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April 21, 2011

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

Re: CSM 02-TC-22 (portion)
West Kern Community College District
Disabled Student Program and Services
CSM 02-TC-25
Los Rios Community College District
Notice to Students
CSM 02-TC-31 (portion)
Santa Monica Community College District
Minimum Conditions for State Aid

Dear Mr. Bohan:

I have received the Commission's Draft Staff Analysis (DSA) for the above referenced consolidated test claim¹ dated January 31, 2011, to which I respond on behalf of the

¹ Test Claim Consolidation History

By letter dated January 9, 2008, the Commission consolidated the Notice to Students (02-TC-25) test claim with the Minimum Conditions for State Aid (02-TC-31) test claim.

The Disabled Student Program and Services (02-TC-22) test claim included mandate allegations for Title 5, CCR, Sections 55522 and 55602.5 (Register 91, Nos. 23 & 43; Register 95, No. 22), regarding matriculation accommodations and contracting for disabled student education, respectively. These regulations are also included in the Minimum Conditions for State Aid (02-TC-25 and 02-TC-31) test claim. By letter dated April 2, 2008, the Commission severed these two sections and consolidated them into the Minimum Conditions for State Aid (02-TC-25 and 02-TC-31) test claim.

By letter dated June 22, 2010, the Commission severed from the consolidated Minimum Conditions for State Aid (02-TC-25/31) test claim and transferred to the Discrimination

test claimants. This response will first address procedural and threshold legal issues, then respond to exceptions to the analysis of each program's mandated activities. Issues raised by the DSA, but not responded to by this letter, are not waived.

PART A. NEW PROGRAM STANDARD OF REVIEW

The DSA (23) states that to determine if a program is new or imposes a higher level of service, the statutes pled "must be compared with the legal requirements in effect immediately before the enactment." This is incorrect. The Disabled Student Program and Services (02-TC-22) test claim was filed May 23, 2003. The Notice to Students (02-TC-25) test claim was filed June 5, 2003. The Minimum Conditions for State Aid (02-TC-31) test claim was filed June 23, 2003. Based on the date these test claims were submitted, the standard of review is to compare the statutes, regulations, and executive orders pled on the effective date of the test claim filing (for these test claims, July 1, 2001) to the status of the law as of December 31, 1974, pursuant to Government Code Section 17514.

The Commission, however, decided to the contrary on this issue in the March 24, 2011, Statement of Decision for 02-TC-25/31/46, Discrimination Complaint Procedures, relying upon *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859. The legal issue here is identical to that in the Discrimination Complaint Procedures test claim. The test claimant raises it here for purposes of the record and does not waive the issue. The proposed statement of decision should be revised to compare the statutes and laws effective July 1, 2001 (the effective reimbursement date of these test claims), to the law as it existed on December 31, 1974.

PART B. MINIMUM CONDITIONS THRESHOLD ISSUE-TITLE 5 SECTION 51000

The DSA (34,35) concludes that Subchapter 1 (Title 5, California Code of Regulations, Sections 51002 through 51027) does not impose any state-mandated activities. The DSA (33) concludes that the test claimants have erred in concluding that *compliance* is required to *receive state aid*. The DSA instead asserts that compliance is required only to establish *entitlement*. The DSA concludes that since the plain language of Section 51000 "does not preclude" a district that has not satisfied the minimum conditions, and therefore is not entitled to receive general state aid, from receiving state aid, that there was an absence of regulatory intent to prevent entitlement to state aid where there is no satisfaction of the minimum conditions. The DSA creation of new language to satisfy the opposite intent of the regulation is unnecessary and artificial. The fact that the regulation does not include this surplusage indicates that it is an unnecessary

Complaint Procedures (02-TC-46) test claim the equal employment opportunity program and the student equity plan program statutes and regulations.

interpretation of the scope of the regulation that only becomes an issue when the DSA artificially separates entitlement from payment. The Section 51000 language stands on its own: districts must comply with the minimum conditions to be entitled to general state funding.

Relying upon the Chancellor's Section 51100 review requirement and possible enforcement actions against a district deemed to be out of compliance, the DSA (34) concludes that compliance is a "downstream activity of becoming *entitled* to receive state aid," thus invoking the *Kern* argument. This is erroneous on its face. Compliance is not a program activity. Section 51000 does not define new program activities; the referenced program regulations do that. The minimum conditions program activities (Sections 51002 through 51027) are not downstream of any other programs. Performing the program activities remains the condition precedent to obtaining state aid.

The Section 51000 entitlement to state aid is based on compliance with the program regulations, not the subsequent Section 51100 compliance review. The Section 51100 review is qualitative in nature. It does not determine the amount of program appropriation or entitlement. The discretion allowed the Board of Governors by Section 51102 to resolve the perceived noncompliance is not a condition precedent to Section 51000, nor is it a condition of the Section 51000 coercion. Section 51102 does not address original entitlement, but only describes the scope of potential penalties for noncompliance and is not a condition of appropriation for the programs either retroactively or prospectively.

The DSA interpretation is inconsistent with the statutory scheme created by Education Code Section 70901, subdivision (b) (6), to have the Board of Governors establish and enforce minimum conditions for entitlement to the receipt of state aid. All of the Board of Governors compliance procedures occur after the appropriation of the general state aid. The appropriation is not conditioned on the review every seven years by the Board of Governors. The DSA incorrectly relies upon Section 51102, the Chancellor's enforcement power, as the source of actual control of general state aid, as if Section 51102 granted the Board of Governors the original power to appropriate funds. The Board of Governors cannot legislate state apportionment. The Board of Governors can only punish for noncompliance. The district receives the apportionment and may then be subject to post-facto punishment for noncompliance, but the appropriation remains.

The *Kern*² issues are not reached. Section 51000 is a legally compelling regulation

² The *Kern* Case Facts Do Not Match Minimum Conditions Coercion

The facts of *Kern* are significantly different:

“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, because they have been free at all relevant times to use funds provided by the state 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.” The minimum conditions mandate results from the requirement to comply with programs as a condition of receipt of general state aid.

that needs no further qualification. Neither entitlement nor coercive compliance is a “program.” The DSA treatment of program compliance as a downstream activity of “becoming entitled” is a contrived use of *Kern*.

The DSA (34) cites *POBRA* to assert a need for a “concrete showing” that a failure to perform the programs would result in “certain and severe penalties.” This additional test is not necessary since Section 51000 is, by itself, legally compelling. Notwithstanding, the failure to implement a program can remove the entitlement for *all* state funding, *all* general program funding, that is, funding for other programs and needs beyond the scope of the single minimum condition program not implemented, subject only to the Board of Governors post facto unilateral unlimited discretion regarding the degree of noncompliance.

