Received
December 26, 2012
Commission on
State Mandates

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December 26, 2012

Heather Halsey, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: CSM 02-TC-25 and CSM 02-TC-31
Los Rios Community College District
Santa Monica Community College District
West Kern Community College District
Minimum Conditions for State Aid

Dear Ms. Halsey:

I have received the Draft Staff Analysis (DSA) and Proposed Parameters and Guidelines dated December 5, 2012, to which I respond on behalf of the test claimants.

A. ORGANIZATION OF SUBJECT MATTER

On June 16, 2011, the test claimants submitted proposed parameters and guidelines in the form of nine separate programs that include subject matter headers and addtional activity language. The DSA rejects (1) the nine programs as "unnecessarily" separating the activities into separate single subject matter; (2) the use of subject headers and the reorganization of activities as confusing; and, (3) the added language as inconsistent with the statement of decision.

1. Separate subject area parameters and guidelines

The DSA parameters and guidelines list the reimbursable activities in seven program areas. These seven areas are those that were approved by the statement of decision

Received
December 26, 2012
Commission on
State Mandates

from the original twenty program areas proposed in the test claim. For the most part, the DSA parameters and guidelines essentially list by specific code section the activities approved in the statement of decision. The test claimants proposed nine programs. The DSA (7) states that the "benefit" of the test claimants' proposal is outweighed by the "confusion" that it will cause the claimants.

The arrangement into nine program areas was proposed to facilitate cost accounting for the districts when preparing annual claims. There are just two significant departures from the seven programs. First, nearly all of the seven programs have a requirement to adopt and publish policies and procedures (usually in the student catalog and class schedule which are mass printed each year). The test claimants' proposed to detach the printing and publication activities from the adoption portion, thus creating an eighth "program" ("College Catalog") in order to utilize more precise cost accounting methods, and perhaps establish a future unit cost allowance, for the cost of printing the required notification to students based on each document in which the policies and procedures are published. Adoption of policies is labor-based (staff time to draft and present the material to the governing board), whereas publication is based on materials and supplies (the number of pages and the number of copies distributed). There are distinct methods of cost accounting for both types of costs. The second departure from the arrangement in the statement of decision and the source of the test claimants' ninth program ("Corequisites Courses") is that two activities would be removed from the DSA "Curriculum" (Program 5) group of activities in order to facilitate the cost accounting for the corequisite course load.

However, both the DSA and the Controller's July 22, 2011, letter state that the arrangement of the content into the nine programs is confusing. The DSA (8) states that in the interest of simplicity and clarity the activities approved by the statement of decision should be listed in the seven program areas. If they must concede the issue of the nine programs, the test claimants propose separate parameters and guidelines based on the seven programs. The activities for the seven programs are distinct (even if badly organized in the regulations for purposes of cost accounting) and are independently implemented. This is the same factual circumstance that promoted the September 28, 2012, adoption of three separate parameters and guidelines from the one statement of decision for *Discrimination Complaint Procedures*. Separate single-subject parameters and guidelines will reduce confusion when the districts collect documentation for the annual claims and facilitate amendments required by any future legislation or litigation. Further, some of the seven programs may be amenable to a reasonable reimbursement method (unit-cost) in the future as we gain a history of the actual costs from filed annual claims.

2. Subject headers and reorganization of the activities

The DSA (7) objects to the proposed subject headers. The subject headers were proposed to organize the reimbursable activities into distinct activities to facilitate cost

Received
December 26, 2012
Commission on
State Mandates

accounting. Use of the headers should be considered on its merits for this purpose rather than reject the concept in its entirety. Like the headers used by law book publishers, the headers neither add nor subtract from the content of the regulation sections.

3. Consistency with the Statement of Decision

(A) Additional language to clarify activities

The test claimants concur that the parameters and guidelines must be consistent with the statement of decision. The proposed parameters and guidelines added language derived from other relevant Title 5 sections in order to provide specificity to essentially vague or incomplete code or regulation language. Although the proposed addtional Title 5 language was not adopted by the Commission as a separate reimbursable activity for a procedural reason (no practical compulsion to accept state funding for the operation of the colleges), the language was adopted by the state California Community College Board of Governors after public notice and hearing, usually including review by the Department of Finance, in order to implement the activities mandated by the Education Code. Since the proposed addtional Title 5 language was adopted by the Board of Governors to implement these programs, it must be, as a result of the Board of Governors' rulemaking process, inherently consistent with the Education Code sections from which the Title 5 regulations were derived. The Commission has the authority to modify (but not substantively amend) statement of decision language, and does so elsewhere for its own purposes throughout the DSA to "clarify" the statement of decision language.

(B) Limitations on reimbursement for implementation of the mandate

As a second issue of consistency, the DSA for the parameters and guidelines in several places improperly adds language that declares some portion of the approved activity, usually the actual implementation of the activity beyond adoption of a policy, to be non-reimbursable. These new limitations in the parameters and guidelines are merely declared consistent with the statement of decision, but are without explanation or citation to specific language in the statement of decision and, are in some cases, directly contrary to the language of the statement of decision.

(C) Subordinated activities

As a third issue of consistency, the DSA improperly rearranges some mandated activities that were determined by the statement of decision to be independent activities by subordinating these activities to another independent activity, thus changing the scope of reimbursable activities, usually from program implementation to just the adoption of policies and procedures. The DSA has not stated a reason to subordinate independent activities other than to state, without explanation, that it is somehow

Received
December 26, 2012
Commission on
State Mandates

consistent with the statement of decision.

B. REIMBURSABLE ACTIVITIES

Program 1 Participation in District and College Governance

A. Title 5, Sections 51023.5 and 51023.7-District Staff and Students

The statement of decision (150) adopted the following activities:

1. Establish procedures to ensure faculty, staff, and students the opportunity to express their opinions at the campus level, to ensure that these opinions are given every reasonable consideration, and to ensure that these opinions are given every reasonable consideration, and to ensure the right of the academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards.

