, a school may be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student.<sup>93</sup> For example, if an instructor gives a student a low grade because the student failed to respond to his sexual advances, the school may be required to make arrangements for an independent reassessment of the student's work, if feasible, and change the grade accordingly; make arrangements for the student to take the course again

with a different instructor; provide tutoring; make tuition adjustments; offer reimbursement for professional counseling; or take other measures that are appropriate to the circumstances. As another example, if a school delays responding or responds inappropriately to information about harassment, such as a case in which the school ignores complaints by a student that he or she is being sexually harassed by a classmate, the school will be required to remedy the effects of the harassment that could have been prevented had the school responded promptly and effectively.

Finally, a school should take steps to prevent any further harassment<sup>94</sup> and to prevent any retaliation against the student who made the complaint (or was the subject of the harassment), against the person who filed a complaint on behalf of a student, or against those who provided information as witnesses.<sup>95</sup> At a minimum, this includes making sure that the harassed students and their parents know how to report any subsequent problems and making follow-up inquiries to see if there have been any new incidents or any retaliation. To prevent recurrences, counseling for the harasser may be appropriate to ensure that he or she understands what constitutes harassment and the effects it can have. In addition, depending on how widespread the harassment was and whether there have been any prior incidents, the school may need to provide training for the larger school community to ensure that students, parents, and teachers can recognize harassment if it recurs and know how to respond.<sup>96</sup>

### **B. Confidentiality**

The scope of a reasonable response also may depend upon whether a student, or parent of a minor student, reporting harassment asks that the student's name not be disclosed to the harasser or that nothing be done about the alleged harassment. In all cases, a school should discuss confidentiality standards and concerns with the complainant initially. The school should inform the student that a confidentiality request may limit the school's ability to respond. The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs. If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complaint consistent with the student's request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students.

OCR enforces Title IX consistent with the federally protected due process rights of public school students and employees. Thus, for example, if a student, who was the only student harassed, insists that his or her name not be revealed, and the alleged harasser could not respond to the charges of sexual harassment without that information, in evaluating the school's response, OCR would not expect disciplinary action against an alleged harasser.

At the same time, a school should evaluate the confidentiality request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. The factors that a school may consider in this regard include the seriousness of the alleged harassment, the age of the student harassed, whether there have been other complaints or reports of harassment against the alleged harasser, and the rights of the

accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result.<sup>97</sup>

Similarly, a school should be aware of the confidentiality concerns of an accused employee or student. Publicized accusations of sexual harassment, if ultimately found to be false, may nevertheless irreparably damage the reputation of the accused. The accused individual's need for confidentiality must, of course, also be evaluated based on the factors discussed in the preceding paragraph in the context of the school's responsibility to ensure a safe environment for students.

Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual complaint of harassment, other means may be available to address the harassment. There are steps a recipient can take to limit the effects of the alleged harassment and prevent its recurrence without initiating formal action against the alleged harasser or revealing the identity of the complainant. Examples include conducting sexual harassment training for the school site or academic department where the problem occurred, taking a student survey concerning any problems with harassment, or implementing other systemic measures at the site or department where the alleged harassment has occurred.

In addition, by investigating the complaint to the extent possible — including by reporting it to the Title IX coordinator or other responsible school employee designated pursuant to Title IX — the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual. In some situations there may be prior reports by former students who now might be willing to come forward and be identified, thus providing a basis for further corrective action. In instances affecting a number of students (for example, a report from a student that an instructor has repeatedly made sexually explicit remarks about his or her personal life in front of an entire class), an individual can be put on notice of allegations of harassing behavior and counseled appropriately without revealing, even indirectly, the identity of the student who notified the school. Those steps can be very effective in preventing further harassment.

### **C. Response to Other Types of Notice**

The previous two sections deal with situations in which a student or parent of a student who was harassed reports or complains of harassment or in which a responsible school employee directly observes sexual harassment of a student. If a school learns of harassment through other means, for example, if information about harassment is received from a third party (such as from a witness to an incident or an anonymous letter or telephone call), different factors will affect the school's response. These factors include the source and nature of the information; the seriousness of the alleged incident; the specificity of the information; the objectivity and credibility of the source of the report; whether any individuals can be identified who were subjected to the alleged harassment; and whether those individuals want to pursue the matter. If, based on these factors, it is reasonable for the school to investigate and it can confirm the allegations, the considerations described in the previous sections concerning interim measures and appropriate responsive action will apply.

For example, if a parent visiting a school observes a student repeatedly harassing a group of female students and reports this to school officials, school personnel can speak with the female students to confirm whether that conduct has occurred and whether they view it as unwelcome. If the school determines that the conduct created a hostile environment, it can take reasonable, age-appropriate steps to address the situation. If on the other hand, the students in this example were to ask that their names not be disclosed or indicate that they do not want to pursue the matter, the considerations described in the previous section related to requests for confidentiality will shape the school's response.

In a contrasting example, a student newspaper at a large university may print an anonymous letter claiming that a professor is sexually harassing students in class on a daily basis, but the letter provides no clue as to the identity of the professor or the department in which the conduct is allegedly taking place. Due to the anonymous source and lack of specificity of the information, a school would not reasonably be able to investigate and confirm these allegations. However, in response to the anonymous letter, the school could submit a letter or article to the newspaper reiterating its policy against sexual harassment, encouraging persons who believe that they have been sexually harassed to come forward, and explaining how its grievance procedures work.

### **VIII. Prevention**

A policy specifically prohibiting sexual harassment and separate grievance procedures for violations of that policy can help ensure that all students and employees understand the nature of sexual harassment and that the school will not tolerate it. Indeed, they might even bring conduct of a sexual nature to the school's attention so that the school can address it before it becomes sufficiently serious as to create a hostile environment. Further, training for administrators, teachers, and staff and age-appropriate classroom information for students can help to ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond.

### **IX. Prompt and Equitable Grievance Procedures**

Schools are required by the Title IX regulations to adopt and publish a policy against sex discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex.<sup>98</sup> Accordingly, regardless of whether harassment occurred, a school violates this requirement of the Title IX regulations if it does not have those procedures and policy in place.<sup>99</sup>

A school's sex discrimination grievance procedures must apply to complaints of sex discrimination in the school's education programs and activities filed by students against school employees, other students, or third parties.<sup>100</sup> Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints. However, its nondiscrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment. Thus, if, because of the lack of a policy or procedure specifically addressing sexual harassment, students are unaware of what kind of conduct constitutes sexual harassment or that such conduct is

prohibited sex discrimination, a school's general policy and procedures relating to sex discrimination complaints will not be considered effective.<sup>101</sup>

OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the procedures provide for —

- Notice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed;
- Application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- Designated and reasonably prompt timeframes for the major stages of the complaint process;
- Notice to the parties of the outcome of the complaint;<sup>102</sup> and
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.<sup>103</sup>

Many schools also provide an opportunity to appeal the findings or remedy, or both. In addition, because retaliation is prohibited by Title IX, schools may want to include a provision in their procedures prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry.

Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience. In addition, whether complaint resolutions are timely will vary depending on the complexity of the investigation and the severity and extent of the harassment. During the investigation it is a good practice for schools to inform students who have alleged harassment about the status of the investigation on a periodic basis.

A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school's students, easily understood, and widely disseminated. Distributing the procedures to administrators, or including them in the school's administrative or policy manual, may not by itself be an effective way of providing notice, as these publications are usually not widely circulated to and understood by all members of the school community. Many schools ensure adequate notice to students by having copies of the procedures available at various locations throughout the school or campus; publishing the procedures as a separate document; including a summary of the procedures in major publications issued by the school, such as handbooks and catalogs for students, parents of elementary and secondary students, faculty, and staff; and identifying individuals who can explain how the procedures work.

A school must designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities.<sup>104</sup> The school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated.<sup>105</sup> Because it is possible that an employee designated to handle Title IX complaints may himself or herself engage in harassment, a school may want to designate more than one employee to be responsible for handling complaints in order to ensure that students have an effective means of reporting harassment.<sup>106</sup> While a school may choose to have a number of employees responsible for Title IX matters, it is also advisable to give one official responsibility for overall coordination and oversight of all sexual harassment complaints to ensure consistent practices and standards in handling complaints. Coordination of recordkeeping (for instance, in a confidential log maintained by the Title IX coordinator) will also ensure that the school can and will resolve recurring problems and identify students or employees who have multiple complaints filed against them.<sup>107</sup> Finally, the school must make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates.<sup>108</sup>

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so.<sup>109</sup> OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis. Title IX also permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirement of affording a complainant a "prompt and equitable" resolution of the complaint.

In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.<sup>110</sup> Similarly, schools are cautioned about using the results of insurance company investigations of sexual harassment allegations. The purpose of an insurance investigation is to assess liability under the insurance policy, and the applicable standards may well be different from those under Title IX. In addition, a school is not relieved of its responsibility to respond to a sexual harassment complaint filed under its grievance procedure by the fact that a complaint has been filed with OCR.<sup>111</sup>

## X. Due Process Rights of the Accused

A public school's employees have certain due process rights under the United States Constitution. The Constitution also guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding. Furthermore, the Family Educational Rights and Privacy Act (FERPA) does not override federally protected due process rights of persons accused of sexual harassment. Procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions. Of course, schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant. In both public and private schools, additional or separate rights may be created for employees or students by State law, institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements. Schools should be aware of these rights and their legal responsibilities to individuals accused of harassment.

## XI. First Amendment

In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved.<sup>112</sup> Free speech rights apply in the classroom (e.g., classroom lectures and discussions)<sup>113</sup> and in all other education programs and activities of public schools (e.g., public meetings and speakers on campus; campus debates, school plays and other cultural events<sup>114</sup>; and student newspapers, journals, and other publications<sup>115</sup>). In addition, First Amendment rights apply to the speech of students and teachers.<sup>116</sup>

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX.<sup>117</sup> In order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program.<sup>118</sup>

Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights. For instance, while the First Amendment may prohibit a school from restricting the right of students to express opinions about one sex that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard. The age of the students involved and the location or forum may affect how the school can respond consistently with the First Amendment.<sup>119</sup> As an example of the application of free speech rights to allegations of sexual harassment, consider the following:

Example 1: In a college level creative writing class, a professor's required reading list includes excerpts from literary classics that contain descriptions of explicit

sexual conduct, including scenes that depict women in submissive and demeaning roles. The professor also assigns students to write their own materials, which are read in class. Some of the student essays contain sexually derogatory themes about women. Several female students complain to the Dean of Students that the materials and related classroom discussion have created a sexually hostile environment for women in the class. What must the school do in response?

Answer: Academic discourse in this example is protected by the First Amendment even if it is offensive to individuals. Thus, Title IX would not require the school to discipline the professor or to censor the reading list or related class discussion.

Example 2: A group of male students repeatedly targets a female student for harassment during the bus ride home from school, including making explicit sexual comments about her body, passing around drawings that depict her engaging in sexual conduct, and, on several occasions, attempting to follow her home off the bus. The female student and her parents complain to the principal that the male students' conduct has created a hostile environment for girls on the bus and that they fear for their daughter's safety. What must a school do in response?

Answer: Threatening and intimidating actions targeted at a particular student or group of students, even though they contain elements of speech, are not protected by the First Amendment. The school must take prompt and effective actions, including disciplinary action if necessary, to stop the harassment and prevent future harassment.

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## Endnotes

<sup>1</sup> This guidance does not address sexual harassment of employees, although that conduct may be prohibited by Title IX. 20 U.S.C. 1681 *et seq.*; 34 CFR part 106, subpart E. If employees file Title IX sexual harassment complaints with OCR, the complaints will be processed pursuant to the Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance. 28 CFR 42.604. Employees are also protected from discrimination on the basis of sex, including sexual harassment, by Title VII of the Civil Rights Act of 1964. For information about Title VII and sexual harassment, see the Equal Employment Opportunity Commission's (EEOC's) Guidelines on Sexual Harassment, 29 CFR 1604.11, for information about filing a Title VII charge with the EEOC, see 29 CFR 1601.7-1607.13, or see the EEOC's website at [www.eeoc.gov](http://www.eeoc.gov).

<sup>2</sup> 20 U.S.C. 1681; 34 CFR part 106.

<sup>3</sup> See, e.g., Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 649-50 (1999); Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 281 (1998); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992); S. REP. NO. 100-64, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 14 (1987); Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (1997 guidance), 62 FR 12034 (1997).

<sup>4</sup> As described in the section on "Applicability," this guidance applies to all levels of education.

<sup>5</sup> For practical information about steps that schools can take to prevent and remedy all types of harassment, including sexual harassment, see "Protecting Students from Harassment and Hate Crime, A Guide for Schools," which we issued jointly with the National Association of Attorneys General. This Guide is available at our web site at: [www.ed.gov/pubs/Harassment](http://www.ed.gov/pubs/Harassment).