What degree of “certainty” is needed? Must the test claimants show that a district intentionally failed to implement a mandated program, or intentionally received and

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 determination in each case must depend on such factors as the nature and purpose of 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)

misspent the appropriations, and was severely penalized by the Board of Governors? That no district was ever severely penalized is not the proof that the coercion for compliance exists. Does the DSA demand for proof either neglect or malfeasance on the part of one district, or worse, a pattern by many districts, that results in severe fiscal punishment by the Board of Governors at its unfettered discretion? Catastrophic malfeasance is not a practice of the professional public servants who lead the community colleges.

It is the magnitude of coercion created by the threat of penalty, not any proof of actual penalty, that is the measure of the issue. To decide otherwise is to make the Section 51000 coercion language surplusage since the Board of Governors has the independent Section 51100 duty to review compliance notwithstanding the original Section 51000 entitlement issue. The Board of Governors has made it quite clear that the districts are required to implement the programs included in the Chapter by conditioning receipt of general college funding on that implementation and providing a post-facto audit and penalty system to evaluate the measure of compliance. The fact that no district has catastrophically failed to comply and has been severely punished thereafter does not make this regulatory structure a sham. There is no reason to reach the *POBRA* severe consequences practical compulsion issue since the districts are already legally compelled by Section 51000 to comply with the program regulations.

Notwithstanding and independently of the determination regarding Section 51000 above, pursuant to rules of statutory construction, the test claimants assert that for each of the Title 5, CCR, Sections 51002 through 51027 that cite the requirements of other codes and regulations, either specifically or inclusively, outside of Subchapter 1, compliance with Sections 51002 through 51027 requires compliance with those other cited sections outside of Subchapter 1 to implement the mandated minimum condition. Section 51000 and 51002 through 51027 are therefore independent derivative bases for a finding of legal compulsion to implement the activities for the codes and regulations cited within Subchapter 1 that are outside of Subchapter 1.

The Commission, however, decided to the contrary on this issue in the March 24, 2011, Statement of Decision for the Discrimination Complaint Procedures (02-TC-46) test claim. The legal issue here is identical to that in the Discrimination Complaint Procedures test claim. The test claimants raise it here for purposes of the record and do not waive the issue. The proposed statement of decision should be revised to find that all codes and regulations cited in Sections 51002 through 51027 are required activities.

PART C. THE TWENTY MINIMUM CONDITION MANDATE PROGRAMS

The DSA having concluded that Section 51000 is not coercive, that the sections of Subchapter 1 do not impose any state mandated activities, and absent a finding of a mandate wholly either based on coercion or derived from Subchapter 1, each of the

outside codes and Title 5 regulations cited in Subchapter 1, or as otherwise pled by the test claims, have to be individually analyzed to determine if they impose activities on community colleges that are a new program or higher level of service.

The DSA (27) concludes that Education Code Sections 70901, 70901.5, and 70902 do not constitute reimbursable new programs or higher levels of service, without conducting an analysis of the language or legislative history. The test claim cited these sections as an authoritative source for Title 5 rulemaking. In addition, these code sections also state affirmative duties of the Board of Governors that result in mandated activities on college districts, or affirmative duties of college district governing boards. The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service for community college districts.

The Minimum Conditions for State Aid test claim pled twenty mandate programs and the DSA analyzed eighteen of them in that format. Two of the twenty programs were previously consolidated into the Discipline Complaint Procedures (02-TC-46) test claim.

1. STANDARDS OF SCHOLARSHIP
Title 5, CCR, Sections 51002, 55750 through 55765

The subject of this program is Title 5, CCR, Sections 51002 and 55750 through 55765. Section 51002 is the minimum condition that requires each community college governing board to adopt regulations consistent with the standards of scholarship contained in other Title 5 sections, file a copy of those regulations with the Chancellor, and substantially comply with those rules and regulations of the Board of Governors pertaining to standards of scholarship. The DSA does not analyze Section 51002. Education Code Section 70902, subdivision (b) (3) (as added by Chapter 973, Statutes of 1988), requires the district governing board to establish academic standards, probation and dismissal policies. The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service for community college districts.

The DSA (71) incorrectly concludes that Section 55750 does not require the district to file its adopted regulations with the Chancellor, as required by Section 51002, based on its previous determination that the minimum conditions Title 5 Sections 51002 through 51027 do not constitute mandates on the districts. This is an error in statutory construction. Section 55750 is an independent basis for the mandate and merely relates back to Section 51002 for the pertinent language. Had Section 55750 restated the language of Section 51002 in Section 55750 instead of referencing Section 51002, there would be no such question presented regarding filing the regulations with the Chancellor.

Utilizing *Kern*, the DSA improperly concludes that Section 55754, subdivision (b) (p.75), Section 55755, subdivision (b) (p.76), and Section 55756, subdivision (b) (p.76), regarding placement and removal from "progress probation" are not mandated activities because the 50% test is based on Section 55758 grading symbols, the use of which are the choice of the district. The grading symbols are not a new program applied to a precursor optional program, so *Kern* is inapplicable. If the district only utilized the A through F grading formula, there would be no question here. The Section 55758, subdivision (a), grading symbols CR and NC are a matter of substitution for the A through F designators, but still have the same regulatory standing as the A-F ratings for the purposes of implementing the mandate to place students on or remove students from progress probation, or to make the student subject to dismissal. The Sections 55754, 55755, and 55756 mandate program is for the remediation of unsatisfactory student academic performance, not the choice of grading methods.

The DSA (80) improperly concludes that Section 55758.5 does not impose any activity on districts, but rather to avoid "engaging in an activity." Subdivision (b) states an affirmative duty not to include noncredit courses in the calculation of the grade point average. The Section 55758.5 activity in which the districts must "engage" is the calculation of the grade point average, which must exclude noncredit courses. To implement the calculation, the noncredit grade must be affirmatively removed, thus creating an activity in which the districts must "engage." The noncredit grading ratings have the same regulatory standing in Section 55758, subdivision (a), as the A- F ratings.

2. DEGREES AND CERTIFICATES

Title 5, CCR, Sections 51004, 55800 through 55809

The subject of this program is Title 5, CCR, Sections 51004 and 55800 through 55809. Section 51004 is the minimum condition that requires each community college governing board to adopt regulations consistent with the standards of scholarship contained in other sections of Title 5, file a copy of those regulations with the Chancellor, and substantially comply with the regulations of the Board of Governors pertaining to degrees and certificates. The DSA does not analyze Section 51004. The proposed statement of decision should include an analysis to determine whether this section constitutes a new program or higher level of service for community college districts.