   The procedures established shall be consistent with the minimum standards set forth in California Code of Regulations, Title 5, sections 53200-53207 (for faculty), 51023.5 (for staff), and 51023.7 (for students). (Education Code, § 70902, subdivision (b)(7) (Statutes of 1988, Chapter 973).)

Because the statement of decision language referenced Section 51023.5 (for non-faculty district staff shared governance) and Section 51023.7 (for student shared governance), the test claimants proposed that the language from those sections to be added since the language provides specific guidance to districts and eliminates confusion regarding the scope of the approved activities, which also may be of use to the Controller for audit purposes. The following Title 5 language was adopted by the Board of Governors for the purpose of implementing this program created by Education Code 70902:

C. District and College Staff
(Reference; Title 5, CCR, Section 51023.5)

1. Policies and Procedures

The governing board of a community college district shall adopt and shall comply substantially with policies and procedures that provide district and college staff the opportunity to participate effectively in district and college governance that are exclusive of and which do not encroach upon the collective bargaining process. The policies and procedures of the governing board shall ensure that the recommendations and opinions of staff are given every reasonable

Received
December 26, 2012
Commission on
State Mandates

consideration. Staff shall be provided with opportunities to participate in the formulation and development of district and college policies and procedures, and in those processes for jointly developing recommendations for action by the governing board, that the governing board reasonably determines, in consultation with staff, have or will have a significant effect on staff. (Education Code, § 70902, subdivision (b)(7) (Statutes of 1988, Chapter 973).)

2. Consultation

The governing board or its designees shall consult with the representatives of existing staff councils, committees, employee organizations, and other such bodies. Where no groups or structures for participation exist that provide representation for the purposes of this section for particular groups of staff, the governing board or its designees, shall 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. Except in unforeseeable, emergency situations, the governing board shall not take action on matters significantly affecting staff until it has provided staff an opportunity to participate in the formulation and development of those matters through appropriate structures and procedures as determined by the governing board in accordance with the provisions of this Section. (Education Code, § 70902, subdivision (b)(7) (Statutes of 1988, Chapter 973).)

D. Student
(Reference: Title 5, CCR, Section 51023.7)

1. Policies and Procedures

The governing board of a community college district shall adopt and substantially comply with policies and procedures that provide students the opportunity to participate effectively in district and college governance which do not encroach upon the collective bargaining process or employee governance processes. These procedures shall ensure that at the district and college levels, recommendations and positions developed by students are given every reasonable consideration. (Education Code, § 70902, subdivision (b)(7) (Statutes of 1988, Chapter 973).)

2. Consultation

The governing board shall give reasonable consideration 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. Students shall be provided an opportunity to participate in formulation and development of district and college policies and procedures that have or will

Received
December 26, 2012
Commission on
State Mandates

> have a significant effect on students. This right includes the opportunity to participate in processes for jointly developing recommendations to the governing board regarding such policies and procedures. Except in unforeseeable, emergency situations, the governing board shall not take action on a matter having a significant effect on students until it has provided students with an opportunity to participate in the formulation of the policy or procedure or the joint development of recommendations regarding the action. (Education Code, § 70902, subdivision (b)(7) (Statutes of 1988, Chapter 973).)

These two Title 5 sections were included in the proposed parameters and guidelines to assist the claimants to understand, in one complete document, the scope of the procedures for shared governance contemplated by the Board of Governors.

B. Education Code Section 70902, subdivision (b) (7) - Implementation

The DSA (11) for the parameters and guidelines adds the following language in excess of the statement of decision:

> *Reimbursement is not required to implement the procedures.* (Ed. Code, § 70902(b)(7) (Stats. 1988, ch. 973).)

The DSA (9) for the parameters and guidelines references the statement of decision finding that the Title 5 Sections 51023.5 and 51013.7 do not "independently" impose state mandated activities due to a threshold determination in the statement of decision that these Title 5 sections are triggered by each district's discretionary decision to accept general state funding. For the DSA (10), this leaves Education Code Section 70902 (b) (7), as the source of the mandate:

> The Commission emphasizes that the reimbursable activity found to be imposed by Education Code section 70902(b)(7) is the *establishment of procedures* to ensure faculty, staff, and students the opportunity to express their opinions at the campus level, *not* the subsequent *process or implementation of the procedures* that allow faculty, staff, and student participation in formulating and developing any subsequent district and college policies and procedures.
>
> Education Code section 70902(b)(7) provides in relevant part:
>
> > [T]he governing board of each community college district shall do all of the following:
> > ¶] ... [¶]
>
> (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... .

Received
December 26, 2012
Commission on
State Mandates

This "clarification" is not a clarification. It is a substantive change to the language and intent of the regulation without legal or factual foundation. At other locations in the DSA (e.g., 19) a "clarification" is characterized as "non-substantive," but no such qualifier is used here. Further, there is no such "emphasis" or suggested limitation to reimbursement to Section 70902, subdivision (b) (7) in the statement of decision. This limitation placed in the DSA parameters and guidelines thus exceeds the scope of the statement of decision. The requirement to establish a policy compels implementation as a practical matter or it is without legal significance. The DSA interpretation would mean that the Legislature mandated that districts adopt policies that state affirmative duties, but with no requirement to implement those duties.

As an addtional reason to avoid reimbursement to implement the mandate, the DSA (10) states:

> The language of Education Code section 70902(b)(7) does not specifically cite to California Code of Regulations, title 5, sections 53200-53207 (for faculty), 51023.5 (for staff), and 51023.7 (for students). The Commission included references to the regulation sections for purposes of clarifying for the parties where the minimum standards established by the Board of Governors were located at the start of the reimbursement period for this test claim.

While the referenced Education Code sections do not cite Title 5, that is not unusual or determinative of the issue. Regulations are adopted by executive branch agencies after the statutory codes written by the Legislature become law, so no citation in a new code section can be made to regulations that are not extant. It is more relevant whether the subsequent Title 5 sections cite the Education Code. Title 5, Sections 53200-53207 either cite or reference Education Code Sections 70901 and 70902 for their authority so the linkage is complete.