<sup>6</sup> See, e.g., Davis, 526 U.S. at 653 (alleged conduct of a sexual nature that would support a sexual harassment claim included verbal harassment and "numerous acts of objectively offensive touching;"); Franklin, 503 U.S. at 63 (conduct of a sexual nature found to support a sexual harassment claim under Title IX included kissing, sexual intercourse); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 60-61 (1986) (demands for sexual favors, sexual advances, fondling, indecent exposure, sexual intercourse, rape, sufficient to raise hostile environment claim under Title VII); Ellison v. Brady, 924 F.2d 872, 873-74, 880 (9<sup>th</sup> Cir. 1991) (allegations sufficient to state sexual harassment claim under Title VII included repeated requests for dates, letters making explicit references to sex and describing the harasser's feelings for plaintiff); Lipsett v. University of Puerto Rico, 864 F.2d 881, 904-5 (1<sup>st</sup> Cir. 1988) (sexually derogatory comments, posting of sexually explicit drawing of plaintiff, sexual advances may support sexual harassment claim); Kadiki v. Virginia Commonwealth University, 892 F.Supp. 746, 751 (E.D. Va. 1995)

(professor's spanking of university student may constitute sexual conduct under Title IX); Doe v. Petaluma, 830 F.Supp. 1560, 1564-65 (N.D. Cal. 1996) (sexually derogatory taunts and innuendo can be the basis of a harassment claim); Denver School Dist. #2, OCR Case No. 08-92-1007 (same to allegations of vulgar language and obscenities, pictures of nude women on office walls and desks, unwelcome touching, sexually offensive jokes, bribery to perform sexual acts, indecent exposure); Nashoba Regional High School, OCR Case No. 01-92-1377 (same as to year-long campaign of derogatory, sexually explicit graffiti and remarks directed at one student).

<sup>7</sup> See also Shoreline School Dist., OCR Case No. 10-92-1002 (a teacher's patting a student on the arm, shoulder, and back, and restraining the student when he was out of control, not conduct of a sexual nature); Dartmouth Public Schools, OCR Case No. 01-90-1058 (same as to contact between high school coach and students); San Francisco State University, OCR Case No. 09-94-2038 (same as to faculty advisor placing her arm around a graduate student's shoulder in posing for a picture); Analy Union High School Dist., OCR Case No. 09-92-1249 (same as to drama instructor who put his arms around both male and female students who confided in him).

<sup>8</sup> 20 U.S.C. 1687 (codification of the amendment to Title IX regarding scope of jurisdiction, enacted by the Civil Rights Restoration Act of 1987). See 65 FR 68049 (November 13, 2000) (Department's amendment of the Title IX regulations to incorporate the statutory definition of "program or activity").

<sup>9</sup> If a school contracts with persons or organizations to provide benefits, services, or opportunities to students as part of the school's program, and those persons or employees of those organizations sexually harass students, OCR will consider the harassing individual in the same manner that it considers the school's employees, as described in this guidance. (See section on "Harassment by Teachers and Other Employees.") See Brown v. Hot, Sexy, and Safer Products, Inc., 68 F.3d 525, 529 (1<sup>st</sup> Cir. 1995) (Title IX sexual harassment claim brought for school's role in permitting contract consultant hired by it to create allegedly hostile environment).

In addition, if a student engages in sexual harassment as an employee of the school, OCR will consider the harassment under the standards described for employees. (See section on "Harassment by Teachers and Other Employees.") For example, OCR would consider it harassment by an employee if a student teaching assistant who is responsible for assigning grades in a course, i.e., for providing aid, benefits, or services to students under the recipient's program, required a student in his or her class to submit to sexual advances in order to obtain a certain grade in the class.

<sup>10</sup> Cf. John Does 1 v. Covington County Sch. Bd., 884 F.Supp. 462, 464-65 (M.D. Ala. 1995) (male students alleging that a teacher sexually harassed and abused them stated cause of action under Title IX).

<sup>11</sup> Title IX and the regulations implementing it prohibit discrimination "on the basis of sex;" they do not restrict protection from sexual harassment to those circumstances in

which the harasser only harasses members of the opposite sex. See 34 CFR 106.31. In Oncale v. Sundowner Offshore Services, Inc. the Supreme Court held unanimously that sex discrimination consisting of same-sex sexual harassment can violate Title VII's prohibition against discrimination because of sex. 523 U.S. 75, 82 (1998). The Supreme Court's holding in Oncale is consistent with OCR policy, originally stated in its 1997 guidance, that Title IX prohibits sexual harassment regardless of whether the harasser and the person being harassed are members of the same sex. 62 FR 12039. See also Kinman v. Omaha Public School Dist., 94 F.3d 463, 468 (8<sup>th</sup> Cir. 1996), rev'd on other grounds, 171 F.3d 607 (1999) (female student's allegation of sexual harassment by female teacher sufficient to raise a claim under Title IX); Doe v. Petaluma, 830 F.Supp. 1560, 1564-65, 1575 (N.D. Cal. 1996) (female junior high student alleging sexual harassment by other students, including both boys and girls, sufficient to raise a claim under Title IX); John Does 1, 884 F.Supp. at 465 (same as to male students' allegations of sexual harassment and abuse by a male teacher.) It can also occur in certain situations if the harassment is directed at students of both sexes. Chiapuzo v. BLT Operating Corp., 826 F.Supp. 1334, 1337 (D.Wyo. 1993) (court found that if males and females were subject to harassment, but harassment was based on sex, it could violate Title VII); but see Holman v. Indiana, 211 F.3d 399, 405 (7<sup>th</sup> Cir. 2000) (if male and female both subjected to requests for sex, court found it could not violate Title VII).

In many circumstances, harassing conduct will be on the basis of sex because the student would not have been subjected to it at all had he or she been a member of the opposite sex; e.g., if a female student is repeatedly propositioned by a male student or employee (or, for that matter, if a male student is repeatedly propositioned by a male student or employee.) In other circumstances, harassing conduct will be on the basis of sex if the student would not have been affected by it in the same way or to the same extent had he or she been a member of the opposite sex; e.g., pornography and sexually explicit jokes in a mostly male shop class are likely to affect the few girls in the class more than it will most of the boys.

In yet other circumstances, the conduct will be on the basis of sex in that the student's sex was a factor in or affected the nature of the harasser's conduct or both. Thus, in Chiapuzo, a supervisor made demeaning remarks to both partners of a married couple working for him, e.g., as to sexual acts he wanted to engage in with the wife and how he would be a better lover than the husband. In both cases, according to the court, the remarks were based on sex in that they were made with an intent to demean each member of the couple because of his or her respective sex. 826 F.Supp. at 1337. See also Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463-64 (9<sup>th</sup> Cir. 1994), cert. denied, 115 S.Ct. 733 (1995); but see Holman, 211 F.3d at 405 (finding that if male and female both subjected to requests for sex, Title VII could not be violated).

<sup>12</sup> Nashoba Regional High School, OCR Case No. 01-92-1397. In Conejo Valley School Dist., OCR Case No. 09-93-1305, female students allegedly taunted another female student about engaging in sexual activity; OCR found that the alleged comments were sexually explicit and, if true, would be sufficiently severe, persistent, and pervasive to create a hostile environment.

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<sup>13</sup> See Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8<sup>th</sup> Cir. 1989, cert. denied 493 U.S. 1089 (1990)); DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327, 329-30 (9<sup>th</sup> Cir. 1979)(same); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5<sup>th</sup> Cir. 1979)(same).

<sup>14</sup> It should be noted that some State and local laws may prohibit discrimination on the basis of sexual orientation. Also, under certain circumstances, courts may permit redress for harassment on the basis of sexual orientation under other Federal legal authority. See Nabozny v. Podlesny, 92 F.3d 446, 460 (7<sup>th</sup> Cir. 1996) (holding that a gay student could maintain claims alleging discrimination based on both gender and sexual orientation under the Equal Protection Clause of the United States Constitution in a case in which a school district failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student's gender and sexual orientation).

<sup>15</sup> However, sufficiently serious sexual harassment is covered by Title IX even if the hostile environment also includes taunts based on sexual orientation.

<sup>16</sup> See also, Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (where an accounting firm denied partnership to a female candidate, the Supreme Court found Title VII prohibits an employer from evaluating employees by assuming or insisting that they match the stereotype associated with their sex).

<sup>17</sup> See generally Gebser; Davis; See also Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65-66 (1986); Harris v. Forklift Systems Inc., 510 U.S. 14, 22 (1993); see also Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10<sup>th</sup> Cir. 1987) (concluding that harassment based on sex may be discrimination whether or not it is sexual in nature); McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (physical, but nonsexual, assault could be sex-based harassment if shown to be unequal treatment that would not have taken place but for the employee's sex); Cline v. General Electric Capital Auto Lease, Inc., 757 F.Supp. 923, 932-33 (N.D. Ill. 1991).

<sup>18</sup> See, e.g., sections on "Harassment by Teachers and Other Employees," "Harassment by Other Students or Third Parties," "Notice of Employee, Peer, or Third Party Harassment," "Factors Used to Evaluate a Hostile Environment," "Recipient's Response," and "Prompt and Equitable Grievance Procedures."

<sup>19</sup> See Lipsett, 864 F.2d at 903-905 (general antagonism toward women, including stated goal of eliminating women from surgical program, statements that women shouldn't be in the program, and assignment of menial tasks, combined with overt sexual harassment); Harris, 510 U.S. at 23; Andrews v. City of Philadelphia, 895 F.2d 1469, 1485-86 (3<sup>rd</sup> Cir. 1990) (court directed trial court to consider sexual conduct as well as theft of female employees' files and work, destruction of property, and anonymous phone calls in determining if there had been sex discrimination); see also Hall v. Gus Construction Co., 842 F.2d 1010, 1014 (8<sup>th</sup> Cir. 1988) (affirming that harassment due to the employee's sex

may be actionable even if the harassment is not sexual in nature); Hicks, 833 F.2d at 1415; Eden Prairie Schools, Dist. #272, OCR Case No. 05-92-1174 (the boys made lewd comments about male anatomy and tormented the girls by pretending to stab them with rubber knives; while the stabbing was not sexual conduct, it was directed at them because of their sex, i.e., because they were girls).

<sup>20</sup> Davis, 526 U.S. at 650 (“Having previously determined that ‘sexual harassment’ is ‘discrimination’ in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.”); Franklin, 503 U.S. at 75 (“Unquestionably, Title IX placed on the [school] the duty not to discriminate on the basis of sex, and ‘when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor “discriminate[s]” on the basis of sex.’ ... We believe the same rule should apply when a teacher sexually harasses and abuses a student.” (citation omitted)).

OCR’s longstanding interpretation of its regulations is that sexual harassment may constitute a violation. 34 CFR 106.31; See Sexual Harassment Guidance, 62 FR 12034 (1997). When Congress enacted the Civil Rights Restoration Act of 1987 to amend Title IX to restore institution-wide coverage over federally assisted education programs and activities, the legislative history indicated not only that Congress was aware that OCR interpreted its Title IX regulations to prohibit sexual harassment, but also that one of the reasons for passing the Restoration Act was to enable OCR to investigate and resolve cases involving allegations of sexual harassment. S. REP. NO. 64, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 12 (1987). The examples of discrimination that Congress intended to be remedied by its statutory change included sexual harassment of students by professors, id. at 14, and these examples demonstrate congressional recognition that discrimination in violation of Title IX can be carried out by school employees who are providing aid, benefits, or services to students. Congress also intended that if discrimination occurred, recipients needed to implement effective remedies. S. REP. NO. 64 at 5.

<sup>21</sup> 34 CFR 106.4.

<sup>22</sup> These are the basic regulatory requirements. 34 CFR 106.31(a)(b). Depending upon the facts, sexual harassment may also be prohibited by more specific regulatory prohibitions. For example, if a college financial aid director told a student that she would not get the student financial assistance for which she qualified unless she slept with him, that also would be covered by the regulatory provision prohibiting discrimination on the basis of sex in financial assistance, 34 CFR 106.37(a).

<sup>23</sup> 34 CFR 106.31(b)(1).

<sup>24</sup> 34 CFR 106.31(b)(2).

<sup>25</sup> 34 CFR 106.31(b)(3).

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<sup>26</sup> 34 CFR 106.31(b)(4).

<sup>27</sup> 34 CFR 106.31(b)(6).

<sup>28</sup> 34 CFR 106.31(b)(7).

<sup>29</sup> 34 CFR 106.3(a).

<sup>30</sup> 34 CFR 106.9.

<sup>31</sup> 34 CFR 106.8(b).

<sup>32</sup> 34 CFR 106.8(a).

<sup>33</sup> The 1997 guidance referred to quid pro quo harassment and hostile environment harassment. 62 FR 12038-40.

<sup>34</sup> See Alexander v. Yale University, 459 F.Supp. 1, 4 (D.Conn. 1977), aff'd, 631 F.2d 178 (2<sup>nd</sup> Cir. 1980)(stating that a claim “that academic advancement was conditioned upon submission to sexual demands constitutes [a claim of] sex discrimination in education...”); Crandell v. New York College, Osteopathic Medicine, 87 F.Supp.2d 304, 318 (S.D.N.Y. 2000) (finding that allegations that a supervisory physician demanded that a student physician spend time with him and have lunch with him or receive a poor evaluation, in light of the totality of his alleged sexual comments and other inappropriate behavior, constituted a claim of quid pro quo harassment); Kadiki, 892 F.Supp. at 752 (reexamination in a course conditioned on college student’s agreeing to be spanked should she not attain a certain grade may constitute quid pro quo harassment).

<sup>35</sup> 34 CFR 106.31(b).

<sup>36</sup> Davis, 526 U.S. at 651 (confirming, by citing approvingly both to Title VII cases (Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57,67 (1986) (finding that hostile environment claims are cognizable under Title VII), and Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998)) and OCR’s 1997 guidance, 62 FR at 12041-42, that determinations under Title IX as to what conduct constitutes hostile environment sexual harassment may continue to rely on Title VII caselaw).

<sup>37</sup> 34 CFR 106.31(b). See Davis, 526 U.S. at 650 (concluding that allegations of student-on-student sexual harassment that is “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits” supports a claim for money damages in an implied right of action).