The DSA (120) incorrectly concludes that Section 55800 does not require the district to file its regulations with the Chancellor as required by Section 51004, based on its previous determination that the minimum conditions Title 5 Sections 51002 through 51027 do not constitute mandates on the districts. This is an error in statutory construction. Section 55800 is an independent basis for the mandate and merely relates back to Section 51004 for the pertinent language. Had Section 55800 restated

the language of Section 51002 in Section 55750 instead of referencing Section 51004, there would be no such question presented regarding filing the regulations with the Chancellor.

The DSA (122) incorrectly concludes that the districts are not required to award an Associate degree pursuant to Section 55800.5, a Certificate of Achievement pursuant to Section 55808, or a diploma pursuant to Section 55809. In the case of Section 55800.5, the DSA (127) concludes that community colleges have always been practically compelled to grant degrees, so it is not a new program. In the case of Sections 55808 and 55809, the DSA (122) concludes that while the colleges are degree granting institutions, there is no legal requirement to offer a course of study for which a certificate of achievement or diploma is offered. This misconstrues the mandate. The community college course offerings are mandated by law to the extent that they comply with the primary mission (Education Code Section 66010.4). The DSA has not stated a basis to distinguish courses that can lead to a certificate or diploma from those which lead to a degree. Sections 55800.5, 55805 and 55809 establish independent legal compulsion to award either a degree, a certificate, or a diploma when a student completes the designated curriculum. The compulsion derives from the student's completion of course work that is part of an educational plan that complies with the primary mission of the community college.

3. OPEN COURSES:

Title 5, CCR, Sections 51006, 58102 through 58108

The subject of this program is Title 5, CCR, Sections 51006 and 58102 through 58108. Section 51006 is the minimum condition that requires each community college governing board to adopt a policy statement regarding open enrollment, to publish the policy statement in the in the official student catalog, schedule of classes, and addenda, and to file the policy statement with the Chancellor. The DSA does not analyze Section 51006. The proposed statement of decision should include an analysis to determine whether this section constitutes a new program or higher level of service for community college districts.

The DSA (129) concludes that the "and/or" language in Section 58102 allows the district the option of publishing a description of all courses in more than one document, but not all three locations described in the section. The plain language of Section 58102 requires publication in the official catalog because this precedes the use of "and/or." As to whether this section requires publication in the schedule of classes and addenda, it depends on the legal meaning of "and/or."³ The best use of that confusing conjunctive

³ Legal Uses of "and/or":

The late David Mellinkoff, in his much venerated *The Language of the Law* (Little

phrase would be to rely upon the language in Section 51006 which properly states that publication must be made in all three locations.

The DSA (130) concludes that the "and/or" language in Section 58104 allows the district

Brown1963), traces *and/or* back to scholarly concerns about the correct translation of some famous words in the Magna Carta:

nisi per legale iudicium parium suorum vel per legem terrae.

"Except by lawful judgment of his peers *vel* by the law of the land."

The debate over the meaning of *vel* raged. Does it mean *and* or *or*?

Mellikoff cites Holdsworth's *A History of English Law* (1922) among others, noting that the law interpreters agreed on *and/or* as the best translation. Apparently an ancient Latin division between the copulative and disjunctive was not very meaningful. For centuries the courts have argued about this (Mellikoff, 147-152), often contradicting each other. Several legal scholars have called *and/or* "a bastard" since the first time it was called into question (1845). Mellinkoff concludes that it has several understandings (307-308):

1. It includes every possibility imaginable with *and* alone plus every possibility imaginable with *or* alone. It should best accord with the equity of the situation.
2. It includes some but not all of the possibilities of *and* and *or* (but legal scholars disagree about which possibilities to include).
3. It means either *and* or *or* but it can't mean both.
4. It is meaningless.

In his excellent book, *The Language of Judges* (Chicago 1993) Larry Solan (who is both a linguist and a law professor) devotes 14 pages to "the and/or rule" as it is used in the legal context, noting that commentators on statutes who have encountered the legal uses of *and*, *or*, and *and/or* say that this expression is notoriously loose and inaccurate.

Mellinkoff's understanding 2 seems the best. It would seem that Geoff Pullum is quite right when he says: "The right theory of what *or* means in English is that it is in general inclusive but that sometimes the exclusive case is conveyed as a conversational implicature."

Maybe some day this will be clear to the field of law.

Filed by Roger Shuy under "Language and the Law"

the option of publishing the course descriptions in more than one document, either the general catalog or the addenda. For the same reasons stated for Section 58102, this should mean publishing at both locations, especially since "addenda" denotes a supplement and not a repetition. Failure to supplement the catalog would mean that the mandate was not implemented as to the courses described in the supplement to the general catalog. The DSA (130) also reaches an uncited conclusion that colleges are not required to establish or conduct courses after the general catalog or regular schedule of classes are published in support of its ultimate conclusion that publishing the changes is not required. Considering the lead time required to print the catalog and class schedules that are based on conditions such as faculty and facility availability, and the persistent historical practice of the Legislature to adopt the State Budget months after the start of the college academic year, it can be concluded that changes in the class schedule will frequently occur and that it is reasonable and necessary to notify students about the changes (hence the need for "addenda") in order to comply with the mandate.

Section 58106 provides methods to limit enrollment in courses. The DSA (132) concludes that Section 58106 does not require districts to establish or implement policies for open enrollment. That requirement is specifically stated in Section 51006, the minimum condition for open enrollment. The DSA (132) also states that there is no mandate to "claim" courses for state apportionment; however, that is how community colleges are funded. Whether or not there is a statement of an open enrollment policy, a community college district is principally limited in the number of students they can service based on its apportionment from the Legislature, which is outside the control of the district. It would seem reasonable and necessary to establish equitable mechanisms that provide for methods to allocate the available courses to the number of students (which is also not controlled by the district) wanting the courses, and Section 58106 provides those methods.

Section 58107 requires the district to ensure 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. The DSA(132) states that the section merely "sets forth a prohibited activity." Not so. The district must take some affirmative action to avoid the prohibited activity. The language of the section is replete with words and phrases that require further description in order to determine compliance. It would seem reasonable and necessary for the district to adopt policies and implement procedures to avoid the prohibited use of funding.

Section 58108 addresses procedures and standards for enrollment in courses and specifically prohibits types of preferential enrollment. The DSA(133) states that the section does not require any activities by the district. The district must take some affirmative action to avoid the prohibited activity, that is, to ensure that enrollment is consistent with all sections of Title 5 and is "uniformly administered by appropriately

authorized employees.” It would seem reasonable and necessary for the district to adopt policies and implement procedures to avoid the prohibited use of funding.