The DSA (10) concludes that Title 5, Sections 53200-53207, as independent regulations, are subject to future change and that college districts will be subject to implementing the future version of the mandate, that is, procedures may have to be updated in future years to comply with any changes to Title 5. For that purpose only, reference in the parameters and guidelines to Title 5 sections would seem adequate if it prevents the need for a future test claim to incorporate changes to those sections. However, if incorporation by reference as stated in the DSA does not prevent the need for a future test claim or amended parameters and guidelines to implement any future Title 5 changes, then incorporation by reference only has achieved nothing here but brevity. If future Title 5 changes require future test claims, then the test claimants' proposed inclusion of the Title 5 language at the time the test claim was filed is appropriate since that language is the scope of reimbursement until a future change that would have to be recognized by a new test claim or amended parameters and guidelines.

Received
December 26, 2012
Commission on
State Mandates

C. Title 5, Section 53207-State Consultation Release Time

The DSA (11) concludes that reimbursement is not required for the replacement cost of the released faculty member since the Academic Senate of the California Community Colleges (ASCCC) provides reimbursement for the replacement costs.

The statement of decision (151) adopted the following activities:

> 6. Grant faculty members elected to serve as president and vice president of the Academic Senate of the California Community Colleges release or reassigned time from their terms of office. This activity is subject to offsetting revenue from reimbursement of release or reassigned time and administrative costs for hiring faculty to replace the faculty serving as president or vice president pursuant to title 5 section 53207, subdivision (b) (Register 2003, No. 18). (Cal. Code Regs., tit. 5, § 53207, subd. (a) (Register 2003, No. 18).)

The DSA (11) modifies the language for the purpose of limiting reimbursement as follows:

> f. Grant faculty members elected to serve as president and vice president of the Academic Senate of the California Community Colleges release or reassigned time from their terms of office.
>
> Reimbursement is not required for the replacement cost of the released or reassigned faculty member. Rather reimbursement is required *only* for the administrative costs associated with granting faculty members release or reassigned time and the administrative costs associated with replacing the faculty serving as president or vice president. This activity is subject to offsetting revenue from the Academic Senate of the California Community Colleges for the administrative costs associated with granting release or reassigned time and administrative costs for hiring faculty to replace the faculty serving as president or vice president pursuant to title 5, section 53207(b) (Register 2003, No. 18). (Cal. Code Regs., tit. 5, § 53207(a) (Register 2003, No. 18).) *This activity was operative April 11, 2003, and thus, reimbursement for this activity begins on this date.*

The DSA (11) states that these changes are "consistent" within the statement of decision and the language of the regulations. No such limitation on reimbursement was considered or stated in the statement of decision. To the contrary, the statement of decision (39) agreed with the test claimants that the full cost of the activity is claimable and then subject to offset in the amount of the actual reimbursement:

Received
December 26, 2012
Commission on
State Mandates

The claimants note that the sufficiency of the amount provided to the ASCCC is determined by the state, and that when funding is provided it is unclear whether reimbursements provided pursuant to section 53207 fully reimburse all costs for releasing faculty members. The Commission agrees. Thus, Commission finds that title 5 section 53207 requires community college districts to engage in the following state-mandated activities, subject to offsets for reimbursement provided by the ASCCC for release and reassignment time.

1. Grant faculty members elected to serve as president and vice president of the Academic Senate of the California Community Colleges release or reassigned time from their terms of office. This activity is subject to offsetting revenue from reimbursement of release or reassigned time and administrative costs for hiring faculty to replace the faculty serving as president or vice president pursuant to title 5 section 53207, subdivision (b) (Register 2003, No. 18). (Cal. Code Regs., tit. 5, § 53207, subd. (a) (Register 2003, No. 18).)

The statement of decision describes the correct cost accounting method for this situation. The same concerns remain. The reimbursement may not be paid each year or it may be discontinued. Contrary to the assumption in the DSA for the parameters and guidelines, the amount of the "replacement cost" reimbursement (if actually paid by the state), is not as a matter of law the same as the actual cost of the released faculty member. Standard mandate reimbursement cost accounting includes the direct cost of the activity as well as an indirect cost rate applied. The indirect cost rate applied is an addtional 35% to 50% of the direct cost as calculated by the Controller's Form 29C, and specific to each college district. Therefore, absent a Government Code Section 17556, subdivision (e), finding in the statement of decision (there is none) that the ASCCC reimbursement funding is a state subvention in an amount sufficient to fund the actual cost of this activity, the appropriate method to reimburse this mandated activity is to determine the actual (direct and indirect) cost of the release time and then subtract any ASCCC revenues actually received each year.

Program 2 <u>Transfer Centers</u>

A. Education Code Section 66736 and Title 5, Section 51027-Student Services

The DSA (13) for the parameters and guidelines slightly modifies the statement of decision language for the adopted activities for Education Code Section 66736 as follows:

c. Clarifying changes to the activity imposed by Education Code section 66736

For purposes of clarification, the Commission makes the following changes

Received
December 26, 2012
Commission on
State Mandates

indicated by the underlined language and strike-out to the activity imposed by Education Code section 66736:

> ~~Ensure that its college or colleges maintain~~ Maintain student transfer counseling centers or other counseling and student services at its college or colleges designed and implemented to affirmatively seek out, counsel, advise, and monitor the progress of potential and identified community college transfer students. All policies and procedures adopted for this purpose must give preference and emphasis toward enhancing the transfer of students from economically disadvantaged families and students from traditionally underrepresented minorities, to the fullest extent possible under state and federal statutes and regulations. (Ed. Code, § 66736 (Stats. 1991, ch. 1188).)

The above amendments are consistent with the Commission's statement of decision for the test claim.

The test claimants concur that the above sort of "clarification," while not essential, is acceptable since it neither adds nor limits the scope of the activity as adopted by the statement of decision.

