BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	Case No.: 02-TC-27
Education Code Sections 70901(b)(1)(B), 87356, 87357, 87358, 87359, 87360, 87610.1, 87611, 87663, 87714, 87740, 87743.2, 87743.3, 87743.4, 87743.5 Statutes 1981, Chapter 470, Statutes 1988, Chapter 973, Statutes 1990, Chapter 1302, Statutes 1993, Chapter 506, Statutes 1995, Chapter 758, Statutes 1998, Chapter 1023, Statutes 2000, Chapter 124 California Code of Regulations, Title 5, Sections 53130, 53403, 53406, 53407, 53410, 53410.1, 53412, 53414, 53415, 53416, 53417, 53420, 53430 Register 90, No. 37 (July 5, 1990), Register 90, No. 49 (Nov. 30, 1990), Register 91, No. 23 (June 7, 1991), Register 91, No. 50 (July 19, 1991), Register 92, No. 9 (Nov. 24, 1991), Register 92, No. 26 (July 27, 1992), Register 92, No. 45 (Nov. 6, 1992), Register 93, No. 25 (June 4, 1993), Register 93, No. 42 (Nov. 4, 1993), Register 93, No. 46 (Oct. 8, 1993), Register 94, No. 38 (Oct. 6, 1994), Register 95, No. 19 (Mar. 19, 1995), Register 96, No. 40 (Oct. 4, 1996) Filed June 13, 2003, by the Santa Monica Community College District, Claimant	*Employment of Community College Faculty and Administrators* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. *(Adopted July 28, 2011)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

Dated: July 29, 2011

Drew Bohan
Executive Director

BEFORE THE

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STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 70901(b)(1)(B), 87356, 87357, 87358, 87359, 87360, 87610.1, 87611, 87663, 87714, 87740, 87743.2, 87743.3, 87743.4, 87743.5 Statutes 1981, Chapter 470, Statutes 1988, Chapter 973, Statutes 1990, Chapter 1302, Statutes 1993, Chapter 506, Statutes 1995, Chapter 758, Statutes 1998, Chapter 1023, Statutes 2000, Chapter 124 California Code of Regulations, Title 5, Sections 53130, 53403, 53406, 53407, 53410, 53410.1, 53412, 53414, 53415, 53416, 53417, 53420, 53430 Register 90, No. 37 (July 5, 1990), Register 90, No. 49 (Nov. 30, 1990), Register 91, No. 23 (June 7, 1991), Register 91, No. 50 (July 19, 1991), Register 92, No. 9 (Nov. 24, 1991), Register 92, No. 26 (July 27, 1992), Register 92, No. 45 (Nov. 6, 1992), Register 93, No. 25 (June 4, 1993), Register 93, No. 42 (Nov. 4, 1993), Register 93, No. 46 (Oct. 8, 1993), Register 94, No. 38 (Oct. 6, 1994), Register 95, No. 19 (Mar. 19, 1995), Register 96, No. 40 (Oct. 4, 1996) Filed June 13, 2003, by the Santa Monica Community College District, Claimant	Case No.: 02-TC-27 *Employment of Community College Faculty and Administrators* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. *(Adopted July 28, 2011*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on July 28, 2011. Keith Petersen appeared on behalf of claimant. Donna Ferebee and Ed Hanson appeared on behalf of the Department of Finance. Steve Bruckman appeared on behalf of the Chancellor's Office of the California Community Colleges.

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

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

Summary of Findings

This test claim addresses various activities related to determining the minimum qualifications for academic employees in community colleges, as well as for hiring procedures, evaluating, and providing tenure grievance procedures and faculty service areas for them.

Most of the test claim statutes are based on the Community College Reform Act of 1988 (1988 Reform Act), which abolished the credential system for community college faculty and administrators, and required the Board of Governors of the California Community Colleges (Board of Governors) to establish minimum standards for the employment of academic and administrative staff in community colleges.