4. **COMPREHENSIVE PLANS**
Education Code Sections 81820 through 81823
Title 5, CCR, Sections 51008, 55401 through 55405

The subject of this program is Education Code Sections 81820 through 81823, and Title 5, CCR, Sections 51008 and 55401 through 55405. Section 51008 is the minimum condition that requires each community college governing board to adopt and annually update policies for comprehensive academic and facility master plans subject to the requirements of the Board of Governors and to submit the plans to the Board of Governors for approval. The DSA does not analyze Section 51008. Education Code Section 70901, subdivision (b), (9) (as amended by Chapter 1023, Statutes of 1998), and Section 70902, subdivision (b) (1), require comprehensive plans to be prepared by the district, to be submitted to the Board of Governors, and for the Board of Governors to review and approve the plans. The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service for community college districts.

Educational/Academic Master Plans

The DSA (39) concludes that the plain language of Sections 55401 through 55404 has remained unchanged since the adoption of the sections in 1971. This is true. However, the mandate derives from Section 51008 which was not evaluated by the DSA to determine if that section constitutes a new program or higher level of service for community college districts.

Capital Construction Master Plans

The DSA does not analyze the Education Code Sections 81820 through 81823 that establish the facility master plan mandate. The proposed statement of decision should be revised to include an analysis of whether these sections constitute a new program or higher level of service for community college districts.

5. **EQUAL EMPLOYMENT OPPORTUNITY**
Education Code Sections 87100 through 87108
Title 5, CCR, Sections 51010, 53000 through 53034

These codes and regulations were consolidated into the Discrimination Complaint Procedures (02-TC-46) test claim and are no longer a subject of this consolidated test claim.

6. STUDENT FEES
Title 5, CCR, Section 51012

The subject of this program is Title 5, CCR, Section 51012. Section 51012 is the minimum condition that requires the district governing board to only establish such mandatory student fees as expressly authorized by law. The DSA does not analyze Section 51012. Education Code Section 70902, subdivision (b) (9), requires the district governing board to establish student fees as is required or authorized by law. The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service for community college districts.

7. APPROVAL OF NEW COLLEGES AND EDUCATIONAL CENTERS
Title 5, CCR, Sections 51014, 55825 through 55831

The subject of this program is Title 5, CCR, Sections 51014 and 55825 through 55831. Section 51014 is the minimum condition that requires each community college governing board to obtain approval of the Board of Governors for the formation of new colleges or educational centers pursuant to Sections 55825 through 55831. The DSA does not analyze Section 51016. Education Code Section 70901, subdivision (b), (1) (C), requires the Board of Governors to establish minimum standards for the formation of community colleges and districts. Subdivision (b) (5) (C) requires the Board of Governors to establish space and utilization standards for facility planning in order to determine eligibility for state funds for construction purposes. Subdivision (b) (9) requires the Board of Governors to review and approve the facility plans for each district. Subdivision (b) (11) requires the Board of Governors to exercise general supervision over the formation and reorganization of districts including approval of the plans therefor. Education Code Section 70902, subdivision (b) (1), requires the district governing board to establish policies for and approve facilities plans to promote the orderly growth of the colleges within the district. The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service for community college districts.

The DSA (38) concludes that the plain language of these Sections 55825 through 55831 does not mandate any activities on the districts since planning the formation of a new college or educational center is discretionary. Based on that premise, the DSA does not further analyze the regulations to determine whether the activities result in a new program or higher level of service. A threshold issue here is whether college districts are either legally or practically compelled (*Kern*) to build new instructional facilities. If so, planning is required, and the planning process is controlled by the Board of Governors and the Chancellor by these sections. The Commission, however, has decided the threshold issue to the contrary for both school and community college

districts in the statements of decision for three previous test claims.⁴ The test claimant raises it here for purposes of the record and does not waive the issue.

8. ACCREDITATION

Title 5, CCR, Section 51016

Handbook of Accreditation and Policy Manual, Accrediting Commission for Community and Junior Colleges (Summer 2002)

The subject of this program is Title 5, CCR, Sections 51016 and the Handbook of Accreditation and Policy Manual, Accrediting Commission for Community and Junior Colleges (Summer 2002). Section 51016 is the minimum condition that requires each community college within a district to be accredited by the Accrediting Commission for Community and Junior Colleges. The DSA does not analyze Section 51016. The proposed statement of decision should include an analysis to determine whether this section constitutes a new program or higher level of service for community college districts.

Regarding the Handbook, the DSA (24) concludes that because ACCJC/WASC is a non governmental entity, the Handbook does not constitute an executive order. However, there is an independent basis for the mandate. Accreditation is a Title 5 regulatory requirement established by the Board of Governors. The Handbook states the standards and criteria for accreditation by ACCJC/WASC. The Board of Governors has retained no independent adjudicatory power for the ultimate determination of accreditation, instead, the Board of Governors has entirely deferred to ACCJC/WASC. This is similar to state laws (e.g., Education Code Section 42010) that require government entities to have annual financial audits conducted by Certified Public Accountants whose standards are not executive orders, but are professional standards drafted into the law by reference.

9. COUNSELING PROGRAMS

Title 5, CCR, Section 51018

The subject of this program is Title 5, CCR, Section 51018. This Section is the minimum condition that requires each community college district to (1) establish and implement regulations and procedures to provide counseling programs for students in each college within the district; file a copy of the community college district's regulations regarding counseling programs with the Chancellor's Office; to publicize the counseling program; ensure the counseling program is organized and functioning and meets the needs of average students and those with special needs; to ensure the counseling

⁴ 01-TC-28 Prevailing Wage Rates, 02-TC-30 School Facilities Funding Requirements, and 03-TC-17 California Environmental Quality Act

program includes academic counseling, career counseling, personal counseling, skills testing programs, financial assistance programs, and job placement services; and, ensure that academic, career and personal counseling services are provided to first-time students enrolled for more than six units, students enrolled provisionally, and students on academic or progress probation. The DSA does not analyze Section 51018. The proposed statement of decision should include an analysis to determine whether this section constitutes a new program or higher level of service for community college districts.

10. INSTRUCTIONAL OBJECTIVES
Title 5, CCR, Section 51020

The subject of this program is Title 5, CCR, Section 51020. Section 51020 is the minimum condition that requires each community college district to have stated objectives for its instructional programs. The DSA does not analyze Section 51020. Education Code Section 70902, subdivision (b) (3), requires district governing boards to establish academic standards, probation and dismissal policies. The proposed statement of decision should include an analysis to determine whether this section constitutes a new program or higher level of service for community college districts.