However, the test claimants proposed making more specific the activity imposed by Education Code Section 66736 by including the language derived from Title 5, Section 51027. This language provides specific guidance to claimants and eliminates confusion regarding the scope of the approved activities. The Title 5 language was adopted by the Board of Governors for purposes of implementing this program. The proposed language is as follows:

> (1) Required Services (See Title 5, CCR. Section 51027) Districts shall:
>
> (A) Identify, contact, and provide transfer support services to targeted student populations as identified in the transfer center plan, with a priority emphasis placed on African-American, Chicano/Latino, American Indian, disabled, low-income, and other underrepresented students. These activities shall be developed and implemented in cooperation with student services departments and with faculty.
>
> (B) Ensure the provision of academic planning for transfer, the development and use of transfer admission agreements with baccalaureate institutions where available and as appropriate, and the development and use of course-to-course and major articulation agreements. Academic planning and articulation activities shall be provided in cooperation with student services, with faculty, and with baccalaureate institution personnel as available.

Received
December 26, 2012
Commission on
State Mandates

(C) Ensure that students receive accurate and up-to-date academic and transfer information through coordinated transfer counseling services.

(D) Monitor the progress of transfer students to the point of transfer, in accordance with monitoring activities established in the Transfer Center Plan.

(E) Support the progress of transfer students through referral as necessary, to such services as ability and diagnostic testing, tutoring, financial assistance, counseling, and to other instructional and student services on campus as appropriate.

(F) Assist students in the transition process, including timely completion and submittal of necessary forms and applications.

(G) In cooperation with baccalaureate institution personnel as available, develop and implement a schedule of services for transfer students to be provided by baccalaureate institution staff.

(H) Provide a resource library of college catalogs, transfer guides, articulation information and agreements, applications to baccalaureate institutions, and related transfer information.

(2) Facilities. Each district governing board shall provide space and facilities adequate to support the transfer center and its activities. Each district shall designate a particular location on campus as the focal point of transfer functions. This location should be readily identifiable and accessible to students, faculty, and staff.

(3) Staffing. Each district governing board shall provide clerical support for the transfer center and assign college staff to coordinate the activities of the transfer center; to coordinate underrepresented student transfer efforts; to serve as liaison to articulation, to student services, and to instructional programs on campus; and to work with baccalaureate institution personnel.

(4) Advisory Committee. Each district shall designate an advisory committee to plan the development, implementation, and ongoing operations of the transfer center. Membership shall be representative of campus departments and services. Baccalaureate institution personnel shall be included as available.

(5) Evaluation and Reporting. Each district governing board shall include in its transfer center plan a plan of institutional research for ongoing internal evaluation of the effectiveness of the college's transfer efforts, and the achievement of its transfer center plan.

Received
December 26, 2012
Commission on
State Mandates

The DSA (13) would deny the test claimants' proposed language because it is not consistent with the Commission's statement of decision and the claimants have not provided evidence or analysis as to why the activities contained in Title 5, Section 51027 are reasonably necessary to implement the duty imposed by Education Code Section 66736. Section 66736 only states the goals of the transfer centers, but does not specify how they are to be accomplished. As a matter of law, the Title 5 language was adopted by the Board of Governors specifically to implement the mandate, so the Title 5 language is inherently consistent. The language in Section 51027 provides a comprehensive explanation of services to be provided by transfer centers. The DSA (14) default to an evidentiary standard argument is not required here because the Title 5 language was adopted by the Board of Governors specifically to implement the mandate, pursuant to a legal rulemaking process, and the relevance of the Section 51027 activities has already been determined.

B. Education Code Section 66738, subdivision (a)-Transfer Agreements

The DSA (14) for the parameters and guidelines slightly modifies the statement of decision language for adopted activities for Education Code Section 66738, subdivision (a), as follows:

> *d. Clarifying changes to the activity imposed by Education Code section 66738*
>
> For purposes of clarification, the Commission makes the following changes indicated by the underlined language and strike-out to the activities imposed by Education Code section 66738(a):
>
> > ~~Be accountable for the development and implementation of~~ Develop and implement formal system wide articulation agreements and transfer agreement programs, including those for general education or a transfer core curriculum, and other appropriate procedure to support and enhance the transfer function. (Ed. Code, § 66738(a) (Stats. 1991, ch. 1188).)
>
> This amendment is clarifying and consistent with the Commission's statement of decision on the test claim.

The test claimants concur that the above sort of "clarification" is acceptable as it neither adds nor limits the scope of the activity as adopted by the statement of decision.

However, the test claimants proposed language that makes more specific the activity imposed by Education Code Section 66738, subdivision (a) by including the language of Education Code Section 66738, subdivision (b) in the parameters and guidelines. This language provides specific guidance to claimants and eliminates confusion

Received
December 26, 2012
Commission on
State Mandates

regarding the scope of the approved activities. This Education Code language was adopted by the Legislature for purposes of implementing this program:

> The elements in a comprehensive transfer system shall include, but not be limited to, the following:
>
> (1) Enrollment and resource planning; intersegmental faculty curricular efforts.
> (2) Coordinated counseling.
> (3) Financial aid and transfer services.
> (4) Transfer articulation agreements and programs.
> (5) Specific efforts to improve diversity.
> (6) Early outreach activities.
> (7) Expansion of current practices relating to concurrent enrollment of community college students in appropriate university courses.
> (8) Centers.
> (Reference: Education Code, § 66738, subdivision (b) (Statutes of 1991, Chapter 1188).)

The DSA (14) asserts that the statement of decision specifically found "that the plain language of subdivision (b) does not impose any state-mandated activities on community college districts." The language from Section 66738, subdivision (b) was included in the proposed parameters and guidelines to assist the districts to understand, in one complete document, the scope of Education Code Section 66738, subdivision (a) which requires the development and implementation of formal articulation and transfer agreements. Section 66738, subdivision (b) only states the goal, but does not specify how it is to be accomplished. The test claimants are not asserting that subdivision (b) is a mandate enumerated in the statement of decision. However, that does not prevent the language in subdivision (b) from providing a comprehensive explanation of the elements to be included in a complete transfer system and such services are rational and reasonably necessary, since this language was adopted by the Legislature for this purpose.