<sup>38</sup> In Harris, the Supreme Court explained the requirement for considering the “subjective perspective” when determining the existence of a hostile environment. The Court stated— “... if the victim does not subjectively perceive the environment to be abusive, the

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conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." 510 U.S. at 21-22.

<sup>39</sup> See Davis, 526 U.S. at 650 (conduct must be "objectively offensive" to trigger liability for money damages); Elgamil v. Syracuse University, 2000 U.S. Dist. LEXIS 12598 at 17 (N.D.N.Y. 2000) (citing Harris); Booher v. Board of Regents, 1998 U.S. Dist. LEXIS 11404 at 25 (E.D. Ky. 1998) (same). See Oncale, 523 U.S. at 81, in which the Court "emphasized ... that the objective severity of harassment should be judged from the perspective of a reasonable person in the [victim's] position, considering 'all the circumstances,'" and citing Harris, 510 U.S. at 20, in which the Court indicated that a "reasonable person" standard should be used to determine whether sexual conduct constituted harassment. This standard has been applied under Title VII to take into account the sex of the subject of the harassment, see, e.g., Ellison, 924 F.2d at 878-79 (applying a "reasonable woman" standard to sexual harassment), and has been adapted to sexual harassment in education under Title IX, Patricia H. v. Berkeley Unified School Dist., 830 F.Supp. 1288, 1296 (N.D. Cal. 1993) (adopting a "reasonable victim" standard and referring to OCR's use of it).

<sup>40</sup> See Davis, 526 U.S. at 651, citing both Oncale, 523 U.S. at 82, and OCR's 1997 guidance (62 FR 12041-12042).

<sup>41</sup> See, e.g., Davis, 526 U.S. at 634 (as a result of the harassment, student's grades dropped and she wrote a suicide note); Doe v. Petaluma, 830 F. Supp. at 1566 (student so upset about harassment by other students that she was forced to transfer several times, including finally to a private school); Modesto City Schools, OCR Case No. 09-93-1391 (evidence showed that one girl's grades dropped while the harassment was occurring); Weaverville Elementary School, OCR Case No. 09-91-1116 (students left school due to the harassment). Compare with College of Alameda, OCR Case No. 09-90-2104 (student not in instructor's class and no evidence of any effect on student's educational benefits or service, so no hostile environment).

<sup>42</sup> Doe v. Petaluma, 830 F.Supp. at 1566.

<sup>43</sup> See Waltman v. Int'l Paper Co., 875 F.2d 468, 477 (5<sup>th</sup> Cir. 1989) (holding that although not specifically directed at the plaintiff, sexually explicit graffiti on the walls was "relevant to her claim"); Monteiro v. Tempe Union High School, 158 F.3d 1022, 1033-34 (9<sup>th</sup> Cir. 1998) (Title VI racial harassment case, citing Waltman; see also Hall, 842 F. 2d at 1015 (evidence of sexual harassment directed at others is relevant to show hostile environment under Title VII).

<sup>44</sup> See, e.g., Elgmil 2000 U.S. Dist. LEXIS at 19 ("in order to be actionable, the incidents of harassment must occur in concert or with a regularity that can reasonably be termed pervasive"); Andrews, 895 F.2d at 1484 ("Harassment is pervasive when 'incidents of harassment occur either in concert or with regularity'"); Moylan v. Maries County, 792 F.2d 746, 749 (8<sup>th</sup> Cir. 1986).

<sup>45</sup> 34 CFR 106.31(b). See Vance v. Spencer County Public School District, 231 F.3d 253 (6<sup>th</sup> Cir. 2000); Doe v. School Admin. Dist. No. 19, 66 F.Supp.2d 57, 62 (D. Me. 1999). See also statement of the U.S. Equal Employment Opportunity Commission (EEOC): "The Commission will presume that the unwelcome, intentional touching of [an employee's] intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment." EEOC Policy Guidance on Current Issues of Sexual Harassment, 17. Barrett v. Omaha National Bank, 584 F. Supp. 22, 30 (D. Neb. 1983), aff'd, 726 F. 2d 424 (8<sup>th</sup> Cir. 1984) (finding that hostile environment was created under Title VII by isolated events, i.e., occurring while traveling to and during a two-day conference, including the co-worker's talking to plaintiff about sexual activities and touching her in an offensive manner while they were inside a vehicle from which she could not escape).

<sup>46</sup> See also Ursuline College, OCR Case No. 05-91-2068 (a single incident of comments on a male student's muscles arguably not sexual; however, assuming they were, not severe enough to create a hostile environment).

<sup>47</sup> Davis, 526 U.S. at 653 ("The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher student harassment."); Patricia H., 830 F. Supp. at 1297 (stating that the "grave disparity in age and power" between teacher and student contributed to the creation of a hostile environment); Summerfield Schools, OCR Case No. 15-92-1929 ("impact of the ... remarks was heightened by the fact that the coach is an adult in a position of authority"); cf. Doe v. Taylor I.S.D., 15 F.3d 443, 460 (5<sup>th</sup> Cir. 1994) (Sec. 1983 case; taking into consideration the influence that the teacher had over the student by virtue of his position of authority to find that a sexual relationship between a high school teacher and a student was unlawful).

<sup>48</sup> See, e.g., McKinney, 765 F.2d at 1138-49; Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991).

<sup>49</sup> Cf. Patricia H., 830 F. Supp. at 1297.

<sup>50</sup> See, e.g., Barrett, 584 F. Supp. at 30 (finding harassment occurring in a car from which the victim could not escape particularly severe).

<sup>51</sup> See Hall, 842 F. 2d at 1015 (stating that "evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile environment") (citing Hicks, 833 F. 2d, 1415-16). Cf. Midwest City-Del City Public Schools, OCR Case No. 06-92-1012 (finding of racially hostile environment based in part on several racial incidents at school shortly before incidents in complaint, a number of which involved the same student involved in the complaint).

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<sup>52</sup> In addition, incidents of racial or national origin harassment directed at a particular individual may also be aggregated with incidents of sexual or gender harassment directed at that individual in determining the existence of a hostile environment. Hicks, 833 F.2d at 1416; Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025, 1032 (5<sup>th</sup> Cir. 1980).

<sup>53</sup> Does v. Covington Sch. Bd. of Educ., 930 F.Supp. 554, 569 (M.D. Ala. 1996); Henson v. City of Dundee, 682 F.2d 897, 903 (11<sup>th</sup> Cir. 1982).

<sup>54</sup> See Meritor Savings Bank, 477 U.S. at 68. “[T]he fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII.... The correct inquiry is whether [the subject of the harassment] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”

<sup>55</sup> Lipsett, 864 F.2d at 898 (while, in some instances, a person may have the responsibility for telling the harasser “directly” that the conduct is unwelcome, in other cases a “consistent failure to respond to suggestive comments or gestures may be sufficient....”); Danna v. New York Tel. Co., 752 F.Supp. 594, 612 (despite a female employee’s own foul language and participation in graffiti writing, her complaints to management indicated that the harassment was not welcome); see also Carr v. Allison Gas Turbine Div. GMC., 32 F.3d 1007, 1011 (7<sup>th</sup> Cir. 1994) (finding that cursing and dirty jokes by a female employee did not show that she welcomed the sexual harassment, given her frequent complaints about it: “Even if ... [the employee’s] testimony that she talked and acted as she did [only] in an effort to be one of the boys is ... discounted, her words and conduct cannot be compared to those of the men and used to justify their conduct.... The asymmetry of positions must be considered. She was one woman; they were many men. Her use of [vulgar] terms ... could not be deeply threatening....”).

<sup>56</sup> See Reed v. Shepard, 939 F.2d 484, 486-87, 491-92 (7<sup>th</sup> Cir. 1991) (no harassment found under Title VII in a case in which a female employee not only tolerated, but also instigated the suggestive joking activities about which she was now complaining); Weinsheimer v. Rockwell Int’l Corp., 754 F.Supp. 1559, 1563-64 (M.D. Fla. 1990) (same, in case in which general shop banter was full of vulgarity and sexual innuendo by men and women alike, and plaintiff contributed her share to this atmosphere.) However, even if a student participates in the sexual banter, OCR may in certain circumstances find that the conduct was nevertheless unwelcome if, for example, a teacher took an active role in the sexual banter and a student reasonably perceived that the teacher expected him or her to participate.

<sup>57</sup> The school bears the burden of rebutting the presumption.

<sup>58</sup> Of course, nothing in Title IX would prohibit a school from implementing policies prohibiting sexual conduct or sexual relationships between students and adult employees.

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<sup>59</sup> See note 58.

<sup>60</sup> Gebser, 524 U.S. at 281 (“Franklin ... establishes that a school district can be held liable in damages [in an implied action under Title IX] in cases involving a teacher’s sexual harassment of a student...”; 34 CFR 106.31; See 1997 Sexual Harassment Guidance, 62 FR 12034.

<sup>61</sup> See Davis, 526 U.S. at 653 (stating that harassment of a student by a teacher is more likely than harassment by a fellow student to constitute the type of effective denial of equal access to educational benefits that can breach the requirements of Title IX).

<sup>62</sup> 34 CFR 106.31(b). Cf. Gebser, 524 U.S. at 283-84 (Court recognized in an implied right of action for money damages for teacher sexual harassment of a student that the question of whether a violation of Title IX occurred is a separate question from the scope of appropriate remedies for a violation).

<sup>63</sup> Davis, 526 U.S. at 646.

<sup>64</sup> See section on “Applicability of Title IX” for scope of coverage.

<sup>65</sup> See section on “Notice of Employee, Peer, or Third Party Harassment.”

<sup>66</sup> See section on “Notice of Employee, Peer, or Third Party Harassment.”

<sup>67</sup> 34 CFR 106.31(b).

<sup>68</sup> 34 CFR 106.31(b).

<sup>69</sup> See section on “Notice of Employee, Peer, or Third Party Harassment.”

<sup>70</sup> Cf. Davis, 526 U.S. at 646.

<sup>71</sup> 34 CFR 106.31(b).

<sup>72</sup> 34 CFR 106.31(b).

<sup>73</sup> Consistent with its obligation under Title IX to protect students, cf. Gebser, 524 U.S. at 287, OCR interprets its regulations to ensure that recipients take reasonable action to address, rather than neglect, reasonably obvious discrimination. Cf. Gebser, 524 U.S. at 287-88; Davis, 526 U.S. at 650 (actual notice standard for obtaining money damages in private lawsuit).

<sup>74</sup> Whether an employee is a responsible employee or whether it would be reasonable for a student to believe the employee is, even if the employee is not, will vary depending on

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factors such as the age and education level of the student, the type of position held by the employee, and school practices and procedures, both formal and informal. The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. Gebser, 524 U.S. at 290, and Davis, 526 U.S. at 642. The concept of a "responsible employee" under our guidance is broader. That is, even if a responsible employee does not have the authority to address the discrimination and take corrective action, he or she does have the obligation to report it to appropriate school officials.

<sup>75</sup> The Title IX regulations require that recipients designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulations, including complaint investigations. 34 CFR 106.8(a).

<sup>76</sup> 34 CFR 106.31. See Yates v. Avco Corp., 819 F.2d 630, 636 (6<sup>th</sup> Cir. 1987); Katz v. Dole, 709 F.2d 251, 256 (4<sup>th</sup> Cir. 1983).

<sup>77</sup> For example, a substantiated report indicating that a high school coach has engaged in inappropriate physical conduct of a sexual nature in several instances with different students may suggest a pattern of conduct that should trigger an inquiry as to whether other students have been sexually harassed by that coach. See also Doe v. School Administrative Dist. No. 19, 66 F.Supp.2d 57, 63-64 and n.6 (D.Me. 1999) (in a private lawsuit for money damages under Title IX in which a high school principal had notice that a teacher may be engaging in a sexual relationship with one underage student and did not investigate, and then the same teacher allegedly engaged in sexual intercourse with another student, who did not report the incident, the court indicated that the school's knowledge of the first relationship may be sufficient to serve as actual notice of the second incident).

<sup>78</sup> Cf. Katz, 709 F.2d at 256 (finding that the employer "should have been aware of the problem both because of its pervasive character and because of [the employee's] specific complaints ..."); Smolsky v. Consolidated Rail Corp., 780 F.Supp. 283, 293 (E.D. Pa. 1991), reconsideration denied, 785 F.Supp. 71 (E.D. Pa. 1992) "where the harassment is apparent to all others in the work place, supervisors and coworkers, this may be sufficient to put the employer on notice of the sexual harassment" under Title VII); Jensen v. Eveleth Taconite Co., 824 F.Supp. 847, 887 (D.Minn. 1993); "[s]exual harassment ... was so pervasive that an inference of knowledge arises .... The acts of sexual harassment detailed herein were too common and continuous to have escaped Eveleth Mines had its management been reasonably alert."; Cummings v. Walsh Construction Co., 561 F.Supp. 872, 878 (S.D. Ga. 1983) ("... allegations not only of the [employee] registering her complaints with her foreman ... but also that sexual harassment was so widespread that defendant had constructive notice of it" under Title VII); but see Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 250-51 (2<sup>nd</sup> Cir. 1995) (concluding that other students' knowledge of the conduct was not enough to charge the school with notice, particularly because these students may not have been aware that the conduct was offensive or abusive).

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<sup>79</sup> 34 CFR 106.9 and 106.8(b).

<sup>80</sup> 34 CFR 106.8(b) and 106.31(b).

<sup>81</sup> 34 CFR 106.9.

<sup>82</sup> 34 CFR 106.8(b).

<sup>83</sup> 34 CFR 106.31.