The 1988 Reform Act also changed faculty evaluation procedures, such as reducing the evaluation frequency from every two years to every three years for regular (tenured) employees, and requiring temporary employees to be evaluated within the first year of employment, and once every six semesters or nine quarters thereafter.

The 1988 Reform Act also set up a process, in districts where tenure evaluation procedures are collectively bargained and there is a contractual grievance procedure resulting in arbitration, whereby an employee may file a grievance and seek review before an arbitrator for certain allegations. Districts without a contractual grievance procedure resulting in arbitration follow the hearing process in Education Code section 87740.[1] Decisions on grievances and arbitrator hearings under the test claim statute are subject to judicial review.

The Act also required community college districts to establish "faculty service areas" by July 1, 1990. A faculty service area (FSA) is "a service or instructional subject area or group of related services or instructional subject areas performed by faculty and established by a community college district." Each faculty member is required to qualify for one or more FSAs at the time of initial employment, and if qualified, may apply for more FSAs. Any disputes due to denial of FSA applications are treated as grievances. Districts are required to maintain records of faculty members' FSAs in the faculty members' personnel files.

For the reasons below, *the Commission denies this test claim and finds that the test claim statutes and regulations do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.*

Although the activities listed below mandate a new program or higher level of service, there is no substantial evidence in the record to support a finding that the claimant has incurred increased costs mandated by the state pursuant to Government Code section 17514 to perform these activities.

1. <u>Determine the Minimum Qualifications of Applicants for Faculty and Educational Administrator Positions</u> as follows (§ 87359(a), as added by Stats. 1988, ch. 973; Cal. Code Regs, tit. 5, § 53430(a).):

    - Determine that an applicant for a faculty or educational administrator position possesses qualifications that are at least equivalent to the minimum qualifications identified in sections 53406, 53407, 53410, 53410.1, 53415, 53416, 53417, and 53420 as applicable, before an action is taken to employ the individual.

[1] All statutory references are to the Education Code unless otherwise indicated.

- The criteria used in making the employment determination of faculty and educational administrators shall be reflected in the district's action. (§ 53430(a).)

Community college districts are *not* entitled to reimbursement for these activities above when employing faculty or educational administrators in the following programs and courses: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.), and noncredit courses (Cal. Code Regs., tit. 5, § 53412).

2. Develop Process, Criteria, and Standards for Determinations on Faculty (§ 87359(b), Stats. 1988, ch. 973; Stats. 1993, ch. 506; Cal. Code Regs, tit. 5, § 53430(b) & (c).):

- The process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty whose qualifications are equivalent to the minimum qualifications shall be developed and agreed upon jointly by representatives of the governing board and the academic senate. (§ 87359(a); Cal. Code Regs, tit. 5, § 53430(b).)
- The agreed upon process for hiring faculty shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty employed possess qualifications that are at least equivalent to the applicable minimum qualifications specified in the regulations. (§ 87359, subd. (a), Cal. Code Regs, tit. 5, § 53430(b).)
- The process for hiring faculty shall further require that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to section 87358. (§ 87359, subd. (a), Cal. Code Regs, tit. 5, § 53430(c).)
- The governing board shall approve the process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty and administrators. (§ 87359, subd. (a); Cal. Code Regs, tit. 5, § 53430(b).)

Community college districts are *not* entitled to reimbursement for the activities listed above when employing faculty or administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

3. Faculty Evaluations:

- Evaluate a temporary employee within the first year of employment, and at least once every six regular semester or once every nine regular quarters thereafter. (§ 87663(a), Stats. 1988, ch. 973, Stats. 1990, ch. 1302.)
- Include a peer review process in evaluations of academic employees, on a departmental or divisional basis, that addresses the forthcoming demographics of California and the principles of affirmative action. The process shall require that the peers reviewing are both representative of the diversity of California and sensitive to

affirmative action concerns, all without compromising quality and excellence in teaching. (§ 87663(c)and (d), Stats. 1988, ch. 973, Stats. 1990, ch. 1302.)