Program 4. Standards of Scholarship

Title 5, Section 55760, subdivision (a)-Student Grades

The DSA (16) for the parameters and guidelines modifies the statement of decision language for the adopted activities for Title 5, Section 55760, subdivision (a) as follows:

> For purposes of clarification the Commission makes the following changes indicated by the underlined language and strike-out to the activity imposed by California Code of Regulations, title 5, section 55760:

Received
December 26, 2012
Commission on
State Mandates

x. ~~The instructor of the course is to determine~~ Determine the grade to be awarded each student in accordance with the California Code of Regulations, title 5, section 55758 ("Academic Record Symbols and Grade Point Average"). (Cal. Code Regs., tit. 5, § 55760(a) (Register 91, No. 23); for current requirement see Cal. Code Regs., tit. 5, § 55025(a) (Register 2007, No. 35).)

This "clarification" is not a clarification. It is a substantive change to the language and intent of the regulation without legal or factual foundation. The Title 5 mandate is for the instructor, not some other person, to determine the student grade. The statement of decision (91) only stated that:

> As a result, immediately prior to the adoption of title 5, sections 55750, 55751, 55754, 55755, 55756, 55757, 55759, *55760*, 55761, and 55764, community college districts were not required to engage in the activities mandated by the sections. *Emphasis added.*

There was no other analysis and no finding in the statement of decision regarding Section 55760 that would support departing in the parameters and guidelines from the actual language in the regulation. Reimbursement for the instructor to assign a grade for each student is required.

Program 5. Curriculum

A. Title 5, Section 55002, subdivisions (a) (4), (b) (4), and (c) (3) – Qualified Instructors

The statement of decision (157) adopted the following activities:

2. Establish a college or district curriculum committee by mutual agreement of the college or district administration and the academic senate. The committee shall be either a committee of the academic senate or a committee that includes faculty and is otherwise comprised in a way that is mutually agreeable to the college or district administration and academic senate. (Cal. Code Regs., tit. 5, § 55002, subd. (a)(1) (Register 93, No. 42).)

3. When seeking to offer a course as an associate degree credit course, nondegree credit course, or noncredit course, the course must be recommended by the college or district curriculum committee and approved by the district governing board. (Cal. Code Regs.,tit. 5, § 55002, subds. (a), (b), and (c) (Register 93, No. 42).)

4. Each section of an associate degree course, nondegree course, or

Received
December 26, 2012
Commission on
State Mandates

noncredit course is to be taught by a qualified instructor in accordance with a set of objectives and with other specifications defined in the course outline of record. (Cal. Code Regs., tit. 5, § 55002, subds. (a)(4), (b)(4), and (c)(3) (Register 93, No. 42).)

5. Proposed associate degree credit courses and nondegree credit courses must meet the following requirements found in California Code of Regulations, title 5, section 55002, subdivisions (a)(2) and (b)(2), in order to receive a recommendation by the college or district curriculum committee:

. . . . . .

The DSA (16) for the parameters and guidelines modifies the statement of decision language for the adopted activities for Title 5, Section 55760, Section 55002, subdivisions (a) (4), (b) (4), and (c) (3) as follows:

a. *Clarifying changes to the activity imposed by California Code of Regulations, title 5, section 55002*

California Code of Regulations, title 5, section 55002, requires community colleges to get a recommendation from the college or district curriculum committee and approval by the district governing board when seeking to offer a course, and sets forth the elements the course must have to receive recommendation and approval. For purposes of clarification the Commission consolidates the elements for approval with the requirement of getting a recommendation and approval when seeking to offer a course. Specifically, the Commission makes the following changes indicated by the underlined language and strike-out to the activity imposed by California Code of Regulations, title 5, section 55002:

c. Get a recommendation by the college or district curriculum committee and approval by the district governing board. ~~When~~ when seeking to offer ~~a~~ the course as an associate degree credit course, nondegree credit course, or noncredit course, ~~the course must be recommended by the college or district curriculum committee and approved by the district governing board~~. Recommendation by the college or district curriculum committee and approval by the district governing board are based on the courses meeting the following requirements listed in i. through iv.: ~~(Cal. Code Regs., tit. 5, § 55002(a), (b), and (c) (Register 93, No. 42)~~.)

i Each section of an associate degree course, nondegree course, or noncredit course is to be taught by a qualified

Received
December 26, 2012
Commission on
State Mandates

> instructor in accordance with a set of objectives and with other specifications defined in the course outline of record. (Cal. Code Regs., tit. 5, § 55002(a)(4), (b)(4), and (c)(3) (Register 93, No. 42).)
>
> . . . . . .

> *Reimbursement is not required to pay for the courses offered. Reimbursement is limited to obtaining the recommendation.* (Cal. Code Regs., tit. 5, § 55002(a), (b), and (c) (Register 93, No. 42).)

This clarification is consistent with the Commission's statement of decision on the test claim and similar to the claimants' proposed parameters and guidelines titled "Curriculum Standards.

This "clarification" is not a clarification. It is a substantive change to the language and intent of the regulation without legal or factual foundation. There is no "non-substantive" qualifier included here. Instead, the DSA reorganizes the statement of decision findings in order to inappropriately subordinate Section 55002, subdivisions (a)(4), (b)(4), and (c)(3) as a subject of the district curriculum committee recommendation. The DSA asserts that the change is consistent with the test claimants' proposed parameters and guidelines. That is incorrect. The test claimants' proposed parameters and guidelines listed the activity requiring a qualified instructor (at item C. "Qualified Instructor") independent of the requirement for curriculum committee recommendation (at item B. 2. "Curriculum Committee Recommendation") and independent of the course requirements (as item B. 3. "Standards for Recommendation").