<sup>84</sup> 34 CFR 106.31 and 106.3. Gebser, 524 U.S. at 288 (“In the event of a violation, [under OCR’s administrative enforcement scheme] a funding recipient may be required to take ‘such remedial action as [is] deem[ed] necessary to overcome the effects of [the] discrimination.’ §106.3.”).

<sup>85</sup> 20 U.S.C. 1682. In the event that OCR determines that voluntary compliance cannot be secured, OCR may take steps that may result in termination of Federal funding through administrative enforcement, or, alternatively, OCR may refer the case to the Department of Justice for judicial enforcement.

<sup>86</sup> Schools have an obligation to ensure that the educational environment is free of discrimination and cannot fulfill this obligation without determining if sexual harassment complaints have merit.

<sup>87</sup> In some situations, for example, if a playground supervisor observes a young student repeatedly engaging in conduct toward other students that is clearly unacceptable under the school’s policies, it may be appropriate for the school to intervene without contacting the other students. It still may be necessary for the school to talk with the students (and parents of elementary and secondary students) afterwards, e.g., to determine the extent of the harassment and how it affected them.

<sup>88</sup> Gebser, 524 U.S. at 288; Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981) (employers should take corrective and preventive measures under Title VII); accord, Jones v. Flagship Int’l, 793 F.2d 714, 719-720 (5<sup>th</sup> Cir. 1986) (employer should take prompt remedial action under Title VII).

<sup>89</sup> See Doe ex rel. Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380 (5<sup>th</sup> Cir. 2000) (citing Waltman); Waltman, 875 F.2d at 479 (appropriateness of employer’s remedial action under Title VII will depend on the “severity and persistence of the harassment and the effectiveness of any initial remedial steps”); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309-10 (5<sup>th</sup> Cir. 1987); holding that a company’s quick decision to remove the harasser from the victim was adequate remedial action).

<sup>90</sup> See Intlekofer v. Turnage, 973 F.2d 773, 779-780 (9<sup>th</sup> Cir. 1992)(holding that the employer’s response was insufficient and that more severe disciplinary action was

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necessary in situations in which counseling, separating the parties, and warnings of possible discipline were ineffective in ending the harassing behavior).

<sup>91</sup> Offering assistance in changing living arrangements is one of the actions required of colleges and universities by the Campus Security Act in cases of rape and sexual assault. See 20 U.S.C. 1092(f).

<sup>92</sup> See section on “Harassment by Other Students or Third Parties.”

<sup>93</sup> University of California at Santa Cruz, OCR Case No. 09-93-2141 (extensive individual and group counseling); Eden Prairie Schools, Dist. #272, OCR Case No. 05-92-1174 (counseling).

<sup>94</sup> Even if the harassment stops without the school’s involvement, the school may still need to take steps to prevent or deter any future harassment — to inform the school community that harassment will not be tolerated. Wills v. Brown University, 184 F.3d 20, 28 (1<sup>st</sup> Cir. 1999) (difficult problems are posed in balancing a student’s request for anonymity or limited disclosure against the need to prevent future harassment); Fuller v. City of Oakland, 47 F.3d 1522, 1528-29 (9<sup>th</sup> Cir. 1995) (Title VII case).

<sup>95</sup> 34 CFR 106.8(b) and 106.71, incorporating by reference 34 CFR 100.7(e). The Title IX regulations prohibit intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX.

<sup>96</sup> Tacoma School Dist. No. 10, OCR Case No. 10-94-1079 (due to the large number of students harassed by an employee, the extended period of time over which the harassment occurred, and the failure of several of the students to report the harassment, the school committed as part of corrective action plan to providing training for students); Los Medanos College, OCR Case No. 09-84-2092 (as part of corrective action plan, school committed to providing sexual harassment seminar for campus employees); Sacramento City Unified School Dist., OCR Case No. 09-83-1063 (same as to workshops for management and administrative personnel and in-service training for non-management personnel).

<sup>97</sup> In addition, if information about the incident is contained in an “education record” of the student alleging the harassment, as defined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, the school should consider whether FERPA would prohibit the school from disclosing information without the student’s consent. Id. In evaluating whether FERPA would limit disclosure, the Department does not interpret FERPA to override any federally protected due process rights of a school employee accused of harassment.

<sup>98</sup> 34 CFR 106.8(b). This requirement has been part of the Title IX regulations since their inception in 1975. Thus, schools have been required to have these procedures in place since that time. At the elementary and secondary level, this responsibility generally lies

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with the school district. At the postsecondary level, there may be a procedure for a particular campus or college or for an entire university system.

<sup>99</sup> Fenton Community High School Dist. #100, OCR Case 05-92-1104.

<sup>100</sup> While a school is required to have a grievance procedure under which complaints of sex discrimination (including sexual harassment) can be filed, the same procedure may also be used to address other forms of discrimination.

<sup>101</sup> See generally Meritor, 477 U.S. at 72-73 (holding that “mere existence of a grievance procedure” for discrimination does not shield an employer from a sexual harassment claim).

<sup>102</sup> The Family Educational Rights and Privacy Act (FERPA) does not prohibit a student from learning the outcome of her complaint, i.e., whether the complaint was found to be credible and whether harassment was found to have occurred. It is the Department’s current position under FERPA that a school cannot release information to a complainant regarding disciplinary action imposed on a student found guilty of harassment if that information is contained in a student’s education record unless — (1) the information directly relates to the complainant (e.g., an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a postsecondary institution. See note 97. If the alleged harasser is a teacher, administrator, or other non-student employee, FERPA would not limit the school’s ability to inform the complainant of any disciplinary action taken.

<sup>103</sup> The section in the guidance on “Recipient’s Response” provides examples of reasonable and appropriate corrective action.

<sup>104</sup> 34 CFR 106.8(a).

<sup>105</sup> Id.

<sup>106</sup> See Meritor, 477 U.S. at 72-73.

<sup>107</sup> University of California, Santa Cruz, OCR Case No. 09-93-2131. This is true for formal as well as informal complaints. See University of Maine at Machias, OCR Case No. 01-94-6001 (school’s new procedures not found in violation of Title IX in part because they require written records for informal as well as formal resolutions). These records need not be kept in a student’s or employee’s individual file, but instead may be kept in a central confidential location.

<sup>108</sup> For example, in Cape Cod Community College, OCR Case No. 01-93-2047, the College was found to have violated Title IX in part because the person identified by the school as the Title IX coordinator was unfamiliar with Title IX, had no training, and did not even realize he was the coordinator.

<sup>109</sup> Indeed, in University of Maine at Machias, OCR Case No. 01-94-6001, OCR found the school's procedures to be inadequate because only formal complaints were investigated. While a school isn't required to have an established procedure for resolving informal complaints, they nevertheless must be addressed in some way. However, if there are indications that the same individual may be harassing others, then it may not be appropriate to resolve an informal complaint without taking steps to address the entire situation.

<sup>110</sup> Academy School Dist. No 20, OCR Case No. 08-93-1023 (school's response determined to be insufficient in a case in which it stopped its investigation after complaint filed with police); Mills Public School Dist., OCR Case No. 01-93-1123, (not sufficient for school to wait until end of police investigation).

<sup>111</sup> Cf. EEOC v. Board of Governors of State Colleges and Universities, 957 F.2d 424 (7<sup>th</sup> Cir. 1992), cert. denied, 506 U.S. 906 (1992).

<sup>112</sup> The First Amendment applies to entities and individuals that are State actors. The receipt of Federal funds by private schools does not directly subject those schools to the U.S. Constitution. See Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982). However, all actions taken by OCR must comport with First Amendment principles, even in cases involving private schools that are not directly subject to the First Amendment.

<sup>113</sup> See, e.g., George Mason University, OCR Case No. 03-94-2086 (law professor's use of a racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment); Portland School Dist. 1J, OCR Case No. 10-94-1117 (reading teacher's choice to substitute a less offensive term for a racial slur when reading an historical novel aloud in class constituted an academic decision on presentation of curriculum, not racial harassment).

<sup>114</sup> See Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.2d 386 (4<sup>th</sup> Cir. 1993) (fraternity skit in which white male student dressed as an offensive caricature of a black female constituted student expression).

<sup>115</sup> See Florida Agricultural and Mechanical University, OCR Case No. 04-92-2054 (no discrimination in case in which campus newspaper, which welcomed individual opinions of all sorts, printed article expressing one student's viewpoint on white students on campus.)

<sup>116</sup> Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (neither students nor teachers shed their constitutional rights to freedom of expression at the schoolhouse gates); Cf. Cohen v. San Bernardino Valley College, 92 F.3d 968, 972 (9<sup>th</sup> Cir. 1996) (holding that a college professor could not be punished for his longstanding teaching methods, which included discussion of controversial subjects such as obscenity and consensual sex with children, under an unconstitutionally vague sexual harassment policy); George Mason University, OCR Case No. 03-94-2086 (law professor's use of a

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racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment.)

<sup>117</sup> See, e.g., University of Illinois, OCR Case No. 05-94-2104 (fact that university's use of Native American symbols was offensive to some Native American students and employees was not dispositive, in and of itself, in assessing a racially hostile environment claim under Title VI.)

<sup>118</sup> See Meritor, 477 U.S. at 67 (the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to a sufficient degree to violate Title VII), quoting Henson, 682 F.2d at 904; cf. R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) (citing with approval EEOC's sexual harassment guidelines); Monteiro, 158 F.3d at 1032-34 (9<sup>th</sup> Cir. 1998) (citing with approval OCR's racial harassment investigative guidance).

<sup>119</sup> Compare Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (Court upheld discipline of high school student for making lewd speech to student assembly, noting that "[t]he undoubted freedom to advocate unpopular and controversial issues in schools must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."), with Iota Xi, 993 F.2d 386 (holding that, notwithstanding a university's mission to create a culturally diverse learning environment and its substantial interest in maintaining a campus free of discrimination, it could not punish students who engaged in an offensive skit with racist and sexist overtones).

# SixTen and Associates

## Mandate Reimbursement Services

Exhibit G

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Telephone: (858) 514-8605  
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September 21, 2004

Paula Higashi, Executive Director  
Commission on State Mandates  
U.S. Bank Plaza Building  
980 Ninth Street, Suite 300  
Sacramento, California 95814



Re: Test Claim 02-TC-31  
Santa Monica Community College District  
Minimum Conditions for State Aid

Dear Ms. Higashi:

By letter dated May 5, 2004, I responded to the comments of the Chancellor's Office of the California Community Colleges ("CCC") dated March 11, 2004. At pages 15-16 of my response, I pointed out that CCC had represented that it was attaching copies of historic regulation packages as Attachments 1, 2, 3 and 4. I also called your attention to the fact that the comments provided to me did not have any attachments and, therefore, test claimant reserved the right to respond, if needed, when the attachments may be received in the future.

On July 29, 2004, copies of those attachments were supplied to me by your office.<sup>1</sup> Therefore, I am now augmenting my prior response of May 5, 2004 to further respond to the comments of CCC to address the issues raised by the Attachments and to address facts discovered through additional research facilitated by the Attachments.

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<sup>1</sup> Page 11 of Attachment 1 was not received.

**Condition 1 - Standards of Scholarship**

CCC refers to Attachment 1<sup>2</sup> and Attachment 2<sup>3</sup>. These references, however, are incomplete. The complete Title 5 regulations pertaining to Standards of Scholarship, as they existed on December 31, 1974, are found in former Division 2, Chapter 4, sections 51300 through 51308. A copy of those regulations is attached hereto as Exhibit "A" and is incorporated herein by reference.

Former Chapter 4 (Standards of Scholarship) was amended thereafter as follows:

Sections 51301 (Grading Practices), 51302 (Grade Options), 51302.5 (Credit by Examination), 51303 (Standards for Probation), 51304 (Standards for Dismissal), 51305 (Units Attempted), 51306 (Grade Point Average), 51307 (Notification of Probation and Dismissal), and 51308 (Grades Offered) were amended to make technical changes. (See: Register 77, No. 45)

Section 51315 (District Policy for Course Repetition) was added on April 29, 1977. (See: Register 77, No. 18) Therefore, for the first time, community college districts were required to adopt and publish procedures or regulations pertaining to the repetition of courses for which substandard work had been recorded. Community college districts were also required, for the first time, when course repetition occurred to annotate the permanent academic record in such a manner that all work remains legible, ensuring a true and complete academic history.

Section 51316 (Course Repetition: Implementation) was added on April 29, 1977 and amended on November 4, 1977. (See: Register 77, No. 18 and Register 77, No. 45) Therefore, for the first time, community college districts were (a) required to refrain from adopting any regulation or procedure which conflicted with other specified Education Code sections, (b) allowed to permit repetition of any course taken in any accredited college or university and for which substandard academic performance was recorded, (c) required to indicate which courses or categories of courses were exempt from

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<sup>2</sup> Attachment 1 is a document approved for filing on August 26, 1969. My subsequent research reveals that it was published in Register 69, No. 35, as an emergency measure on that date.

<sup>3</sup> Attachment 2 is a document approved for filing on July 1, 1971. My subsequent research reveals that it was published in Register 71, No. 27, on that date.

consideration under these regulations, (d) required to deem any course repetition permitted to constitute "unusual circumstances" and, therefore, require prior written permission from the district superintendent, (e) required to clearly indicate any courses repeated on the student's permanent academic record, using an appropriate symbol, (f) required to publish adopted procedures or regulations, (g) allowed to honor similar prior course repetition actions by other accredited colleges and universities, and (h) required to maintain a careful record of actions taken under course repetition procedures or regulations to include in periodic reports which may be required by the Chancellor.