- Develop "evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative" for probationary faculty. (§ 87663(h).)
- Establish and disseminate written evaluation procedures for administrators (§ 87663(i), Stats. 1988, ch. 973, Stats. 1990, ch. 1302).
- Adopt and cause to be printed and made available to each academic employee of the district amended rules and regulations that reflect the new requirements imposed by Education Code section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) and provide for the evaluation of the performance of academic employees in their assigned duties. This is a one-time activity. (Cal. Code Regs., tit. 5, § 53150.)[2]

Community college districts are *not* entitled to reimbursement for these evaluations activities above when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

4. Hearings on Reappointing Probationary Employees

To hold hearings pursuant to section 87740 regarding:

- Allegations that the district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. (§ 87610.1(b).)

Community college districts are *not* entitled to reimbursement for these hearing activities when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414) and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

5. Faculty Service Areas:

- Receive faculty service area applications from faculty members and determine whether a faculty member qualifies for one or more faculty service areas at the time of initial employment, and whether the faculty member qualifies for additional faculty service areas to which he or she may apply. (§ 87743.3, Stats. 1988, ch. 973.)
- Procedurally address as a grievance, or use fair and equitable procedures for resolution of, any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area. (§ 87743.3, Stats. 1988, ch. 973.)

[2] California Code of Regulations, title 5, section 53130, Register 91, No. 23 (June 7, 1991). A new article heading was added by Register 93, No. 25 (June 18, 1993). Editorial correction of the history was made by Register 95, No. 19 (March 19, 1995).

- Maintain a permanent record for each faculty member employed by the district, in his or her personnel file, of each faculty service area for which the faculty member possess the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards. (§ 87743.4, Stats. 1988, ch. 973.)

Community college districts are *not* entitled to reimbursement for these FSA activities above when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414) and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

There is no substantial evidence in the record, however, to support a finding that the claimant has incurred increased costs mandated by the state to perform these activities.

During the period of reimbursement, funding between $2.1 and $3.9 billion has been specifically appropriated for the costs of the mandated activities through the base funding in the budget acts (line item 6870-101-0001), and pursuant to section 84755(b) and (d), that funding must first be used to pay for the mandated activities listed above.

Government Code section 17556(e) provides that the Commission shall not find costs mandated by the state if:

> The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

Pursuant to Government Code section 17556(e) and section Education Code section 84755(b) and (d), revenue has been appropriated that was specifically intended to fund the costs of the state mandate.

The claimant argues, however, that there is no evidence in the record that the base funding provided in the budget acts is sufficient to cover the costs of the mandated activities and that since the claimant has alleged an estimate of $1,000 in costs for this test claim, it has met its burden of proof.

The Commission disagrees with the claimant's arguments in this case. It is a general principle of law that the party bringing the claim has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim. This burden of proof is recognized throughout the architecture of the mandates statutes and regulations. By statute, only the local agency or school district may bring a claim, and the local entity must present and prove that it has incurred increased costs mandated by the state pursuant to Government Code section 17514, and is therefore entitled to reimbursement.

In many cases, a declaration from the claimant that alleges that the claimant has incurred $1,000 in costs to pay for the program satisfies the claimant's burden of proving it has incurred increased costs mandated by the state pursuant to Government Code section 17514. This is true, for example, when legislation mandates a new program or higher level of service, but does not appropriate any funding with the new requirements. It may also be true when the Legislature

appropriates general funding for a block of programs, one of which is the test claim program, but does not establish a priority use of the funding. In this second example, local government has discretion to use the funding for any of the programs identified, and offsetting revenue may only be identified and deducted from the claim if a claimant has used the funds for the mandated program.