Of the four statement of decision findings (2-5) listed above, only finding 4 regarding the qualified instructor is not a subject of the curriculum committee recommendation. There is no analysis or finding in the statement of decision regarding Section 55002, subdivisions (a)(4), (b)(4), and (c)(3) that would support departing from the language of the regulation and subordinating it to the curriculum committee activity. Rather, the statement of decision determined that:

> Thus, although community college districts maintain discretion in the curriculum the districts' offer, districts at a minimum must offer some courses, and as a result, districts must comply with the regulations and procedures necessary to offer courses. SOD (95)
>
> As a result, the activities required by title 5, sections 55001, 55002, 55005, and 55006, constitute state-mandated activities as they apply to associate degree credit courses, nondegree credit courses, and noncredit courses. SOD (98)

Thus, the findings are first, that "districts at a minimum must offer some courses, and

Received
December 26, 2012
Commission on
State Mandates

as a result, districts must comply with the regulations and procedures necessary to offer courses," and second, that it is mandated that "(e)ach section of an associate degree course, nondegree course, or noncredit course is to be taught by a qualified instructor in accordance with a set of objectives and with other specifications defined in the course outline of record."

Here, unlike other sections discussed above, the test claim did not determine that Section 55002, subdivisions (a)(4), (b)(4), and (c)(3) was contingent on funding, was discretionary, or subject to the practical compulsion test of *Kern*. Section 55002 independently imposes the state mandate that qualified instructors instruct the courses and this necessarily must include the reimbursement of the process required to determine that the instructor is qualified as well as the cost of course instruction. There is no finding in the statement of decision to the contrary, therefore, this limitation placed in the parameters and guidelines exceeds the scope of the statement of decision.

B. Education Code Section 66010.2, subdivision (b) - Student Equity Activity

Education Code Section 66010.2, subdivision (b) is one of three student equity activities severed from the *Discrimination Complaint Procedures* parameters and guidelines in order to include those activities in these parameters and guidelines for *Minimum Conditions for State Aid.* In the statement of decision for the *Discrimination Complaint Procedures* test claim (249), the Commission found that Education Code Section 66010.2, subdivision (b) imposes the following reimbursable activity:

1. Provide all students the opportunity to address issues, including ethical issues that are central to their full development as responsible citizens, in community college programs. (Ed. Code, § 66010.2, subd. (b) (Stats. 1991, ch. 1198), beginning July 1, 2001.)

The DSA (19) for these parameters and guidelines concludes that this activity "fits programmatically" within the "Curriculum" activities, specifically, the approved activity imposed by Education Code Section 70902 subdivision (b)(2)(A) to "(e)stablish policies for and approve educational programs" as follows:

c. *Amendment of the activity imposed by Education Code section 70902(b)(2)(A) by adding an activity approved by the Commission in the Discrimination Complaint Procedures (02-TC-46 and a portion of 02-TC-25 and 02-TC-31) test claim within the Minimum Conditions for State Aid (02-TC-25 and 02-TC-31) parameters and guidelines*

. . . . . .

Establish policies for and approve educational programs. <u>When doing so, provide</u> ~~Provide~~ all students the opportunity to address issues, including ethical issues that are central to their full development as responsible

Received
December 26, 2012
Commission on
State Mandates

citizens~~, in community college programs~~. (Ed. Code, § 66010.2(b) (Stats. 1991, ch. 1198) and Ed. Code, § 70902(b)(2)(A) (Stats. 1988, ch. 973).)

This amendment is consistent with the statement of decision for both the *Minimum Condition for State Aid* test claim and the *Discrimination Complaint Procedures* test claim.

This amendment is not a clarification. Nor is it a non-substantive clarification. It is a substantive change to the language and intent of the code section without legal or factual foundation. The DSA reorganizes the statement of decision finding for *Minimum Conditions for State Aid* in order to inappropriately subordinate Section 66010.2, subdivision (b) as a subject of the general requirement to adopt policies for educational programs. The DSA (19) provides the following reason for subordinating the change to the statement of decision findings.

> In order to emphasize that the opportunity to address issues, including ethical issues that are central to their full development as responsible citizens, is to occur in community college programs, the Commission combines the activities imposed by Education Code Sections 66010.2(b) and 70902(b)(2)(A) as indicated by the underlined language and strike-out:

The DSA (19) asserts that this "amendment" is consistent with both statements of decisions. There is no analysis or finding in the statement of decision for *Discrimination Complaint Procedures* for Section 66010.2 that would support departing from the plain meaning of the regulation language and subordinating it to the general adoption of policies required by Section 70902. Rather, the statement of decision determined that:

> The plain language of sections 66010.2 and 66010.7 require community college districts to engage in the following activities:
>
> 1. Provide access to education, and the opportunity for educational success, for all qualified Californians. (Ed. Code, § 66010.2, subd. (a) (Stats. 1991, ch. 1198).) DCP SOD 161
>
> However, prior to 1991, community college districts were not required to provide as part of their quality teaching and programs of excellence, opportunities to address issues, including ethical issues that are central to students' full development as responsible citizens.
>
> As a result, the Commission finds that Education Code section 66010.2, subdivisions (a) and (b), as added by Statutes 1991, chapter 1198, do constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution, except for the following activity:

Received
December 26, 2012
Commission on
State Mandates

> Provide all students the opportunity to address issues, including ethical issues that are central to their full development as responsible citizens, in community college programs. (Ed. Code, § 66010.2, subd. (b) (Stats. 1991, ch. 1198).) DCP SOD 190

Thus, the test claim findings were that Section 66010.2 is a program activity to be implemented (as "part of their quality teaching and programs of excellence, opportunities to address issues") and not a policy adoption-only activity. Section 66010.2, subdivision (b) independently imposes the state mandate to "provide" an opportunity to address issues, not to merely to adopt policies to do so. There was no previous duty to provide this program activity. There is no finding in the statement of decision to support the DSA subordination of Section 66010.2, subdivision (b) in the parameters and guidelines. Therefore, the DSA exceeds the scope of the statement of decision.

Regarding placement of the activity in the parameters and guidelines, the scope of the Section 66010.2, subdivision (b), activity to address issues in community college programs would appear to more appropriately "fit" the first program in these parameters and guidelines: "Participation in District and College Governance." Issues of this type appear to be of the nature of the subject matter of the student "senate."