11. CURRICULUM
Title 5, CCR, Sections 51021, 55000 through 55350
"Program and Course Approval Handbook" Chancellor's Office California
Community Colleges (September 2001)

The subject of this program is Title 5, CCR, Sections 51021, 55000 through 55350, and the "Program and Course Approval Handbook" Chancellor's Office California Community Colleges (September 2001). Section 51021 is the minimum condition that requires each community college to establish programs and courses that will permit the realization of the objectives and functions of the community college and submit them to the Chancellor for approval. The DSA does not analyze Section 51021. Education Code Section 70901, subdivision (b), (10), requires the Board of Governors to review and approve all educational programs offered by the districts, as well as those courses that are not offered as part of an educational program. Education Code Section 70902, subdivision (b) (2), requires the district governing board to establish policies and to approve courses of instruction and educational programs, and to submit those to the Board of Governors. The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service for community college districts.

Program Classification and Standards

The DSA (92) correctly concludes that since districts must offer courses (Education Code Section 66010.4), the districts must comply with the regulations and procedures

The DSA citation only included the language in item (C). Not included were the “shall” imperative of the preamble and the affirmative duty in the subdivision (a) (2) language, to which item (C) is a subordinate clause that is controlled by the superior language. Inasmuch as item (C) requires that the community services courses and program be compatible with the mandated primary missions; that Title 5, Section 55001 defines these courses and activities as “educational programs”; that the Education Code Sections 70901 and 70902 require educational programs be reported to and be approved by the Board of Governors; both the statutory and regulatory schemes require these community service courses and programs to be treated as educational programs subject to curriculum standards and approval mandate. There is no statutory or regulatory basis to exclude community service courses from the scope of the mandate, and *Kern* is not applicable since these activities are part of the primary mission of the community colleges.

Contract Classes

The Education Code Section 70902, subdivision (a) (6), authorizes the district governing board to contract for goods and services. Education Code Section 78021 (as added by Chapter 493, Statutes of 1987) authorizes the use of contract education programs and direct the district to recover the cost of the program from all sources, public and private. Title 5, Section 55170 authorizes districts to approve and conduct “contract classes” without the Chancellor’s approval if the district does not claim state support for the class. Subdivision (a) defines “contract classes” as those classes offered by a community college district which fulfill a contract with a public or private agency, corporation, association or other body or person.

The DSA (97) incorrectly concludes that seeking state support for the contract classes triggers the approval requirement and thus is an “underlying” discretionary decision of the district. This would apply only to classes if the legislation that authorizes the class does not require approval of the course. If the legislation requiring the class requires approval, then the contract class must comply with the approval process mandate, whether or not there is state support for the class, including the requirements of the Handbook (DSA, p. 99). The use of private contractors is a method to implement the mandate, not a subsequent new program.

Reinstatement of Deleted Courses

Section 55182 (added in 1983 and last amended in 1991) authorizes the governing board to reinstate any course that was removed from the credit or noncredit curriculum during the 1982-83 fiscal year, in response to the Budget Act of 1982. The DSA (98) concludes that since districts are only authorized, and not required, to reinstate these courses, there are no activities mandated on the districts. This is a misconstruction of the mandate. Section 55182 states that reinstatement of the course must be in

accordance with the mission of the community college, which is the Education Code 66010.4 criterion for including these courses in the scope of the mandate, not the fact that they were once deleted due to budget constraints. Further, these courses are part of the educational program subject to (Education Code Sections 70901 and 70902 and Title 5 Section 55001) Board of Governors approval. The DSA does not cite any legal basis that defines the specific courses that must be provided in furtherance of the primary mission of the community colleges. The codes and regulations only speak to types of course, therefore, the courses deleted pursuant to the 1982 Budget Act are not automatically discretionary as to this course approval mandate. Adoption of previously deleted courses is essentially the same process as adopting a new course that is within the scope of this mandate.

Alternative Instructional Methodologies

The DSA (104) has incorrectly invoked *Kern* for the conclusion that the alternative instructional methodologies, because they are permissive, are not mandated activities. This includes Article 1 Distance Education and Article 3 Independent Study. This is a misuse of *Kern* and a misconstruction of the mandate. The mandate here pertains to approval of courses, and not to the method of course delivery. The precursor program is the mandated approval of the courses. The alternative methodologies are not a new mandate applied to a discretionary precursor mandate. The DSA does not assert that any of the distance courses or independent study courses are not part of the educational program subject to the course approval requirements or outside the scope of the primary mission of the community colleges. The DSA does not assert any legal requirement for instruction to be delivered only by the traditional classroom methodology.

The overall regulatory scheme also brings these two alternative methods within scope of the mandated activities of Chapter 6 Curriculum and Instruction. Regarding distance education:

- Section 55205 requires that all distance education is subject to the general course approval requirements
- Section 55207 requires the same standards of course quality to be applied to distance education as are applied to traditional classroom courses, in regard to the course quality judgments and any local course quality determination or review process.
- Section 55209 requires determinations and judgments about the quality of distance education to be made with the full involvement of faculty in accordance with the provisions commencing with Section 53200.
- Section 55211 requires district governing boards to ensure that all approved courses offered as distance education include regular effective contact between instructors and students and that all distance education courses are delivered consistently with guidelines issued by the Chancellor pursuant to Section 409 of

- the Procedures and Standing Orders of the Board of Governors (pertaining to a report from a committee on distance learning).
- Section 55213 requires each distance learning course to be separately reviewed and approved, according to the district's certified course approval procedures.
 - Section 55215 requires that instructors of sections delivered via distance education technology must be selected by the same procedures used to determine all instructional assignments.
 - Section 55217 requires the determination of the number of students assigned to any one course offered by distance learning to be consistent with other district procedures related to faculty assignments, including curriculum committee review and collective bargaining methods.
 - Section 55219 requires the district to comply with certain record keeping and reporting requirements for noncredit and nontransferable distance learning courses, including an annual report to the district governing board, and compliance with Section 409 of the Procedures and Standing Orders of the Board of Governors (pertaining to a report from a committee on distance learning).

Regarding independent study courses:

- Sections 55300 and 55310 require the college district to report approved independent study courses to the Chancellor in the manner specified by the Chancellor.
- Section 55316 requires independent study courses to be accepted for the purpose of awarding associate degrees and to be recognized by the California State College and University systems.
- Section 55320 states that the academic standards for independent study courses will be the same as those applied to credit courses.
- Section 55322 requires the college to provide independent study students the same access to their course instructor as that available for other courses.
- Section 55340 requires independent study courses to meet all the requirements of curriculum approval and standards in order to be eligible for state funds.
- Section 55350 requires instructors of independent study courses to be qualified for the services provided; be responsible for the supervision and control of the course and enrolled students; provide orientation and guidance to each student; and provide a schedule of office hours.

Inasmuch as the Legislature does not mandate a form of instructional delivery, all methods, traditional or otherwise, are alternatives, but are not discretionary programs pursuant to *Kern*.