Section 51318 (District Policy for Academic Renewal Without Course Repetition) was added on April 29, 1977. (See: Register 77, No. 18) Therefore, for the first time, the governing boards of community college districts were required to adopt and publish procedures or regulations pertaining to the alleviation of previously recorded, substandard academic performance which was not reflective of a student's demonstrated ability. And, when previously recorded, substandard course work was to be disregarded in the computation of grade point averages, and districts were required to annotate the student's permanent academic record in such a manner that all work remained legible, insuring a true and complete academic history.

Section 51319 (Academic Renewal Without Course Repetition: Implementation) was added on April 29, 1977. (See: Register 77, No. 18) Therefore, for the first time, governing boards of community college districts, in adopting procedures or regulations pertaining to the alleviation of previously recorded substandard academic performance which was not reflective of a student's demonstrated ability, were (a) restrained from adopting any regulation or procedure which conflicted with specified Education Code sections, (b) required to state specified data, and (c) required to publish adopted procedures to be followed in implementing the procedures or regulations adopted stating at a minimum the procedure to be followed by students and naming district officers and personnel responsible for implementing the procedures.

Section 51302.5 was amended to make a technical correction on November 15, 1979. (See: Register 79, No. 46)

Section 51301 was amended on March 14, 1980 to delete the provision allowing governing boards to establish a deadline and make provisions for a student to withdraw from a class without penalty, and to make technical corrections. (See: Register 80, No. 11)

Section 51302 was amended on March 14, 1980. (See: Register 80, No. 11)  
Subdivision (a) was amended to require, for the first time, that the governing board of a

district shall specify in its catalog the category into which each course falls. Subdivision (e) was added to provide, for the first time, that independent study courses may be graded on a "credit/no credit" basis. Subdivision (f) was added to provide, for the first time, that when a district offers courses in which there is a single satisfactory standard of performance for which unit credit is assigned, the "CR/NC" grading system shall be used to the exclusion of other grades.

Section 51302.5 (Credit by Examination) was amended on March 14, 1980. (See: Register 80, No. 11) Subdivision (a) was added to require, for the first time, that governing boards adopt and publish procedures and regulations pertaining to credit by examination. The provisions of the section prior to 1980 were placed in subparagraph (b). Subdivision (c) was added to require, for the first time, that the student's academic record be clearly annotated to reflect that credit was earned by examination. Subdivision (d) was added to provide that units for which credit was given by examination shall not be counted in determining the required 12 semester hours in residence.

Section 51303 (Standards for Probation) was amended on March 14, 1980 and again on May 8, 1980. (See: Register 80, No. 11, and Register 80, No. 19) The provisions of the section prior to 1980 were placed in subparagraph (a). Subparagraph (b) was added to provide, for the first time, that certain students be placed on progress probation. Subparagraph (c) was added to provide that governing boards of community college districts may adopt standards of probation that do not exceed those standards specified in subdivisions (a) and (b).

Section 51303.5 (Removal from Probation) was added on March 14, 1980 and amended on May 8, 1980. (See: Register 80, No. 19) New subdivision (a) required, for the first time, that a student shall be removed from academic probation when the student's accumulated grade point average was 2.0 or higher. New subdivision (b) required, for the first time, that a student on progress probation shall be removed from probation when the entries of "W," "I," and "NC" dropped below 50 percent. New subdivision (c) required, for the first time, that the governing board of a district adopt and publish procedures and conditions for probation, appeals from probation and requests for removal from probation.

Section 51304 (Standards for Dismissal) was amended on March 14, 1980 and again on May 8, 1980. (See: Register 80, No. 11, and Register 80, No. 19) An introductory paragraph was added to require community college districts to consider certain semesters and quarters as being consecutive. The provisions of the section prior to 1980 (when students on academic probation shall be subject to dismissal) were placed

in subparagraph (a). Subdivision (b) was added to provide, for the first time, when a student who has been placed on progress probation shall be subject to dismissal. Subdivision (c) was added to require, for the first time, that the governing board of a district adopt and publish procedures and conditions for dismissal, appeal of dismissal and requests for reinstatement. The former provisions requiring district boards to adopt rules setting forth the circumstances that warrant exceptions to the standards for dismissal were placed in new subdivision (d).

Section 51306 (former heading: Grade Point Average - amended now to "Academic Record Symbols and Grade Point Average") was amended on March 14, 1980 and again on May 8, 1980. (See: Register 80, No. 11, and Register 80, No. 19). Subdivision (a) was amended to require, for the first time, that only specified evaluative symbols be used for grading. Subdivision (b) was amended to require, for the first time, that the governing board of a district publish the point equivalencies for grades. Subdivision (c) was added and amended to provide that the governing board may authorize the use of certain non-evaluative symbols.

Section 51307 (Notification of Probation and Dismissal) was amended on March 14, 1980. (See: Register 80, No. 11) In addition to technical changes, the section was amended to provide, for the first time, that each community college also make every reasonable effort to provide counseling and support services to a student on probation. The amendment also required districts, for the first time, to make every reasonable effort to notify a student of the student's removal from probation or reinstatement after dismissal within established timelines. The amendment also required districts, for the first time, to publish their probation and dismissal policies and procedures in the college catalog.

Former Section 51308 (Grades Offered) was repealed on March 14, 1980 and a new Section 51308 (Grade Changes) was added on that date. (See: Register 80, No. 11) New subdivision (a) required the instructor of any course to determine the grade to be awarded. New subdivision (b) authorized the governing board to authorize a student who has received credit for a course taken on a "credit-no credit" basis within the district to convert that grade to a grade based on a grading scale by taking an appropriate examination. New subdivision (c) required, for the first time, that the governing board of a district adopt and publish procedures and regulations pertaining to the repetition of courses for which substandard work has been recorded and to make appropriate annotations of any courses repeated on the student's permanent academic record.

Section 51315 (District Policy for Course Repetition) was amended on March 14, 1980. (See: Register 80, No. 11) For purposes of course repetition, academic renewal and all

other related provisions, the term "substandard" was defined. In addition, in such cases, the procedures in specified regulation sections were to be followed.

Section 51316 (Course Repetition: Implementation), Section 51318 (District Policy for Academic Renewal Without Course Repetition), and Section 51319 (Academic Renewal Without Course Repetition: Implementation) were amended on March 14, 1980 to make technical changes. (See: Register 80, No. 11)

Section 51325 was added on March 14, 1980 to provide, for the first time, that the governing board of a district may request a reasonable phase-in period from the Chancellor when adopting regulations or otherwise implementing the provisions of the Chapter.

Section 51302 (Credit - No Credit Options) was amended on May 14, 1982 to delete former subdivision (c) which provided that a governing board could authorize a student to convert his or her grade by taking an appropriate examination. (See: Register 82, No. 20)

Section 51302.5 (Credit by Examination) was amended on May 14, 1982 to delete the reference to subdivision (f) of Section 55002. (See: Register 82, No. 20)

Section 51305 (Units Attempted) was amended on May 14, 1982 to delete units of credit earned when the student was enrolled in any college, university, or grades 13 and 14 from required calculations and limit the calculations only to those when enrolled in the current community college of attendance. (See: Register 82, No. 20)

Section 51306 (Academic Record Symbols and Grade Point Average) was amended on May 14, 1982. (See: Register 82, No. 20) Subdivision (c) was amended to limit the use of designated non-evaluative symbols only under specified controls and conditions. The definition of the "IP" symbol was amended to require the appropriate faculty to assign an evaluative symbol (grade) when a student was enrolled in an "open-entry, open-exit" course, was assigned an "IP" at the end of an attendance period, and did not enroll in that course in the subsequent attendance period. The definition of the "W" symbol was amended to provide for authorization to withdraw, upon petition, in extenuating circumstances, and to define "appropriate faculty." Other technical corrections were also made.

Section 51307 (Notification of Probation and Dismissal) was amended on May 14, 1982 to delete three requirements to make "every reasonable effort" to require only "reasonable efforts" (See: Register 82, No. 20)

Section 51308 (Grade Changes) was amended on May 14, 1982 to delete former subdivision (b) allowing the governing board to authorize a student to convert a "credit-no credit" basis to a grade based on a grading scale. A new subdivision (b) was added to require the governing board of a district, for the first time, to adopt and publish procedures and regulations pertaining to the repetition of courses for which substandard work had been recorded and to require appropriate notations of any courses repeated. (See: Register 82, No. 20)

Section 51315 (District Policy for Course Repetition) was amended on May 14, 1982 to delete references to certain regulation sections. (See: Register 82, No. 20)

Section 51317 (Course Repetition: Special Circumstances) was added on May 14, 1982 to add, for the first time, procedures or regulations pertaining to courses for which substandard work had not been recorded. Subdivision (b) required annotation of the student's permanent record when course repetition under the section occurred. (See: Register 82, No. 20)

Section 51325 (Request for Phase-In) was repealed on May 14, 1982. (See: Register 82, No. 20)

Chapter 4 (Sections 51300 through 51319, not consecutive) was repealed on July 13, 1983. (See: Register 83, No. 29)

The test claim regulations (Title 5, sections 51002 and 55750 through 55765 mostly<sup>4</sup> added on July 13, 1983) are attached to the test claim in Exhibit 4.

A comparison of the requirements of the pre-1975 regulations (Exhibit "A"), the regulations added since 1975, and the test claim regulations (Exhibit 4), clearly shows that the test claim requirements are much more extensive than those required before 1975. For example, but not by way of limitation:

1. Pre-1975 regulations did not require that adopted regulations be filed with the Chancellor's office. [Title 5, Section 55750]

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<sup>4</sup> Section 55765.5 (Remedial Coursework Limit) was added on June 5, 1990. (See: Register 90, No. 37) Section 55758.5 (Grade Point Averaging) was added on October 25, 1991. (See: Register 92, No. 7) Sections 55753.5 (Articulation of High School Courses) and 55753.7 (Advanced Placement Examinations) were added on January 4, 2002. (See: Register 2002, No. 8)

2. Pre-1975 regulations did not provide for "credit-no credit" grading for independent study courses. [Title 5, Section 55752(d)]
3. Pre-1975 regulations did not require adoption and publication of procedures and regulations pertaining to credit by examination, the nature and content of which is to be determined solely by faculty, separate examinations for each course, annotations on students' records and offering students a credit-no credit option. [Title 5, Section 55753(a)(c)(d)(e)(f)]
4. Pre-1975 regulations did not address articulation of high school courses. [Title 5, Section 55753.5]
5. Pre-1975 regulations did not address advanced placement examinations. [Title 5, Section 55753.7]
6. Pre-1975 regulations did not consider progress probations or limit adoption of standards for probation. [Title 5, 55754(b)(c)]
7. Pre-1975 regulations did not detail specific requirements for a student's removal from probation. [Title 5, Section 55755]
8. Pre-1975 regulations did not govern standards for dismissal of students placed on progress probation and did not require publication of procedures and conditions for dismissal and appeal of dismissal and requests for reinstatement. [Title 5, Section 55756(b)(c)]
9. Pre-1975 regulations did not place limits on the amount of remedial coursework that students may take. [Title 5, Section 55756.5]
10. Pre-1975 regulations did not govern academic record symbols and grade point averages. [Title 5, Section 55758]
11. Pre-1975 regulations did not require districts to make a reasonable effort to provide counseling and other support services to a student on probation to help the student overcome any academic difficulties; or to make reasonable efforts to notify a student of removal from probation or reinstatement after dismissal within timelines established by the district; or publish probation and dismissal policies and procedures in the college catalog. [Title 5, Section 55759]
12. Pre-1975 regulations did not govern grade changes. [Title 5, Section 55760]

13. Pre-1975 regulations did not require adoption and publication of procedures pertaining to the repetition of courses for which substandard work has been recorded. [Title 5, Section 55761]
14. Pre-1975 regulations did not govern the implementation of procedures or regulations for course repetitions. [Title 5, Section 55762]
15. Pre-1975 regulations did not govern special circumstances when courses may be repeated. [Title 5, Section 55763]
16. Pre-1975 regulations did not require adoption and publication of procedures or regulations pertaining to the alleviation of previously recorded substandard academic performance which is not reflective of a student's demonstrated ability. [Title 5, Section 55764]
17. Pre-1975 regulations did not govern implementation of procedures or regulations pertaining to academic renewal without course repetition. [Title 5, Section 55765]

### **Condition 2 - Degrees and Certificates**

CCC refers to Attachment 1 (for former Section 51005) and Attachment 3<sup>5</sup>. Attachment 3, as published, added former Chapter 8 (Sections 51620 through 51626) pertaining to Degrees and Certificates granted after September 1, 1973. Degrees granted prior to that date were governed by Chapter 7 (Sections 51600 through 51606) which is not relevant to this test claim. The Title 5 regulations pertaining to Degrees and Certificates, as they existed on December 31, 1974, are attached hereto as Exhibit "B" and are incorporated herein by reference.

Sections 51625 (Certificate of Achievement) and 51626 (Duty to Grant Degree or Diploma) were repealed and replaced by new sections 51628 and 51629 on June 9, 1982. The new section headings and text were substantially similar to the repealed sections. (See: Register 82, No. 24)

A new Section 51626 governing the minimum requirements for the Associate Degree was added on June 9, 1982. (See: Register 82, No. 24)

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<sup>5</sup> Attachment 3 is a document approved for filing on October 1, 1971. My subsequent research reveals that it was published in Register 71, No. 40, on that date.