C. Title 5, Section 55202, subdivision (e) - Sufficient Corequisite Courses

The statement of decision (161) adopted the following activities:

> 17. Ensure precollegiate basic skills courses designed to teach the required skills in reading, written expression, or mathematics, are offered with reasonable frequency and that the number of sections available is reasonable given the number of students who are required to meet the associated skills prerequisites and who diligently seek enrollment in the prerequisite course, if a prerequisite requires precollegiate skills in reading, written expression, or mathematics. (Cal. Code Regs., tit. 5, § 55202, subd. (d) (Register 93, No. 42); for current requirement see Cal. Code Regs., tit. 5, § 55003, subd. (i)(Register 2007, No. 35).)
>
> 18. Offer sufficient sections of a corequisite course to reasonably accommodate all students who are required to take the corequisite. (Cal. Code Regs., tit. 5, § 55202, subd. (e) (Register 93, No. 42); for current requirement see Cal. Code Regs., tit. 5, § 55003, subd. (j) (Register 2007, No. 35).)

The DSA (23) for the parameters and guidelines modifies the statement of decision language for the adopted activities for Title 5, Section 55002, subdivision (e) as follows:

Received
December 26, 2012
Commission on
State Mandates

f. Clarifying change to the activity imposed by California Code of Regulations, title 5, section 55202(e)

The Commission approved the following activity in the statement of decision for the test claim:

> Offer sufficient sections of a co-requisite course to reasonably accommodate all students who are required to take the co-requisite. (Cal. Code Regs., tit. 5, § 55202(e) (Register 93, No. 42); for current requirement see Cal. Code Regs., tit. 5, § 55003(j) (Register 2007, No. 35).)

This activity must be read in light of the statement of decision as a whole, in which the Commission found that districts have been required to offer courses of instruction since prior to 1971. Co-requisite courses constitute courses of instruction, and thus, the above activity cannot be read as approving reimbursement for offering co-requisite courses, including the associated teacher time. Rather, it must be read as the administrative act of ensuring sufficient sections of a co-requisite course are offered in light of the students required to take the course. As a result, the Commission amends the activity as follows:

> Ensure sufficient sections of a co-requisite course are offered to reasonably accommodate all students who are required to take the co-requisite. Reimbursement for this activity is limited to the administrative functions of ensuring that sufficient sections of a co-requisite course are offered. This activity *does not* require reimbursement for offering the co-requisite course or the costs associated with the teacher time for the course. (Cal. Code Regs., tit. 5, § 55202(e) (Register 93, No. 42); for current requirement see Cal. Code Regs., tit. 5, § 55003(j) (Register 2007, No. 35).)

Viewed as a whole, this amendment is consistent with the Commission's statement of decision on the test claim.

This "clarification" is not a clarification. It is a substantive change to the language and intent of the regulation without legal or factual foundation. Actually, the DSA (23) for the parameters and guidelines states that the "Commission amends the activity" language. The DSA has not cited a legal basis to allow the scope of a statement of decision to be "amended" by parameters and guidelines. The DSA states that this amendment is needed because this "activity must be read in light of the statement of decision as a whole, in which the Commission found that districts have been required to offer courses of instruction since prior to 1971." The DSA (23) cites page 118 of the statement of decision for this proposition of viewing activities in light of the "whole" statement of decision. However, there is no statement of decision finding on page 118

Received
December 26, 2012
Commission on
State Mandates

that districts have previously been required to provide a *sufficient* number of prerequisite courses. To the contrary, relevant to Section 55202, the statement of decision (118) states only:

> Title 5, sections 55201 and 55202, mandate activities associated with the establishment of prerequisites and corequisites for associate degree programs. The claimants have pled title 5, sections 55201 and 55202, as added in 1993, and section 55201 as last amended in 1998. Immediately prior to 1993, community college districts were not required to engage in the activities mandated by title 5, sections 55201 and 55202, and as a result, the activities mandated by title 5, sections 55201 and 55202, constitute a new program or higher level of service.
>
> In 2007, sections 55201 and 55202 were combined and renumbered to title 5, section 55003, without any substantive changes to the new program or higher level of service found above. *Emphasis added.*

Reimbursement is required for the mandated courses. If one wishes to view the totality of the statement of decision in context, it can be seen from reading the statement of decision findings above that the state wants appropriate precollegiate basic skills courses to be available (finding 17) and that there be a sufficient number of corequisite courses (finding 18). The statement of decision "as a whole" does not circumscribe this activity only to the "administrative act of ensuring sufficient sections," nor does it limit the scope of reimbursement to the "administrative act." The DSA for the parameters and guidelines is creating a specific finding of law not made by the statement of decision. The DSA reliance on a perception based on the "whole" is outcome-driven philosophy and does not conjure up a statement of decision finding that does not otherwise exist. Districts are required to be reimbursed for providing basic skills courses and sufficient co-requisite courses.

Program 6 Degrees and Certificates

Title 5, Section 55806 subdivisions (a) and (b) (1) - Associate Degree Requirements

The statement of decision (161-2) adopted the following activities:

1. Adopt policy consistent with the subchapter regarding degrees and certificates consisting of California Code of Regulations, title 5, section 55800 – 55810. (Cal. Code Regs., tit. 5, § 55800 (Register 91, No. 23); for current requirement see Cal. Code Regs., tit. 5, § 55060 (Register 2007, No. 35).)

8. Condition receipt of an associate degree upon a student who has

Received
December 26, 2012
Commission on
State Mandates

satisfactorily completed at least 60 semester units or 90 quarter units of college work that is fulfilled in a curriculum accepted toward the degree by a college within the district (as shown in its catalog). This course work includes 18 semester or 27 quarter units in general education and at least 18 semester or 27 quarter units in a major, at least 12 semester or 18 quarter units completed in residence at the college granting the degree.

The 18 semester or 27 quarter units in a major must be taken in a single discipline or related disciplines, as listed in the Community Colleges "Taxonomy of Programs."