12. VOCATIONAL EDUCATION PROGRAMS
Education Code Sections 78015 and 78016
Title 5, CCR, Sections 51022, 55600 through 55630

The subject of this program is Education Code Sections 78015 and 78016, and Title 5, CCR, Sections 51022 and 55600 through 55630. Section 51022 is the minimum condition that requires, at subdivision (a), each community college district to adopt and carry out policies and procedures for the establishment, modification, or discontinuance of course or programs, including vocational education. The DSA does not analyze Section 51022. Education Code Section 70901, subdivision (b), (10), requires the Board of Governors to review and approve all educational programs offered by the districts, as well as those courses that are not offered as part of an educational program. Education Code Section 70902, subdivision (b) (2), requires the district governing board to establish policies and to approve courses of instruction and educational programs, and to submit those to the Board of Governors. The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service.

The DSA (67) correctly concludes that vocational education is a “primary mission and function” of the community colleges, and thus colleges are required to establish vocational education programs. Therefore, the DSA (66, 67, 69) properly concludes that Education Code Section 78015, regarding the job-market study, and Education Code Section 78016, regarding the biennial review of the vocational education program, impose state mandated activities on districts that are a new program or higher level of service.

Education Code Section 70902, subdivision (b) (6) permits the district governing board to contract for the provision of goods and services as authorized by law. Education Code Section 78021 authorizes the use of contract education programs and directs the district to recover the cost of the program from all sources, public and private. Title 5, Sections 55600-55630 are the regulatory scheme for Vocational Education programs utilizing private contractors to provide the program, except for Section 55601, which requires the establishment of an advisory committee (but was found by the DSA (69) to be a preexisting duty derived from Education Code 6257). For the remaining Title 5 Sections, the DSA (68), incorrectly invoking *Kern*, concludes that since these sections relate to the district’s discretionary authority to contract with private schools to provide the district’s vocational education, the regulations are not mandated activities. The DSA is using *Kern* backwards. The facts in *Kern* related to a state mandate added onto precursor optional programs. Here, vocational education was determined by the DSA to be a mandate, not a precursor optional program. The use of private contractors is a method to implement the mandate, not a subsequent new program. A choice of methods or sources to implement the mandate is not a new program subsequent to a discretionary program. If regulations never had been established specifically for vocational education contracts, there would be no question presented that private

contracting was a reimbursable method to implement the mandate. The Title 5 Sections regulate the contracting process and the contracts are a permissible method of implementing the mandate. The DSA should complete its analysis of Sections 55600, 55602, 55603, 55605, 55607, 55620, and 55630 as activities mandated upon the districts to implement the vocational education program to determine if they constitute a new program or higher level of service.

13. LOCAL COURSE ARTICULATION
Title 5, CCR, Section 51022

The subject of this program is Title 5, CCR, Sections 51022, subdivision (b). Section 51022, subdivision (b), is the minimum condition that requires the governing board of each district to adopt and implement policies and procedures to provide that the district's courses and programs are articulated with the local colleges and high schools. The DSA does not analyze Section 51022. Education Code Section 70902, subdivision (b) (2), requires the district governing board to establish policies and approve courses of instruction and educational programs, and to submit those policies and procedures to the Board of Governors. Education Code Section 66010.7, subdivision (b) (4) and (5) (as added by Chapter 1198, Statutes of 1991) also require this type of intersegmental collaboration and coordination. The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service for community college districts.

14. ACADEMIC FREEDOM
Title 5, CCR, Section 51023

The subject of this program is Title 5, CCR, Section 51023, subdivisions (a) and (c). Section 51023, subdivisions (a) and (c), comprise the minimum condition that requires each community college district governing board to adopt and comply with policies and procedures for academic freedom. The DSA does not analyze Section 51023. The proposed statement of decision should include an analysis to determine whether this section constitutes a new program or higher level of service for community college districts.

15. SHARED GOVERNANCE (Faculty, Staff, Students)
Title 5, CCR, Sections 51023, 51023.5, 51023.7, and 53200 through 53207

The subject of this program is Title 5, CCR, Sections 51023 through 51023.7 and 53200 through 53207. Section 51023, subdivisions (b) and (c), are the minimum conditions that require each community college district governing board to adopt and comply with policies and procedures regarding the role of academic senates and faculty councils, consistent with Sections 53200 through 53207. Section 51023.5 is the minimum condition that requires each community college district governing board to adopt and comply with policies and procedures to provide district and college staff the

opportunity to participate in district and college governance. Section 51023.7 is the minimum condition that requires each community college district governing board to adopt and comply with policies and procedures to provide students the opportunity to participate in district and college governance. The DSA did not analyze Sections 51023, 51203.5, and 51023.7. Education Code Section 70902, subdivision (b) (7), requires the district governing board to establish procedures to ensure faculty, staff, and students have the opportunity to express their opinions at the campus level and to participate in district and college governance. Subdivision (b) (14) requires the district to participate in the statewide "consultation" process established pursuant to Education Code Section 70901, subdivision (b) (1) (E). The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service for community college districts.

The DSA (40) concludes that the plain language of these Sections 53201, 53202, and 53203 require the district to recognize the academic senate and establish policies for the delegation of specific authority. However, the DSA (43) states that the duties in Section 53202 have been required since 1974. Section 53202 prior to 1975 only pertained to how the academic senate would be established. The district was not required to "recognize" the academic senate until the section was amended by Register 78-06. The remainder of the mandate is defined by Section 51023 which the DSA does not analyze to determine whether that section constitutes a new program or higher level of service.

The DSA (42) concludes that Section 53207, regarding the release time for faculty members to serve as officers on the state academic senate, does not impose any state mandated activities because release time is not required unless "sufficient funds" are provided to operate the program. For the years that funding is provided, the district is required to provide the release time. The amount of funding is a state decision not a district decision. Even when the state decides that funding is sufficient, thus triggering the mandate, it is still a question of fact whether the state funding fully reimburses all of the costs of the district release time. The DSA has treated this activity as a Government Code Section 17556, subdivision (e), exception to finding costs mandated by the state. It is actually an activity to be approved for reimbursement and included in the parameters and guidelines with the actual total cost (staff time, travel, lodging, indirect cost rate applied) subject to reduction by actual funding received. The district's mandated participation is not in pursuit of state funding for the mandated activities.