Former Chapter 8 (Degrees and Certificates), Sections 51620 through 51629, was repealed on July 13, 1983. (See: Register 83, No. 29)

The test claim regulations (Title 5, sections 51004 and 55800 through 55810 mostly<sup>6</sup> added on July 18, 1983) are attached to the test claim in Exhibit 4.

A comparison of the requirements of the pre-1975 regulations (Exhibit "B"), the new regulations since 1975, and the test claim regulations (Exhibit 4), show that the test claim requirements are more extensive than required before 1975. For example, but not by way of limitation:

1. Pre-1975 regulations did not require that the policy adopted by the board regarding degrees and certificates be published in the college catalog and filed with the Chancellor's Office. [Section 55800]
2. Pre-1975 regulations did not require the district to receive and process student petitions seeking that noncredit courses be counted toward associate degrees. [Section 55807]

### **Condition 3 - Open Courses**

CCC again refers to Attachments 1 and 2 in order to cite former Section 51003, subdivision (c) and former Section 51102. Copies of those sections, as they existed on December 31, 1974, are attached hereto as Exhibit "C." As can be seen, these two sections really have nothing to do with "Open Courses."

A new Division 9<sup>7</sup>, chapters<sup>8</sup> 1 through 4 (Sections 58000-58253), was added on December 29, 1971. (See: Register 71, No. 1) This included sections 58100 through 58110 which regulated Open Courses. This Division 9 was repealed on December 21,

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<sup>6</sup> Section 55805.5 (Types of Courses Appropriate to the Associate Degree) was added on October 7, 1988. (See: Register 88, No. 42) Section 55800.5 (Minimum Credit Hours for Graduation from Two-Year Course) was added on March 4, 1991. (See: Register 91, No. 23)

<sup>7</sup> Effective April 1, 1990 the hierarchical headings used within the California Code of Regulations were renamed. Division 9 is now Chapter 9.

<sup>8</sup> See footnote 7. Chapters are now subchapters.

1981, effective January 20, 1982. (See: Register 81, No. 52) A replacement Division 9 was not added until July 29, 1982, effective August 28, 1982. (See: Register 82, No. 31) Therefore, all of the provisions of Division 9 (now Chapter 9), including Subchapter 2 (Limitations on State Aid), Article 1 - (Open Courses), Sections 58102, 58104, 58106, 58107, and 58108 (the test claim regulations) are all new programs.

The test claim regulations (Title 5, sections 51006 and 58102 through 58108, not consecutive) are attached to the test claim in Exhibit 4.

#### **Condition 4 - Comprehensive Plans**

CCC refers to Attachment 4<sup>9</sup>. The Title 5 regulations pertaining to Educational Master Plans, as they existed on December 31, 1974, are found in former Division 6<sup>10</sup>, Chapter 5, sections 55400 et seq. A copy of those regulations is attached hereto as Exhibit "D" and is incorporated herein by reference.

The test claim regulations (Title 5, Sections 51008 and 55401 through 55404) are attached to the test claim in Exhibit 4.

A comparison of the Exhibit "D" regulations to the test claim regulations show that the regulations as they existed on December 31, 1974 did not include comprehensive or long range master plans for facilities.

#### **Condition 7 - New Colleges and Education Centers**

All of the test claim regulations (Sections 51014, 55825, 55827, 55828, 55829, 55830, and 55831) were added on July 13, 1983. (See: Register 1983, No. 29).

My additional research has discovered that former Chapter 10 (Sections 51800 through 51808, not consecutive) also regulated the approval of new colleges and educational

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<sup>9</sup> Attachment 4 is a document approved for filing on June 28, 1971. My subsequent research reveals that it was published in Register 71, No. 27, on July 1, 1971.

<sup>10</sup> As of December 31, 1974, the only regulations affirming and fixing the minimum standards for entitlement to state aid were found in Division 2. (former Title 5, Section 51000) This fact is not relevant to the determination of what test claim duties, if any, existed prior to 1975.

centers. This chapter, however, was not added until June 27, 1975. (See: Register 1975, No. 26) This chapter was repealed on July 13, 1983. (See: Register 83, No. 29)

Therefore, all of the regulations governing new colleges and educational centers were enacted after 1974.

### **Condition 9 - Counseling**

CCC refers to Attachment 1. The Title 5 regulations pertaining to Counseling, as they existed on December 31, 1974, are found in former Division 2, Chapter 6, sections 51500 et seq. A copy of those regulations is attached hereto as Exhibit "E" and is incorporated herein by reference.

The test claim regulation (Title 5, section 51018) is attached to the test claim in Exhibit 4.

A comparison of the requirements of the pre-1975 regulations (Exhibit "E") and the test claim regulation (Exhibit 4) clearly shows that the test claim requirements are much more extensive than required before 1975. For example, but not by way of limitation:

1. Pre-1975 regulations did not require governing boards to adopt regulations and file those regulations, as well as any amendments, with the Chancellor's Office. [Title 5, Section 51018(a)]
2. Pre-1975 regulations did not require governing boards to publicize organized and functioning counseling programs in each college within the district. [Title 5, Section 51018(b)]
3. Pre-1975 regulations did not require career counseling. [Title 5, Section 51018(b)(2)]
4. Pre-1975 regulations did not require personal counseling. [Title 5, Section 51018(b)(3)]
5. Pre-1975 regulations did not require coordination with the counseling aspects of other services to students. [Title 5, Section 51018(b)(4)]

### **Condition 15 - Shared Governance**

CCC refers to former section 51004 in Attachment 1. The Title 5 regulation pertaining to Shared Governance, as it existed on December 31, 1974, is found in former Division 2, Chapter 1, section 51004. A copy of that regulation is attached hereto as Exhibit "F" and is incorporated herein by reference.

It would appear from the best available evidence that former Section 51004 was repealed sometime after its enactment on August 26, 1969 (See: Register 69, No. 35) and prior to April 18, 1970. (See: Declaration of Leo Shaw, submitted herewith) If this best evidence is correct, all of the requirements relative to shared governance are new programs since current Section 51023 was not enacted until July 13, 1983. (See: Register 83, No. 29)

Current Sections 51023.5 (Staff) and 51023.7 (Students) were not enacted until March 12, 1991. (See: Register 91, No. 23) Therefore, the current regulations found in these two latter sections are all new programs.

The test claim regulations (Title 5, sections 51023, 51023.5 and 51023.7) are attached to the test claim in Exhibit 4.

Even if the Commission should find that former Section 51004 was not repealed when suggested by the best evidence available, or was replaced by some other yet unidentified pre-1975 regulation, a comparison of the requirements of the pre-1975 regulation (Exhibit "F") and the test claim regulations (Exhibit 4) clearly show that the test claim requirements are much more extensive than required before 1975. For example, but not by way of limitation:

1. Pre-1975 regulations did not require governing boards to adopt policy statements on academic freedom, make them available to faculty and file them with the Chancellor. [Title 5, Section 51023(a)]
2. Pre-1975 regulations did not require governing boards to adopt detailed policies and procedures pertaining to staff. [Title 5, Section 51023.5(a)(1)(2)]
3. Pre-1975 regulations did not require consultations between the governing board and representatives of existing staff councils, committees, employee organizations, and other such bodies; and, where no groups or structures for participation exist that provide group staff representation, to broadly inform all staff of the policies and procedures being developed, invite the participation of staff, and provide opportunities for staff to express their views. [Title 5, Section 51023.5(a)(3)]

4. Pre-1975 regulations did not require that all staff be provided with opportunities to participate in the formulation and development of district and college policies and procedures. [Title 5, Section 51023.5(a)(4)(5)(6)]
5. Pre-1975 regulations did not require districts to adopt or implement policies and procedures that provide students the opportunity to participate effectively in district and college governance. [Title 5, Section 51023.7]

### CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information or belief.

Sincerely,



Keith B. Petersen

C: Per Mailing List Attached

## DECLARATION OF LEO SHAW

I, Leo Shaw, the undersigned declare:

1. I am now, and have been for the past four years, an employee of SixTen and Associates where I have been designated an Associate. My primary duties are to assist management with the preparation and written presentation of test claims and incorrect reduction claims.
2. All of the statements contained in this declaration are made and based on my own personal knowledge and, if called as a witness, I could testify competently thereto.
3. I hold a Juris Doctorate degree awarded in 1971 by the University of San Diego School of Law. I have been doing law library research, or directing others in law library research, now for thirty-seven (37) years.
4. Researching the California Code of Regulations, especially historical derivations, is difficult. The reason for the difficulty is that current regulations, as published, do not usually provide annotations to prior or similar regulations or identify repealed sections.
5. New regulations and amended regulations are published in registers. The number of the register indicates the year of publication. The new regulations and amendments are then numbered. For example, a citation of Register 80, No. 4, would indicate that it was the fourth publication in 1980. This method of citation is not always accurate and there are some gaps in the process.
6. I researched, or caused to be researched, the original Title 5 Regulations

which comprised the rules and regulations affirming and fixing the minimum standards, satisfaction of which entitled Community Colleges to receive state aid.

7. The section pertaining to Academic Senates or Faculty Councils was originally found in Title 5, Part VI, Chapter 1, Article 5, Section 51004. Article 5, Sections 51000 through 51005, was published on August 26, 1969, as an emergency measure. (See: Register 69, No. 35)

8. Sections 51001 through 51005 no longer appeared thereafter. For example, Chapter 1 was published again on April 18, 1970 in Register 70, No. 16. Sections 51001 through 51005 no longer appeared in the Table of Contents or in the text of Chapter 1. A copy of that portion of Register 70, No. 16 is attached hereto as Exhibit "A" and is incorporated herein by reference.

9. I have researched, and have caused others to research, the "disappearance" of Sections 51001 through 51005 after August 26, 1969 and have been unable to determine why those sections no longer appear.

10. The absence of Sections 51001 through 51005 does not appear to be an error in Register 70, No. 16. Those sections also do not appear in the Table of Contents or the text of Chapter 1 as printed on July 3, 1971 in Register 71, No. 27, a copy of which is attached hereto as Exhibit "B" and is incorporated herein by reference.

11. A new Chapter 1, captioned "Minimum Standards," was added on July 13, 1983. (See: Register 83, No. 29) The history of new Section 51000, as published in Register 83, No. 29, notes the repeal of former Chapter 1 (consisting only of Section

51000) on the same date.

12. Although, I have not been able to find the repealer of former Section 51004, the best evidence found indicates that it was repealed prior to 1975.

13. I have read Attachments 1, 2, 3 and 4 as they were supplied to SixTen and Associates by staff of the Commission on State Mandates. Have those attachments allowed me to locate regulations published on August 26, 1969 in Register 69, No. 35, on April 18, 1970 in Register 70, No. 16, on July 1, 1971 in Register 71, No. 27 and on October 1, 1971 in Register 71, No. 40.

14 I have prepared Exhibits "A" through "F", inclusive, attached to the augmented response of SixTen and Associates dated September 15, 2004. I am informed and believe that the text of those exhibits accurately summarize the additions, renumbering and amendments of the Title 5 Regulations set forth therein. I am informed and believe that those exhibits accurately represent the text of those Title 5 Regulations as of December 31, 1974.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing statements are true and correct, except as to those matters which are stated upon my information and belief, and, as to those matters I believe them to be true.

Executed on September 21, 2004 at San Diego, California



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Leo Shaw

**EXHIBIT "A"**

DIVISION 2 COMMUNITY COLLEGE STANDARDS

Detailed Analysis

CHAPTER 1. GENERAL PROVISIONS

Section 51000. State Aid

CHAPTER 2. INSTRUCTIONAL PROGRAM

Section 51100. Objectives  
51101. Curriculum

Section 51102. Grades Offered

CHAPTER 3. FACULTY

Section 51200. Faculty Personnel

Section 51201. Conditions of Instruction

CHAPTER 4. STANDARDS OF SCHOLARSHIP

Section 51300. Regulations  
51301. Standards for Probation and Dismissal

Section 51302. Reinstatement

CHAPTER 5. FACILITIES

Section 51400. Library

Section 51401. Facilities for Certain Courses

CHAPTER 6. COUNSELING SERVICES

Section 51500. Counseling Services  
51501. Services for Students

Section 51502. Services for First-time Freshman  
51503. Services for Students on Probation

CHAPTER 7. DEGREES AND CERTIFICATES

Section 51600. Regulations  
51601. Definitions  
51602. Associate in Arts Degree  
51603. Associate in Science Degree

Section 51604. Certificate of Achievement  
51605. Credit by Examination  
51606. Duty to Grant Degree or Diploma

CHAPTER 1. GENERAL PROVISIONS

51000. State Aid. The provisions of this division are adopted under the authority of Education Code Section 25510 and comprise the rules and regulations affirming and fixing the minimum standards, satisfaction of which entitles a district maintaining Community Colleges to receive state aid for the support of their Community College.

Note: Authority cited for Division 2: Sections 193, 197 and 25510 Education Code.

**CHAPTER 2. INSTRUCTIONAL PROGRAM**

**51100. Objectives.** Each Community College shall have stated objectives for its instructional program and for the functions which it undertakes to perform.

**51101. Curriculum.** Each Community College shall establish such programs of education and courses as will permit the realization of the objectives and functions of the Community College. All courses shall be approved by the Chancellor in the manner provided in Chapter 2 (commencing with Section 55100) of Division 6 of this part.

**51102. Grades Offered.** (a) The governing board of a district maintaining a Community College may by regulation offer courses in either or both of the following categories and shall specify in its catalog the category or categories in which the course falls:

- (1) Courses wherein all students are evaluated on a "credit—no credit" basis.
- (2) Courses wherein each student may elect on registration, or within a reasonable time thereafter, whether the basis of his evaluation is to be a "credit—no credit" or a letter grade.