Here, however, there is enough evidence to show the relevance of Government Code section 17556(e); a significant amount of money has been appropriated every fiscal year to community college districts that was specifically intended by the state to fund the costs of the mandated activities. Funding between $2.1 and $3.9 billion has been specifically appropriated to community college districts in the budget acts for allocation to the districts' through their base funding appropriation between 2001 and 2010. Pursuant to sections 84755(b) and (d), the state has directed that these appropriations must be *first* used to pay for the costs of the mandated activities identified above before a community college can exercise its discretion to use the funding for other authorized purposes.

Although there is no evidence in the record showing that the claimant's plan for expenditures prepared in accordance with section 84755(d) was, in fact, approved; that funding was actually allocated to the claimant during the period of reimbursement; or that the funding allocated to the claimant was sufficient to cover the costs of the mandated activities, it may be presumed that the official duties required of state and local officials by section 84755(d) have been regularly performed.[3] Thus, it is presumed that community college districts complied with the law in section 84755(d) and submitted a plan for expenditures showing that the allocation of funding would first pay for the mandated activities. It is further presumed that the Board of Governors complied with section 84755(d) before approving the plans and including the district's allocation as part of the district's base budget by ensuring that the proposed expenditures are consistent with the authorized expenditures in section 84755, including the requirement to pay for the mandated activities first. And it is presumed that the districts, after receiving the yearly base-funding allocation, paid for the mandated activities first. There is no evidence in this case that the state and local community college districts failed to comply with these requirements.

The cost issue in this case is similar to what occurred in the *Kern High School District* case.[4] *Kern High School Dist.* addressed legislation requiring school site councils to comply with modified open meeting act requirements, including posting a notice and an agenda of their meetings. School site councils were created by several state and federal programs that included funding for "reasonable district administrative expenses."[5] The school site councils test claim was filed with the Commission in 1994. For the Commission to take jurisdiction of the test claim filing, the claimant was required to estimate costs of at least $200 pursuant to the former Government Code section 17564 and section 1183 of the Commission's regulations. Based on the statutory schemes that created the school site councils, the court noted that the program funding available for the programs was often substantial – "for example, on a statewide basis, funding provided by the state for school improvement programs [citations omitted] for the 1998-

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[3] Evidence Code section 664.

[4] *Department of Finance v. Commission on State Mandates (Kern High School Dist)* (2003) 30 Cal.4th 727, 746-747.

[5] *Id.* at page 747.

1999 fiscal year totaled approximately $394 million. (Cal.Dept. of Ed., Rep., Budget Act of 1998 (Nov. 1998) p. 52.)"[6] In addition, the statutes allowed school districts to use the program funding for "administrative expenses," but did not establish a priority use of the funds. Despite the allegations by the claimant of increased costs mandated by the state, the court still denied the claim.

The facts here are even more compelling than *Kern*. Here, community college districts are required by law to use the allocations received to *first* pay for the mandated activities before the funding could be spent on other authorized expenses. The declaration filed by the claimant in this case estimating increased costs of $1,000, while satisfying the test claim filing requirements when this test claim was filed in 2002, is not enough to show that the claimant actually incurred increased costs mandated by the state above and beyond the significant funding specifically appropriated by the state to first pay for the mandated activities.

Accordingly, the Commission denies this test claim and finds that the test claim statutes and regulations do not impose a reimbursable state-mandated program.

BACKGROUND

The Community College Reform Act of 1988 (Stats. 1988, ch. 973, Reform Act), which provides the basis for most of this test claim, was based largely on a study by the Commission for the Review of the Master Plan for Higher Education (Review Commission) entitled "The Challenge of Change: A Reassessment of the California Community Colleges" (Reassessment Report). In its authorization of the Reassessment Report (Stats. 1984, ch. 1506) the Legislature stated:

> (a) The Legislature finds and declares that the community colleges are a large and important segment of California's system of public higher education. In the last 20 years, [1964-1984] community colleges have not only experienced tremendous growth in the numbers of students enrolled, but have undergone a major transition in the types of students served and the types of programs and courses offered. Community colleges have also experienced an unacceptable degree of uncertainty and instability in their revenues over the last decade.
>
> (b) The Legislature further finds and declares that legislative actions regarding community colleges have not been based on a comprehensive policy on the role that community colleges should play in public education. Community colleges have been reacting and responding to narrow changes in state policy that have shaped the functions of the colleges by default, rather than by design.
>
> (c) It is, therefore, the intent of the Legislature to require the Commission for the Review of the Master Plan for Higher Education established pursuant to Senate Bill 1570 of the 1983-84 Regular Session to set the reassessment of the mission of the community colleges as its first and highest priority.

The Reassessment Report was submitted to the Joint Legislative Committee for the Review of the Master Plan for Higher Education in March 1986 and recommended many of the changes enacted in the 1988 Reform Act.

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[6] *Id.* at page. 732.

Minimum Qualifications for the Employment of Faculty and Educational Administrators

Before the 1988 Reform Act, the Chancellor's Office issued credentials to prospective faculty (including counselors and librarians) and administrators at community colleges. Interested individuals would apply to the Chancellor's Office, which would review the applicants' education and experience to determine if they were eligible for a credential. (Former Cal. Code Regs., tit. 5, § 52030 et seq., Register 83, No. 29 (July 16, 1983) p. 628.15.)

The Review Commission's 1986 Reassessment Report recommended that the community college credential system be abolished, and that community college faculty be subject to peer review, as follows:

> The Community Colleges must recruit and retain faculty and administrators with the highest professional qualifications. To this end, the Board of Governors must establish qualifications appropriate to postsecondary institutions and make certain that both full-time and part-time faculty appointments are subject to peer review, as they are in other collegiate institutions.
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> California is the only state to retain a system of credentialing for community college faculty and administrators originally developed for the elementary and secondary schools. Under this system, new faculty are to obtain a credential in one or more of sixty-six subject matter areas based on a *pro forma* paper review. There is no requirement that proposed new faculty appointments be reviewed by tenured faculty in the appropriate department or division of each college. This system is unnecessarily rigid, cumbersome, and unsuited to the academic rigor of postsecondary institutions.
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> *The Commission recommends:*
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> 34. That the Legislature delete from the *Education Code* existing credential requirements for Community College faculty and administrators.
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> 35. That the Legislature authorize the Board of Governors, in consultation with the faculty, to (a) establish qualifications for employment of faculty and administrators, and (b) require that new faculty appointments, both full-time and part-time, be subject to peer review in addition to other administrative procedures.[7] (Emphasis in original.)

Consequently, the 1988 Reform Act stated that one of the duties of the Board of Governors of the California Community Colleges, a state agency, is to "establish minimum standards … for the employment of academic and administrative staff in community colleges." (§ 70901(b)(1)(B), Stats. 1988, ch. 973.) Similarly, the Reform Act imposed a duty on community college districts to: "Employ and assign all personnel not inconsistent with the minimum standards adopted by the Board of Governors, and establish employment practices, salaries, and benefits for all employees not inconsistent with the laws of this state." (§

[7] Commission for the Review of the Master Plan for Higher Education. "The Challenge of Change: A Reassessment of the California Community Colleges." March 1986, pages 13-16. See: <http://sunsite.berkeley.edu/uchistory/archives_exhibits/masterplan/post1960.html> as of June 1, 2011.

70902(b)(4), Stats. 1988, ch. 973.) Regarding these minimum standards or qualifications, the 1988 Reform Act declared the following legislative intent:

> (q)(1) In general, the appropriate focus of minimum qualifications is in helping the colleges to ensure that they will select faculty who are competent in subject matter and possess the basic academic preparation needed to work effectively at the college level. The minimum qualifications for all faculty should be the same except where the application of qualifications without differentiation would be clearly unreasonable or impractical.
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> (2) The minimum qualifications for administrators should help the colleges to ensure that they will select individuals who are competent to perform the kind of administrative responsibilities that administrators are normally required to assume, such as supervision, organizational planning, and budget development and administration, and who understand the needs of faculty and the learning process. [¶]…[¶]
>
> (s) [¶]…[¶] (4)…[C]olleges may establish criteria for hiring that go well beyond the minimum qualifications set by regulation. The establishment of additional criteria of this sort should be expected and encouraged. (Stats. 1988, ch. 973, § 4.)