16. MATRICULATION

Education Code Sections 78210 through 78218

Title 5, CCR, Sections 51024, 55500 through 55534

The subject of this program is Education Code Sections 78210 through 78218, and Title 5, CCR, Sections 51024 and 55500 through 55534. Section 51024 is the minimum condition that requires each community college governing board to: adopt and submit to

the Chancellor a matriculation plan as required by Section 55510; evaluate the district's matriculation program as required by Section 55512, subdivision (c); provide matriculation services to students as required by Sections 55520 and 55521; establish procedures for waivers and appeals as required by Section 55534; and, substantially comply with all other provisions of Sections 55500 through 55534. The DSA does not analyze Section 51024. Education Code Section 70901, subdivision (b) (10), requires the Board of Governors to review and approve all educational programs offered by the districts, as well as those courses that are not offered as part of an educational program. Education Code Section 70902, subdivision (b) (2), requires the district governing board to establish policies for and to approve courses of instruction and educational programs, and to submit those to the Board of Governors. The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service.

Utilizing *Kern*, the DSA (48) concludes that the plain language of Education Code Section 78211.5, makes this program contingent on funding, and thus any participation and compliance voluntary to the district. The DSA thus concludes that the plain language of these sections does not mandate any activities on the districts. Based on that premise, the DSA does not further analyze the regulations to determine whether the activities are a new program or higher level of service. The DSA misconstrues the effect of Education Code Section 78211.5 which requires the Chancellor to provide for full implementation of the matriculation services specified in Section 78212 in as many community colleges as the funds appropriated for that purpose allow. In addition, Section 78211.5 requires that any college or district receiving funding must agree to carry out the provisions of the article, as specified, for the period during which funding is received pursuant to the article. The district is required to expend the funds received pursuant to the article only for those matriculation services approved by the Board of Governors or for the contribution of matching funds toward the purposes of the article as may be required by the Board of Governor's pursuant to Section 78216. The previous preamble for Title 5, CCR, Section 51024, as added in 1990, stated: "[w]hen matriculation services have been fully funded, . . . , the governing board of each community college district shall [implement the program described in Sections 55500. et seq.]." The preamble for Section 51024, as amended in 1992, states: "[t]he governing board of each community college district shall [implement the program]," thus eliminating the condition of full funding. Section 55500 established the regulatory requirements in 1990 for the matriculation programs and at subdivision (b) states that: "[t]he requirements of this chapter apply only to district receiving funds pursuant to Education Code Section 78216 for the period of time which each funds are received."

However, there is no regulatory mechanism for the districts to apply for the funds, the amounts of which are determined by the Legislature and allocated by the Board of Governors' unilateral formula. There is no mechanism for a district to refuse the funds, nor a stated penalty, as there is for the faculty ratio mandate, that indicates refusal of the funds and the resulting mandate is contemplated. Of course, the concept of refusal

goes to the underlying threshold legal issue that Section 51000 requires compliance notwithstanding. 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 actual and complete costs of compliance. This is not an optional program, but just a program triggered by state funding decisions not under the control of the district. The district's mandated participation is not in pursuit of state funding for the mandated activities.

17. FULL-TIME / PART-TIME FACULTY

Education Code Sections 87482.6 and 87482.7

Title 5, CCR, Sections 51025, 53300 through 53314

The subject of this program is Education Code Sections 87482.6 and 87482.7, and Title 5, CCR, Sections 51025, 53300 through 53314, as well as the issue of the use of program improvement funds. Section 51025 is the minimum condition that requires compliance with Sections 53300 through 53314 and the Board of Governors regulations to increase the district's full-time faculty percentage to 75%. Section 55300 states that it should be read in conjunction with Section 51025, thus creating a derivative mandate for the requirements of Section 51025. The DSA did not analyze Section 51025. The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service for community college districts.

Utilizing *Kern*, the DSA (46) concludes that the plain language of Education Code Section 87482.6, subdivision (a), directs districts to use program improvement funds to increase the number of full-time instructors. If a district does not increase its faculty ratio, the district loses the program improvement funds for this program. The DSA thus concludes that the program is optional and not coerced. However, loss of those funds is not the only penalty for failure to increase the faculty ratios. Section 87482.6, (b) (4), and Title 5 Section 53320, state that the Chancellor shall reduce the district's *base* budget for 1991-92 and subsequent fiscal years by an amount equivalent to the average replacement cost times the deficiency in the number of FTE. Pursuant to Education Code Section 87482.7, these deficiency amounts from those deficient districts are transferred to the statewide Faculty and Staff Diversity Fund/Employment Opportunity Fund for use by all districts and allocated differently, thus creating a net loss to the deficient district for every subsequent fiscal year, which is clearly a penalty independent of the program funds at issue for any one fiscal year.

The DSA (47) concludes that the plain language of Sections 55300 through 53314 does not impose any activities on college districts since they set forth the methods for the Chancellor to calculate the FTEs. To the contrary, the methods of calculating the faculty ratios rely upon district information and have a direct bearing on the amount of program funding or penalty for each district. The mandate and the coercion derive from Education Code Section 87482.6 and Title 5 Section 51025, which is to be read in

conjunction with Sections 53300, et seq. None of the Title 5 sections for this program were evaluated by the DSA to determine if those sections constitute a new program or higher level of service. The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service for community college districts.

18 STUDENT EQUITY PLAN

Education Code Sections 212, 212.5, 213, 214, 221.5, 221.7, 66010.2, 66010.7, 66016, 66030, 66251-66292.3, 72011 through 72014
Title 5, CCR, Sections 51026, 54220

These codes and regulations were consolidated into the Discrimination Complaint Procedures (02-TC-46) test claim and are no longer a subject of this test claim.

19. TRANSFER CENTERS

Education Code Sections 66720 through 66745, 71027
Title 5, CCR, Section 51027

The subject of this program is Education Code Sections 66720-66745, 71027, and Title 5, CCR, Section 51027. Section 51027 is the minimum condition that requires the governing board of community college districts to adopt and implement policies and procedures to provide intersegmental transfer services to students. The DSA did not analyze Section 51027. The proposed statement of decision should include an analysis to determine whether this section constitutes a new program or higher level of service for community college districts.

The DSA concludes that the plain language of Sections 66721 (p. 50), 66722 (p.50), 66722.5 (p. 50), 66737 (p. 53), 66741 (p. 58), does not impose any state mandated activities on the districts. However, to the extent that these sections define the legislative imperative and purposes of the program, they are the guidelines for the implementation and evaluation of outcomes required by the relevant Education Code sections and Section 51027.

The DSA (54) concludes the Education Code Section 66738, subdivision (b), does not impose any state-mandated activities on the district because it merely sets forth the elements of a comprehensive transfer system. The "elements" of the "comprehensive transfer systems" are not otherwise defined in subdivision (a). Subdivision (b) defines the subdivision (a) mandate for the "development and implementation of formal systemwide articulation agreements and transfer agreement programs, including those for general education or a transfer core curriculum, and other appropriate procedures to support and enhance the transfer function." One of the rules of statutory construction is to rationalize and harmonize the statutory scheme in its entirety, and to exclude subdivision (b) would impede the implementation and annual evaluation of the plan if there are no criteria for the plan.