(b) All units earned on a "credit—no credit" basis in California institutions of higher education or equivalent out-of-state institutions shall be counted in satisfaction of Community College curriculum requirements. Such units shall be disregarded in determining a student's grade point average for all purposes for which a grade point average is required.

(c) The governing board of a district maintaining a Community College may authorize a student who has received credit for a course taken on a "credit—no credit" basis within the district to convert this grade to a letter grade by taking an appropriate examination.

(d) In the absence of a regulation of the type authorized in subdivision (a) of this section, a course will be presumed to be offered on a letter-grade basis.

**EXHIBIT "B"**

## DIVISION 2. COMMUNITY COLLEGE STANDARDS

## Detailed Analysis

## CHAPTER 1. GENERAL PROVISIONS

Section  
51000. State Aid

## CHAPTER 2. INSTRUCTIONAL PROGRAM

Section  
51100. Objectives  
51101. Curriculum

Section  
51102. Identification of Courses  
51103. College Credit Course

## CHAPTER 3. FACULTY

Section  
51200. Faculty Personnel

Section  
51201. Conditions of Instruction

## CHAPTER 4. STANDARDS OF SCHOLARSHIP

Section  
51300. Regulations  
51301. Grading Practices  
51302. Credit Courses  
51303. Standards for Probation  
51304. Standards for Dismissal  
51305. Units Attempted

Section  
51306. Probation and Dismissal—  
Grade Point Average  
51307. Determination of Probation  
and Dismissal  
51308. Reinstatement

## CHAPTER 5. FACILITIES

Section  
51400. Library

Section  
51401. Facilities for Certain Courses

## CHAPTER 6. COUNSELING SERVICES

Section  
51500. Counseling Services  
51501. Services for Students

Section  
51502. Services for First-time Freshman  
51503. Services for Students on  
Probation

## CHAPTER 7. DEGREES AND CERTIFICATES

Section  
51600. Regulations  
51601. Definitions  
51602. Associate in Arts Degree  
51603. Associate in Science Degree

Section  
51604. Certificate of Achievement  
51605. Credit by Examination  
51606. Duty to Grant Degree or  
Diploma

## CHAPTER 1. GENERAL PROVISIONS

51000. State Aid. The provisions of this division are adopted under the authority of Education Code Section 25510 and comprise the rules and regulations affirming and fixing the minimum standards, satisfaction of which entitles a district maintaining Community Colleges to receive state aid for the support of their Community Colleges.

NOTE: Authority cited for Division 2: Sections 193, 197 and 25510, Education Code.

**CHAPTER 2. INSTRUCTIONAL PROGRAM**

**51100. Objectives.** Each Community College shall have stated objectives for its instructional program and for the functions which it undertakes to perform.

**51101. Curriculum.** Each Community College shall establish such programs of education and courses as will permit the realization of the objectives and functions of the Community College. All courses shall be approved by the Chancellor in the manner provided in Chapter 2 (commencing with Section 55100) of Division 6 of this part.

**\*51102. Identification of Courses.** For each course offered, a Community College shall make available to students through college publications at least all of the following facts before he enrolls in the course:

(a) Whether the course is offered on the basis of credit—no credit and, if so, which provision of Section 51302, subdivision (a) is applicable.

(b) Whether the course is other than a graded course.

(c) Whether the course is a college credit course under the provisions of Section 51103.

*NOTE:* Authority cited: Sections 193, 197 and 25510, Education Code.

*History:* 1. New section filed 7-1-71; effective thirtieth day thereafter (Register 71, No. 27). Former section 51102 renumbered to 51302.

**\*51103. College Credit Course.** A "college credit course" is a course given in a Community College which meets one or more of the following requirements:

(a) The course is part of an approved educational program.

(b) The credit awarded by the Community College for completion of the course is accepted as completion of a portion of an appropriate educational sequence leading to an associate degree or baccalaureate degree by one or more of the following:

(1) The University of California

(2) A California State College

(3) An accredited independent college or university.

*NOTE:* Authority cited: Sections 193, 197 and 25510, Education Code.

*History:* 1. New section filed 7-1-71; effective thirtieth day thereafter (Register 71, No. 27).

\*The community colleges may identify their courses and maintain their grading practices in accordance with these regulations on and after July 31, 1971. The community colleges shall identify courses to be offered during and after the fall semester or quarter, 1972, in accordance with these regulations and shall maintain their grading practices beginning on the first day of the fall semester or quarter, 1972, in accordance with these regulations.

## Exhibit "A"

### TITLE 5, CALIFORNIA CODE OF REGULATIONS

#### Part VI. California Community Colleges

(As of December 31, 1974)

#### Chapter 4. Standards of Scholarship

##### **Section 51300 Regulations**

The governing board of a district maintaining a Community College shall adopt regulations consistent with the provisions of this chapter. The regulations shall be published in the college catalog under appropriate headings.

(New Section filed 4-18-70. Register 70, No. 16) (Amendment filed 7-1-71; effective thirtieth day thereafter. Register 71, No.27)

##### **Section 51301 Grading Practices**

The governing board of the district maintaining a Community College shall determine the grading practice to be used in that Community College. The grading practice shall be based on sound academic principles and shall conform to the following standards:

- (a) Work in all courses acceptable in fulfillment of the requirements for an associate or baccalaureate degree, a certificate, diploma, or license shall be graded.
- (b) Work shall be graded in accordance with the provisions of Section 51302 or Section 51605 or in accordance with a grading scale.

The grading practice adopted by the governing board shall be published as a part of the catalog or class schedule of the Community College to which it applies. The governing board of a district may provide for withdrawal without penalty for students who withdraw from a class before the deadline established by the governing board.

(Repealer and new section filed 7-1-71; effective thirtieth day thereafter. Register 71, No. 27)

##### **Section 51302 Credit Courses**

Exhibit "A"  
Standards of Scholarship  
As of December 31, 1974

(a) The governing board of a district maintaining a Community College may offer courses in either or both of the following categories:

(1) Courses wherein all students are evaluated on a "credit – no credit" basis.

(2) Courses wherein each student may elect on registration, or within such time thereafter as the district governing board may determine by rules and regulations, whether the basis of his evaluation is to be "credit – no credit" or a grading scale.

(b) All units earned on a "credit – no credit" basis in accredited California institutions of higher education or equivalent out-of-state institutions shall be counted in satisfaction of Community College curriculum requirements. Such units shall be disregarded in determining a student's grade point average for all purposes for which a grade point average is required.

(c) The governing board of a district maintaining a Community College may authorize a student who has received credit for a course taken on a "credit – no credit" basis within the district to convert this to a grade based on a grading scale by taking an appropriate examination.

(d) In the absence of a regulation of the type authorized in subdivision (a) of this section, the work in a course will be presumed to be evaluated on the basis of a grading scale.

(e) The governing board shall establish a policy describing the standards for the award of a "credit" grade for a course.

(Former section 51102 amendment and renumbering filed 7-1-71; effective thirtieth day thereafter. Register 71, No.27) (Former section 51302 renumbered to 51308)

### **Section 51302.5 Credit by Examination**

The governing board of a district maintaining a Community College may grant credit to any student who satisfactorily passes an examination approved or conducted by proper authorities of the college. Such credit may be granted only to a student who is registered at the college and in good standing for a course listed in the catalog of a public Community College.

Units for which credit is given pursuant to the provisions of this section shall not

be counted in determining the 12 semester hours of credit in residence required by Section 51602.

(Amendment filed 7-1-71; effective thirtieth day thereafter. Register 71, No.27)  
(Renumbered from Section 51605 filed 10-1-71; effective thirtieth day thereafter. Register 71; No. 40)

### **Section 51303 Standards for Probation**

A student shall be placed on probation if he has earned a grade point average below 2.0 in all units attempted which were graded on the basis of a grading scale. The district board shall adopt "credit – no credit" probation rules.

The district board shall adopt rules setting forth the circumstances that shall warrant exceptions to the standards for probation herein set forth and shall file a copy of such rules with the Chancellor of the California Community Colleges.

(New sections 51303 through 51307 filed 7-1-71; effective thirtieth day thereafter. Register 71, No. 27)

### **Section 51304 Standards for Dismissal**

A student shall be dismissed if he earned a grade point average of less than 1.75 in all units attempted in each of 3 consecutive semesters (5 consecutive quarters) which were graded on the basis of a grading scale. The district board shall adopt "credit – no credit" dismissal rules.

The district board shall adopt rules setting forth the circumstances that shall warrant exceptions to the standards for dismissal herein set forth and shall file a copy of such rules with the Chancellor of the California Community Colleges.

(New sections 51303 through 51307 filed 7-1-71; effective thirtieth day thereafter. Register 71, No. 27)

### **Section 51305 Units Attempted**

For the purposes of Sections 51303 and 51304, "all units attempted" means all units of credit for which the student was enrolled in any college, university, or grades 13 and 14, regardless of whether he completed the course or received any credit or grade. The governing board of each district shall adopt rules and regulations governing the inclusion in or exclusion from "all units attempted" of units in which a student did not receive a grade or "credit – no credit" or from which the student withdrew in accordance

**Exhibit "A"**  
**Standards of Scholarship**  
**As of December 31, 1974**

with rules adopted by the district governing board.

(New sections 51303 through 51307 filed 7-1-71; effective thirtieth day thereafter.  
Register 71, No. 27)

### **Section 51306 Probation and Dismissal - Grade Point Average**

(a) Grades from a grading scale shall be averaged on the basis of the point equivalencies to determine a student's grade point average. The highest grade shall receive four points, and the lowest grade shall receive 0 points.

(b) The governing board for each Community College shall establish the point equivalencies for the grades used from the grading scale at that Community College in accordance with subsection (a) of this section. These equivalencies shall be published in the catalog of that Community College as a part of the grading practices for that Community College.

(New sections 51303 through 51307 filed 7-1-71; effective thirtieth day thereafter.  
Register 71, No. 27)

### **Section 51307 Determination of Probation and Dismissal.**

Each Community College shall make every reasonable effort to notify a student of his academic probation or dismissal no later than the fifth day of classes of the semester or quarter in which it will be in effect.

(New sections 51303 through 51307 filed 7-1-71; effective thirtieth day thereafter.  
Register 71, No. 27)

### **Section 51308 Grades Offered**

(a) The governing board of a district maintaining a Community College may by regulation offer courses in either or both of the following categories and shall specify in its catalog the category or categories in which the course falls:

(1) Courses wherein all students are evaluated on a "credit - no credit" basis.

(2) Courses wherein each student may elect on registration, or within a reasonable time thereafter, whether the basis of his evaluation is to be a "credit - no credit" or a letter grade.

**Exhibit "A"**  
**Standards of Scholarship**  
**As of December 31, 1974**

(b) All units earned on a "credit – no credit" basis in California institutions of higher education or equivalent out-of-state institutions shall be counted in satisfaction of Community College curriculum requirements. Such units shall be disregarded in determining a student's grade point average for all purposes for which a grade point average is required.

(c) The governing board of a district maintaining a Community College may authorize a student who has received credit for a course taken on a "credit – no credit" basis within the district to convert this grade to a letter grade by taking an appropriate examination.

(d) In the absence of a regulation of the type authorized in subdivision (a) of this section, a course will be presumed to be offered on a letter-grade basis.

(Renumbering from former Section 51102 filed 7-1-71; effective thirtieth day thereafter. Register 71, No.27)

## Exhibit "B"

### TITLE 5, CALIFORNIA CODE OF REGULATIONS

#### Part VI. California Community Colleges

(As of December 31, 1974)

#### DIVISION 2. COMMUNITY COLLEGE STANDARDS

##### Section 51005. Requirement for Degrees and Certificates

(a) The governing board of a district maintaining a community college shall confer the degree of associate in arts upon the satisfactory completion in grades 13 and 14 of from 60 to 64 semester hours of work in curriculum which the district accepts toward the degree (as shown by its catalog) and which includes the requirements listed in (1) through (5), provided that 12 of the required hours were secured in residence at that community college. (The governing board may make exceptions to the residence requirement in any instance in which the governing board determines that an injustice or hardship would otherwise be placed upon an individual student.) "Satisfactory completion" means either credit earned on a "credit-no credit" basis or a grade point average of 2.0 (grade C on a five point scale with zero for an F grade) or better in 13<sup>th</sup> and 14<sup>th</sup> year graded courses in the curriculum upon which the degree is based.

(1) A major consisting of at least 20 semester hours in a specified field of study;

(2) Three semester hours in the Constitution of the United States, and in American history, including the study of American institutions and ideals, and of the principles of state and local government established under the Constitution of this State, and the satisfactory passing of an examination on said courses.

(3) Two semester hours of community and personal hygiene; except that a community college student, who is a minor whose parents or guardian state in writing that the course in community and personal hygiene is contrary to the religious beliefs of the student, or if the student is not a minor if he so states in writing, may be excused from such course and permitted to substitute a two-hour course in a field or fields specifically designated by the governing board of the district in lieu of the required two-hour course in community and personal hygiene.

(4) Two semester hours in physical education earned at the rate of one-

Exhibit "B"  
Degrees and Certificates  
As of December 31, 1974

half credit per semester for a minimum of 120 minutes per week in directed physical education activities, except as a student may be exempted in accordance with Section 8162, Education Code; and

(5) Such requirements in oral and written English as the governing board of the school district may establish.