The 1988 Reform Act requires the Board of Governors to adopt regulations that establish the minimum qualifications for community college faculty teaching credit courses, extended opportunity programs and services workers, handicapped student programs and service workers, and instructional or student services administrators. (§ 87356.) These regulations were adopted between 1990 and 1994, many of which are part of this test claim. (Cal. Code Regs., tit.5, § 53400 et seq.) The regulations require all degrees and units used to satisfy the minimum qualifications to be from accredited institutions, as defined. (Cal. Code Regs., tit. 5, § 53406.) The statute requiring adoption of regulations on minimum qualifications (§ 87356, Stats 1993, ch. 506) was reenacted in 1993 to require the adoption of regulations for specified faculty member and administrator positions.

The 1988 Reform Act also requires the Board of Governors to "adopt regulations setting forth a process authorizing local governing boards to employ faculty who do not meet the applicable minimum qualifications specified in the regulations . . . ." but requires that a new hire have qualifications that are equivalent to the minimum qualifications in the regulations. (§ 87359.) The statute also requires that the governing boards follow a process in developing the process, criteria, and standards by which a district's governing board "reaches its determinations regarding faculty." (*Ibid*.) The title 5 regulation (§ 53430) that implements section 87359 was adopted in 1990. Thus, each district may adopt its own minimum qualifications that are equivalent to the minimum qualifications in the regulations.

Faculty Evaluations

Community colleges have been required to evaluate employees at least since 1971. (Stats. 1971, ch. 1653.) The 1988 Reform Act (§ 87663) made changes that: (1) reduced the evaluation frequency from every two years to every three years for regular (tenured) employees; (2) required temporary employees to be evaluated within the first year of employment, and once every six semesters or nine quarters thereafter; (3) required evaluations to include a peer review

process, as specified; (4) required consultation between the faculty's "exclusive representative"[8] and the academic senate where evaluation procedures are negotiated as part of the collective bargaining process; (5) expressed legislative intent that faculty evaluation procedures include student evaluations to the extent practicable; (6) where the faculty has elected an exclusive representative, accorded probationary faculty the right to be evaluated under clear, fair, and equitable evaluation procedures locally defined through collective bargaining, not to include de facto tenure rights; and (7) required governing boards to establish and disseminate written evaluation procedures for administrators that include, to the extent possible, faculty evaluation.

Tenure Grievance Arbitration

Before the 1988 Reform Act, if the district chose to keep the employee in a probationary or contract status for the second year, at the end of that year the district had only two choices: to grant permanent status or not to grant such status and terminate the teacher's employment. (§87609; *McGuire v. Governing Board* (1984) 161 Cal.App.3d 871, 874.) Termination procedures were and are governed by section 87740 hearings (originally enacted by Stats. 1976, ch. 1010) as to whether "cause" existed for the termination.

In the 1988 Reform Act, the Legislature stated the following regarding tenure reform: "The current tenure system lacks adequate participation by faculty, provides an inadequate probationary period for the evaluation of permanent faculty, and does not provide uniform systemwide procedures for due process and grievance." (Stats. 1988, ch. 973, § 4(l) & (m).)

Thus, under the test claim statute (§ 87610.1, Stats. 1988, ch. 973, Stats. 2000, ch. 124), in districts where tenure evaluation procedures are collectively bargained, and there is a contractual grievance procedure resulting in arbitration, the employee may file a grievance and seek review before an arbitrator for the following allegations:

- That the district, in a decision to grant tenure, made a negative decision that to a reasonable person was unreasonable;
- That the district violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees; and
- That the district in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. (§ 87610.1(b).)