The second paragraph of Education Code Section 66740 requires “[w]here specific majors are impacted or over-subscribed, the prescribed course of study and minimum grade point average required for consideration for upper division admission to all of these majors shall be made readily available to community college counselors, faculty, and students on an annual basis.” The DSA (56, 57) correctly concludes that the Universities and State Colleges are the source of these annual changes and are the agencies required to provide this information. The DSA, however, wrongly concludes that no action is required by the community college districts to accomplish the notification of the appropriate district personnel. The participation of the districts is necessary to identify the district personnel who are to receive the notification. There is no reason to assume that personnel at the Universities and State Colleges do or can directly transmit that information to the district faculty and staff, or even that the Universities and State Colleges are in a position to know the identity and location of the district staff mandated to receive the notification. It would seem reasonable and necessary for the community college districts to facilitate the distribution of this information.

The DSA (60) concludes that Education Code Section 66743 does not impose any state mandated activities on the district because it only requires the intersegmental advisory committee established by the California Postsecondary Education Commission to periodically prepare a report for the Governor and the Legislature on the status of transfer policies and programs based on their findings. Community college districts, as one of the “segments,” are a reasonable and perhaps necessary source for CPEC for some of the information regarding the effectiveness of transfer agreement programs in enhancing the overall transfer function, the status of the implementation of the transfer core curriculum, and the progress made in achieving articulation agreements in specific majors. The participation of the districts is necessary to avoid frustrating the entire statutory scheme. It would seem reasonable and necessary for the community college districts to provide information to CPEC to facilitate the mandate.

In furtherance of the Education Code requirements, Section 51027 requires the district to provide: space and facilities adequate to support the transfer center and its activities; clerical support for the transfer center and assign college staff to coordinate the activities of the transfer center; an advisory committee to plan the development, implementation, and ongoing operations of the transfer center; 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; and, an annual report to the Chancellor describing the status of the district's efforts to implement its transfer center plan. All of these activities are reasonable and necessary activities to implement the statutory scheme.

20. ENFORCEMENT

Education Code Section 70901(b)

Title 5, CCR, Sections 51000, 51100 and 51102

The subject of this program is Title 5, CCR, Sections 51100 and 51102. The DSA (35, 36) concludes that the plain language of these Sections do not require colleges to engage in any activities. Section 51100 requires the Chancellor to review each district to determine if the district has met the minimum conditions contained in Subchapter 1. Section 51102 allows the Chancellor, upon the prior approval of the Board of Governors, to withhold a portion of state funds related to the gravity of the finding of noncompliance. Other possible Section 51102 responses to the review findings include agreeing with the district's explanation regarding the perceived noncompliance or accepting a district plan to mitigate the noncompliance.

Even though specific district activities are not stated in these Sections, the Legislature's mandate upon the Board of Governor's and Chancellor cannot be implemented without the reasonable and necessary participation of the districts. For the Chancellor to be able to "review" a district, the district has to participate in the review. In order for the Chancellor to obtain a district written response to the review findings, the district must prepare the written response. In order for the review to achieve its purpose, the district needs to prepare and implement a mitigation plan. The following district activities are reasonable and necessary to implement the Chancellor's review:

- A) To prepare and submit all data necessary to respond to any review by the Chancellor to determine whether the district has complied with the minimum conditions pursuant to Title 5, CCR, Section 51100.
- B) To adopt and implement policies and procedures to comply with any enforcement orders that the Chancellor may issue to the district regarding district compliance with the minimum conditions pursuant to Title 5, CCR, Section 51102.
 - 1) To prepare and submit to the Chancellor an official written response by a date specified by the Chancellor, if the Chancellor notifies the chief executive officer of the district that any noncompliance with the Subchapter exists, pursuant to Title 5, CCR, Section 51102, subdivision (a);
 - 2) If the Chancellor so requires, to prepare, submit and implement a plan and timetable for achieving compliance as a condition for continued receipt of state aid Title 5, CCR, Section 51102, subdivision (b)(2).

PART D. NOTICES TO STUDENTS

Education Code Sections 66281.5 and 66721.5
Title 5, CCR, Sections 54626, 54805, 59404, and 59410

The subject of this part is Education Code Sections 66281.5 and 66721.5, and Title 5, CCR, Sections 54626, 54805, 59404, and 59410. These two Education Code Sections and four Title 5 sections were included in the original Notice to Students (CSM 02-TC-25) test claim. The two Education Code sections and the other 18 Title 5 sections included in the original test claim have been included in the DSA findings for the 18 minimum condition programs above, or in the two minimum condition programs transferred to the Discrimination Complaint Procedures (02-TC-46) test claim.

Section 54626, subdivision (a), requires community college districts to adopt a policy that identifies the categories of directory information which may be released. Subdivision (b) allows directory information to be released provided that annual public notice is given of the categories of information the district plans on releasing and the identity of the proposed recipients. The notice shall also specify the period of time within which students are given to inform the district, in writing, of those categories of information they wish not to be released. The DSA (137) correctly determined that subdivision (a) mandated activities on the district in excess of FERPA requirements. However, the DSA (137) incorrectly determined that subdivision (a) is not a new program based on previous Section 54626 (as added March 5, 1976) and former Education Code Section 25430.12 (effective January 1, 1976). Both of these dates are after December 31, 1974, the Government Code Section 17514 measurement date for new programs. Notwithstanding this error, the DSA (137) concludes that subdivision (a) is a one-time activity that would most likely to have occurred before July 1, 2001, the effective date of the test claim, although there is no time limit to adopt this policy, nor any penalty for not adopting the policy immediately. The DSA (135,136) concludes that the remainder of Section 54626 was discretionary.

Section 54805 requires district governing boards to include in the materials given to each student at registration, information pertaining to the student representation fee, including a statement indicating that the money collected will be used to provide support for students or representatives who may be stating their positions and viewpoints before government agencies, the amount of the fee, and a statement informing students of their right to refuse to pay the fee for religious, political, moral or financial reasons. The DSA (138) concludes that the district is not compelled to authorize a student body organization. However, the state mandate pertains to the student representation fee which is determined by an election of the students conducted by the student body association that is an independent body pursuant to Section 54801. The representation fee and notice do not result as a downstream activity of the district's authorization of the student body association, but an independent action of a third party that triggers the state mandate to provide written notice to students pursuant to Section 54805.

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 any attached documents are true and correct copies of documents received from or sent by the state agency which originated the document.

Executed on April 21, 2011 at Sacramento, California, by



Keith B. Petersen

C: Commission electronic service list