(b) The governing board of a district maintaining a community college may confer the degree of associate in science upon the satisfactory completion in grades 13 and 14 of a minimum of 60 semester hours of work which shall satisfy all the requirements for an associate in arts degree, and which work shall include a major of at least 20 semester hours in any of the following fields: engineering, physical and biological science, vocational-technical curriculums.

(c) The governing board of a district maintaining a community college shall award the appropriate diploma or degree whenever a student shall have completed all requirements of a full curriculum of the community college without regard to the length of time actually taken by the student to complete such requirements. The governing board shall grant to any student who satisfactorily completes the requirements of any course of study in less than the prescribed time the full number of semester hours scheduled for such course.

(d) The governing board of a district maintaining a community college shall issue a certificate of achievement (as determined by the governing board and specified in the catalog) to any student who successfully completes any course of study or curriculum in length less than the full number of years and grades maintained by the community college.

(e) The governing board of a district maintaining a community college may grant credit (but it shall not count toward the 12 semester hours of credit in residence required in (a)) to any student who satisfactorily passes an examination approved and conducted by proper authorities of the college. Such credit may be granted only:

(1) To a student who is registered at the college and in good standing.

(2) For a course listed in the catalog of a California public community college.

(f) The examination shall be made at the expense of the person being examined.

(g) Information contained in the physician's report is confidential, and the contents of the report shall not be divulged by an official or employee who has access to the report except to the Board of Governors of the California Community Colleges, the Teachers Retirement Board, any county superintendent of schools, the representative of any of them, or to the governing board of a district which has requested such information.

(h) The person shall file with the governing board of any district employing him as a substitute instructor the notice, or a photostatic copy or certified copy of the notice, from the county superintendent, stating that the person has passed the physical examination prescribed by the Board of Governors.

(New Article 5 (§§51000 through 51005) filed 8-26-69, as an emergency measure; effective upon filing. Register 69, No. 35)

### **Chapter 8. Degrees and Certificates** (Post September 1, 1973)

#### **Section 51620 Effective Date**

The provisions of this chapter shall apply to all degrees and certificates granted by a Community College district on and after September 1, 1973. The provisions of this chapter may be made applicable to all degrees and certificates granted on and after July 1, 1972, if the governing board of a community college district adopts regulations consistent with the provisions of this chapter which are effective on July, 1, 1972.

A student who enrolls in a community college prior to September 1, 1973, shall have the option of earning his degree under the provisions of Chapter 7 or Chapter 8 of this division if the community college in which he is enrolled has changed its degree requirements in accordance with this chapter before the degree is awarded. No degree or diploma shall be awarded under the provisions of Chapter 7 after September 1, 1975.

(New Chapter 8 (§§ 51620 through 51626) filed 10-1-71; effective thirtieth day thereafter. Register 71, No. 40)

#### **Section 51621 Regulations**

The governing board of a community college district shall adopt regulations consistent with the provisions of this chapter.

(New Chapter 8 (§§ 51620 through 51626) filed 10-1-71; effective thirtieth day

**Exhibit "B"**  
**Degrees and Certificates**  
**As of December 31, 1974**

thereafter. Register 71, No. 40)

### **Section 51622 Definitions**

For the purpose of this chapter, "satisfactorily completed" means either credit earned on a "credit-no credit" basis or a grade point average of 2.0 or better in 13<sup>th</sup> and 14<sup>th</sup> year graded courses in the curriculum upon which the degree is based.

(New Chapter 8 (§§ 51620 through 51626) filed 10-1-71; effective thirtieth day thereafter. Register 71, No. 40)

### **Section 51623 Associate in Arts Degree**

The governing board of a Community College District shall confer the degree of associate in arts upon a student who in grades 13 and 14 has satisfactorily completed from 60 to 64 semester hours of work in a curriculum which the district accepts toward the degree (as shown by its catalog) and which includes all of the following minimum requirements, provided that 12 hours of the required credit hours were secured in residence at that Community College:

(a) 18 semester units of study taken in a discipline or from related disciplines as listed in the Community Colleges "Classification of Instructional Disciplines."

(b) 15 semester units of general education which shall include at least one course in each of the following areas:

(1) Natural sciences. Those courses of study which deal with matter and energy and their interrelations and transformations (e.g., chemistry, physics, biology).

(2) Social sciences. The body of knowledge that relates to man as a member of society or component of society, such as the state, family, or any systematized human institution (e.g., economics, political science, sociology).

(3) Humanities. Those courses of study having primarily a cultural character (e.g., languages, literature, philosophy, fine arts).

(4) Learning skills. Courses, such as oral and written communication, logic, mathematics, and statistics, designed to facilitate

acquisition and utilization of knowledge in natural sciences, social sciences, and humanities.

Students taking these courses may elect to use them to satisfy partially the general education requirements for a baccalaureate degree at the California State Colleges in accordance with the provisions of Section 40405 of this title.

(c) Ethnic studies courses shall be offered in one or more of the areas listed in subdivision (b).

The community college may determine which courses satisfy the requirements of this subdivision.

The governing board may make exceptions to the residence requirement in any instance in which it determines that an injustice or hardship would otherwise be placed upon an individual student.

(New Chapter 8 (§§ 51620 through 51626) filed 10-1-71; effective thirtieth day thereafter. Register 71, No. 40)

#### **Section 51624 Associate in Science Degree**

The governing board of a Community College district may confer the degree of associate in science upon a student who in grades 13 and 14 has completed satisfactorily a minimum of 60 semester hours of work, which shall satisfy all the requirements for an associate in arts degree and shall include a major of at least 18 semester hours in the fields of engineering, physical and biological sciences or occupational curriculums.

(New Chapter 8 (§§ 51620 through 51626) filed 10-1-71; effective thirtieth day thereafter. Register 71, No. 40)

#### **Section 51625 Certificate of Achievement**

The governing board of a Community College district shall issue a certificate of achievement, when so determined by the governing board to any student who has completed successfully any course of study or curriculum as specified in the college catalog.

(New Chapter 8 (§§ 51620 through 51626) filed 10-1-71; effective thirtieth day

thereafter. Register 71, No. 40)

**Section 51626 Duty to Grant Degree or Diploma**

The governing board of a Community College district shall award the appropriate diploma, degree or certificate whenever a student has completed all requirements for the degree, diploma or certificate without regard to the length of time actually taken by the student to complete such requirements. The governing board shall grant to any student, who has satisfactorily completed the requirements of any course of study in less than the prescribed time, credit for the full number of semester hours scheduled for such course.

(New Chapter 8 (§§ 51620 through 51626) filed 10-1-71; effective thirtieth day thereafter. Register 71, No. 40)

**Exhibit "C"**

**TITLE 5, CALIFORNIA CODE OF REGULATIONS**

**Part VI. California Community Colleges**

(As of December 31, 1974)

**DIVISION 2. COMMUNITY COLLEGE STANDARDS**

**Section 51003 Criteria and Standards for Graded Community College Courses in Grades 13 and 14.**

(a) **Definition.** For the purposes of this subsection, a course of study is defined as an organized sequence of courses of a college within a given subject area.

(b) **Criteria.** A graded course (class) in grade 13 or grade 14 shall possess one or more of the following characteristics:

(1) The course provides credit toward an associate degree; is normally considered of collegiate level; and is approved by the Board of Governors as a component of, a prerequisite to, or eligible as a required or elective course within, a course of study which leads toward an associate degree.

(2) The course is approved by the Board of Governors and is part of an occupational course of study of beyond high school level within the scope of the term "vocational and technical fields leading to employment" as the term is used in Education Code Section 22651 which leads toward an associate degree, an occupational certificate, or both.

(3) The course is approved by the Board of Governors and is recognized upon transfer by the University of California, a California state college, or an accredited independent college or university in California, as part of:

- (A) The required preparation toward a major;
- (B) The general, or general education, requirement; or
- (C) The permissible or recommended elective credits.

(c) **Standards.** Any course meeting one or more of the above criteria shall meet all of the following standards:

(1) It is a course, approved by the Board of Governors the content of which is organized to meet the requirements for the associate degree as

**Exhibit "C"**  
**Open Courses**  
**As of December 31, 1974**

specified in Section 51005 or the requirements for an occupational certificate and is a part of a course of study not exceeding 70 units in length.

(2) It must be offered as described in the college catalog or a supplement thereto which provides an appropriate title, number, and accurate description of course content. A course outline is available at the college. Course requirements and credit awarded are consistent with Education Code Section 22651.

(3) It is a course in which are enrolled only those students who have met the prerequisites for the course.

(4) It is subject to the published standards of matriculation, attendance and achievement of the college, and the enrollees are awarded marks or grades on the basis of methods of evaluation set forth by the college and are subject to the standards of retention set forth in Section 51002 or to such additional standards as may be established by the governing board of the district.

(5) It is a course in which enrollment shall not be repeated except in unusual circumstances and with the prior written permission from the district superintendent or his authorized representative or representatives.

(New Article 5 (§§51000 through 51005) filed 8-26-69, as an emergency measure; effective upon filing. Register 69, No. 35)

### **Section 51102 Identification of Courses**

For each course offered, a Community College shall make available to students through college publications at least all of the following facts before he enrolls in the course:

- (a) Whether the course is offered on the basis of credit – no credit and, if so, which provision of Section 51302, subdivision (a) is applicable.
- (b) Whether the course is other than a graded course.
- (c) Whether the course is a college credit course under the provisions of Section 51103.

(New section filed 7-1-71; effective thirtieth day thereafter. Register 71, No. 27.)  
(Former section 51102 renumbered to 51302)

Exhibit "D"

**TITLE 5, CALIFORNIA CODE OF REGULATIONS**

**Part VI. California Community Colleges**

(As of December 31, 1974)

**DIVISION 6. CURRICULUM AND INSTRUCTION**

**Chapter 5. Educational Master Plans**

**Section 55400 Definitions**

The definitions provided in the *Handbook of Definitions* issued by the Chancellor shall apply to the provisions of this chapter.

(New Chapter 5 (sections 55400 through 55405) filed 7-1-71; effective thirtieth day thereafter. Register 71, No. 27)

**Section 55401 Current and Long Range Plans**

The governing board of each Community College district shall establish policies for, and approve, current and long range educational plans and programs for each Community College which it maintains and for the district as a whole.

(New Chapter 5 (sections 55400 through 55405) filed 7-1-71; effective thirtieth day thereafter. Register 71, No. 27)

**Section 55402 Educational Master Plans**

On or before January 1, 1972, the governing board of each Community College district shall submit to the Chancellor an educational master plan for each Community College which it maintains and for the district as a whole. Each plan shall be modified and brought up to date annually and shall be submitted to the Chancellor on or before November 1 of each year thereafter.

(New Chapter 5 (sections 55400 through 55405) filed 7-1-71; effective thirtieth day thereafter. Register 71, No. 27)

**Section 55403 Form**

Exhibit "D"  
Comprehensive Plans  
As of December 31, 1974

such information as the Chancellor shall require.

(New Chapter 5 (sections 55400 through 55405) filed 7-1-71; effective thirtieth day thereafter. Register 71, No. 27)

**Section 55404 Contents**

Each plan shall contain the educational objectives of the Community College or district and the future plans for transfer programs, occupational programs, continuing education courses, and remedial and developmental programs. On the basis of current and future enrollment, it shall contain plans for the development and expansion of ancillary services, including services in the library and for counseling, placement and financial aids.

(New Chapter 5 (sections 55400 through 55405) filed 7-1-71; effective thirtieth day thereafter. Register 71, No. 27)

**Section 55405 Review and Approval**

The Chancellor shall review each master plan. On or before February 1 following the submission of each plan, he shall send a copy of his approval of it to the superintendent of each district.

(New Chapter 5 (sections 55400 through 55405) filed 7-1-71; effective thirtieth day thereafter. Register 71, No. 27)

**Exhibit "E"**

**TITLE 5, CALIFORNIA CODE OF REGULATIONS**

**Part VI. California Community Colleges**

(As of December 31, 1974)

**DIVISION 2. COMMUNITY COLLEGE STANDARDS**

**Chapter 6. Counseling Services**

**Section 51500 Counseling Services**

Each Community College shall have an adequate counseling staff, both in training and experience, and shall establish procedures to provide, and shall provide, the counseling services listed in Sections 51501 through 51503.

(New Section filed 4-18-70. Register 70, No. 16)

**Section 51501 Services for Students**

The counseling services shall assist each student in the college in the following ways:

- (a) To determine his educational goals.
- (b) To make a self-appraisal toward progress toward his goals.

(New Section filed 4-18-70. Register 70, No. 16)

**Section 51502 Services for First-time Freshman**

The counseling services shall provide to each first-time freshman described in subdivisions (a) and (b) below, who is enrolled in more than six units, special individual or group counseling and guidance, shall arrange a study load suitable to the needs of each such student, and shall keep an appropriate record of each such student.

- (a) He is a high school graduate, his scores on a qualifying test or tests were below an acceptable minimum for the college of attendance, and his grade point average in the last three years in high school was less than 2.0 (grade C on a five point scale with zero for an F grade), excluding only physical education and military science; or

**Exhibit "E"**  
**Counseling Services**  
**As of December 31, 1974**

(b) He is not a high school graduate, and his scores on a qualifying test or tests were below an acceptable minimum for the college of attendance and his grade point average in the years of high school attendance was less than 2.0 (grade C on a five point scale with zero for an F grade), excluding only physical education and military science.

(New Section filed 4-18-70. Register 70, No. 16)

**Section 51503 Services for Students on Probation**

The counseling service shall provide to each student who is on probation individual counseling and guidance service, including the regulation of his program according to his aptitude and achievements.

(New Section filed 4-18-70. Register 70, No. 16)