Districts without a contractual grievance procedure resulting in arbitration follow the hearing process in section 87740. (§ 87610.1(b).)

This statute also outlines grievance procedures (§ 87610.1(c)) and the authority of the arbitrator. (§ 87610.1(d).) Decisions on grievances and arbitrator hearings under the test claim statute are subject to judicial review. (§ 87611.)

[8] "Exclusive representative" means the employee organization recognized or certified as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer. (Gov. Code, § 3540.1(e).)

Faculty Service Areas

A Faculty Service Area ("FSA"), also added by the 1988 Reform Act, is "a service or instructional subject area or group of related services or instructional subject areas performed by faculty and established by a community college district." (§ 87743.1.) Each faculty member is required to qualify for one or more FSAs at the time of initial employment, and if qualified, may apply for more FSAs. Any disputes due to denial of FSA applications are treated as grievances (§ 87743.3.) Districts are required to maintain records of faculty members' FSAs in the faculty members' personnel files. (§ 87743.4.) Each community college district is required to establish criteria to determine competency to serve in the FSA by July 1, 1990. (§ 87443.5.) According to a "Frequently Asked Questions" document on the academic senate's website:

> Faculty Service Areas are established by each district and serve as the basis for making decisions in the event of a layoff or reduction in force (RIF). Some districts construct their FSAs by designating each discipline listed in the Disciplines List as an FSA. Other districts combine several disciplines into an FSA. And other districts combine all disciplines into one single FSA. Upon hire, a faculty member is placed in the FSA that includes the discipline for their position. If your FSA includes more than one discipline, it does not mean that you are qualified for service in each of the disciplines listed in that FSA, but only for those in which you meet the MQs [minimum qualifications].[9]

State Funding

The Legislature established a "trigger provision" in section 70 of the 1988 Reform Act, stating intent that the Act be implemented in two phases of "transitional program improvement"[10] until program-based funding was implemented in fiscal year 1991-1992.[11]

Phase I of transitional program improvement included the statutes regarding minimum qualifications (§§ 87356, 87357, 87358, 87359) and hiring criteria (§87360), as well as employee evaluations (§ 87663), and FSAs (§§ 87743.2-87743.5). The Reform Act requires the hiring criteria (§ 87360) and FSAs (§ 87743.2 & 87743.5) be implemented by July 1, 1990, and a list of disciplines was to be established by the Board of Governors by July 1, 1989. (§ 87357(b).) The Legislature stated its intent "that moneys appropriated during Phase I fully fund any state-mandates created pursuant to this section."[12]

Phase II consisted of tenure reform and program-based funding, including the tenure grievance arbitration procedures (§§ 87610.1 & 87611) in this claim. The Legislature stated its intent "that moneys appropriated during Phase II fully fund any state-mandate created pursuant to this section."[13]

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[9] Academic Senate for California Community Colleges, FAQs on Minimum Qualifications, p. 4.

[10] Statutes 1988, chapter 973, section 70 (b).

[11] Education Code section 84755 (a).

[12] Statutes 1988, chapter 973, section 70(b)(1).

[13] Statutes 1988, chapter 973, section 70(b)(2).

The 1988 Reform Act made its state-mandated provisions conditional on certification of adequate funding by the Board of Governors of the California Community Colleges. Section 70 (d) of the Reform Act states that certain Education Code sections are conditional on state certification of adequate funding for Phase I and Phase II transitional program improvement. The Phase I certification requirement is as follows:

> [Sections of the Reform Act that include the Phase I test claim statutes] shall be implemented by the board of governors and be mandatory with regard to implementation by community college districts only if the board of governors certifies in writing to the Governor and to the Legislature that adequate funding has been provided for Phase I of transitional program improvement and for any applicable state mandates, as authorized by Section 84755 of the Education Code.