The 18 semester or 27 quarter units in general education requirements must include a minimum of three semester or four quarter units in each of the following areas: (1) Natural Sciences, (2) Social and Behavioral Sciences, (3) Humanities, (4) Language and Rationality – English Composition, and (5) Language and Rationality – Communication and Analytical Thinking.

The remainder of the unit requirement is also to be selected from among these five divisions of learning or as determined by local option. (Cal. Code Regs., tit. 5, § 55806, subd. (a) and (b)(1) (Register 91, No. 23); for current requirement see Cal. Code Regs., tit. 5, § 55063, subd. (a) and (b) (Register 2007, No. 35).)

The DSA (24) for the parameters and guidelines modifies the statement of decision language for the adopted activities for Title 5, Section 55806, subdivisions (a) and (b)(1), as follows:

For purposes of clarification, the Commission amends the following activities found in the statement of decision for the test claim as indicated by the underline and strike out:

a. Adopt policy consistent with the subchapter regarding degrees and certificates consisting of California Code of Regulations, title 5, section 55800 – 55810. (Cal. Code Regs., tit. 5, § 55800 (Register 91, No. 23); for current requirement see Cal. Code Regs., tit. 5, § 55060 (Register 2007, No. 35).)

When adopting this policy, Condition receipt of an associate degree by a student ~~upon a student who has~~ on the satisfactory completion of ~~satisfactorily completed~~ at least 60 semester units or 90 quarter units of college work that is fulfilled in a curriculum accepted toward the degree by a college within the district (as shown in its catalog). This course work includes 18 semester or 27 quarter units in general education and at least

Received
December 26, 2012
Commission on
State Mandates

> 18 semester or 27 quarter units in a major, at least 12 semester or 18 quarter units completed in residence at the college granting the degree.
>
> The 18 semester or 27 quarter units in a major must be taken in a single discipline or related disciplines, as listed in the Community Colleges "Taxonomy of Programs."
>
> The 18 semester or 27 quarter units in general education requirements must include a minimum of three semester or four quarter units in each of the following areas: (1) Natural Sciences, (2) Social and Behavioral Sciences, (3) Humanities, (4) Language and Rationality – English Composition, and (5) Language and Rationality – Communication and Analytical Thinking.
>
> The remainder of the unit requirement is also to be selected from among these five divisions of learning or as determined by local option. (Cal. Code Regs., tit. 5, § 55806(a) and (b)(1) (Register 91, No. 23); for current requirement see Cal. Code Regs., tit. 5, § 55063(a) and (b) (Register 2007, No. 35).)
>
> [¶] ... [¶]

These amendments are non-substantive clarifying changes that are consistent with the Commission's statement of decision for the test claim.

This "clarification" is not a clarification. Nor is it a non-substantive clarification. It is a substantive change to the language and intent of the regulation without legal or factual foundation. The DSA reorganizes the statement of decision findings in order to inappropriately subordinate Section 55806, subdivisions (a) and (b) into a subject of the general requirement to adopt policies for Sections 55800 through 55810. The DSA provides no reason for the change to the statement of decision findings. There is no analysis or finding in the statement of decision regarding Section 55806 that would support departing from the plain meaning of the regulation language and subordinating this to the general adoption of policies required by Section 55800. Rather, the statement of decision determined that:

> Thus, although the Education Code authorizes, but does not require, community college districts to grant associate degrees, as defined by the Board of Governors' regulations community colleges are required to grant degrees. SOD (124)
>
> Title 5, sections 55800.5 and 55806, address the duty of community college districts to award an associate degree to students upon the successful completion of the course of study required by the students' majors and the

Received
December 26, 2012
Commission on
State Mandates

criteria and minimum requirements that a student must satisfy as a condition to trigger the duty of community college districts. SOD (127)

Pursuant to the above discussion, the Commission finds that California Code of Regulations, title 5, sections 55800.5, 55806, and 55809, mandate community college districts to engage in the following activities:

1. Confer a degree of associate in arts or associate in science upon a student who successfully completes the prescribed course of study for the degree while maintaining the requisite grade point average; demonstrated competence in reading, in written expression, and in mathematics. The degree shall be conferred to a student without regard to how long it takes for the student to complete the requirements. Credit for the full number of semester hours scheduled for a course shall be granted, even when the student has satisfactorily completed the requirements of any course of study in less than the prescribed time. (Cal. Code Regs., tit. 5, §§ 55800.5, 55806, and 55809 (Register 91, No. 23).)

2. Condition receipt of an associate degree upon a student who has satisfactorily completed at least 60 semester units or 90 quarter units of college work that is fulfilled in a curriculum accepted toward the degree by a college within the district (as shown in its catalog). This course work includes 18 semester or 27 quarter units in general education and at least 18 semester or 27 quarter units in a major, at least 12 semester or 18 quarter units completed in residence at the college granting the degree. SOD (128)

. . . . . .

In sum, the test claim findings were first, that districts must confer an associate degree, and this duty is derived from Title 5 and not the Education Code. Second, the districts must "condition" receipt of this degree upon specific course criteria, which were determined by the statement of decision to be a new duty precedent to conferring the degree. Here, unlike other sections discussed above, the test claim decision did not determine that Section 55806, subdivisions (a) and (b)(1) was contingent on funding, was discretionary, or subject to the practical compulsion test of *Kern*. Section 55806 independently imposes the state mandate that before the associate degree can be conferred, there is a new administrative task to evaluate whether the student has met the specified course required for the degree. There was no previous duty to do so. There is no finding in the statement of decision to the contrary, therefore, this limitation placed in the DSA for the parameters and guidelines exceeds the scope the statement of decision.

Received
December 26, 2012
Commission on
State Mandates

Certification

By my signature below, I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this submission is true and complete to the best of my own knowledge or information or belief, and that the attached documents are true and correct copies of documents received from or sent by the state agency which originated the document.

Executed on December 26, 2012, at Sacramento, California, by

Keith B. Petersen

C: Commission electronic service list