The Board of Governors provided certification of adequate funding for Phase I in September 1989.[14] The Phase II adequate funding certification was provided in November 1990.[15]

The 1988 Reform Act also contained the following legislative declarations:

> The Legislature finds and declares that the reforms enacted through this act form a mutually dependent and related set of provisions. While some few provisions could be enacted independently, other sections of this act depend upon adequate support for the programs of the community colleges. There is a direct linkage between those sections of this act which constitute the further professionalization of the faculty and the moneys required to enhance the programs of the community colleges for "transitional program improvement," as specified in Section 84755 of the Education Code.
>
> For instance, the elimination of credentials must be accompanied by the establishment of minimum qualifications by the board of governors. Minimum qualifications in turn must be implemented by districts through the establishment of faculty service areas, competency criteria, and various waiver processes. The extension of the tenure probationary period to four years as well as the revisions to layoff procedures also depend upon faculty service areas and competency criteria. Similarly, because so many of the reforms call for faculty involvement in the determination and implementation of policy, and because the quality, quantity, and composition of full-time faculty have the most immediate and direct impact on the quality of instruction, overall reform cannot succeed without sufficient members of full-time faculty with sufficient opportunities for continued staff development, and with sufficient opportunity for participation in institutional governance.
>
> The Legislature further finds that, absent resources to reimburse the state-mandated costs of this act, new full-time faculty to replace part-time faculty, and expanded programs for staff development, the viability or success, or both, of

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[14] Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

[15] Board of Governors, California Community Colleges, Board Certification Regarding Adequate Funding for Phase II of AB 1725. (Agenda Item 14) November 8-9, 1990.

many of the reforms in this act will be jeopardized. The Legislature recognizes that due to unanticipated fiscal conditions the State cannot immediately fund all of the reforms contained in this act. The Legislature also recognizes, however, that if minimal funding is not soon provided that it would be inappropriate to proceed with many reforms. (Stats. 1988, ch. 973, § 70(a).)

Claimants' Position

Claimant Santa Monica Community College District asserts that the test claim statutes and regulations constitute a reimbursable state mandate within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to do the following pursuant to the code sections and title 5 regulations cited:

<u>Education Code</u>

A) Establishing and implementing policies and procedures, and periodically updating those policies and procedures regarding the employment of faculty and the resolution of disputes on hiring and tenure issues.

B) Establishing and implementing minimum standards for the employment of academic and administrative staff. (§ 70901(b)(1)(B).)

C) Consulting with and advising the board of governors regarding the minimum qualifications for faculty and administrators. (§ 87357(a)(1).)

D) Conducting or otherwise assisting, at least every three years, in any review of the continued appropriateness of the minimum qualifications for the employment of faculty and administrators (§ 87357(a)(2)).

E) Participating, as designated by the board of governors, in the review of each community college district's application of minimum qualifications to faculty and administrators (§ 87358).

F) Complying with the process adopted by the board of governors providing for the employment of faculty members and educational administrators who do not meet the applicable minimum qualifications specified in the regulations adopted by the board of governors pursuant to Section 87356. (§ 87359.) These regulations shall require all of the following:

   (1) No one may be hired to serve as a community college faculty member or educational administrator unless the governing board determines that he or she possesses qualifications that are at least equivalent to the minimum qualifications specified in regulations of the board of governors adopted pursuant to Section 87356.

   (2) The process, as well as criteria and standards by which the governing board reaches its determinations regarding faculty members, shall be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board. The process shall further require that the governing board provide the academic senate with an opportunity to present its views to the governing board before the board makes a determination, and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to Section 87358.

(3) In the event a joint agreement is not reached and approved pursuant to subdivision (b), the district process in existence on January 1, 1989, shall remain in effect.

G) Complying with the criteria established by the governing board when hiring faculty and administrators that includes a sensitivity to, and understanding of, the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. Pursuant to subdivision (b), developing and agreeing, and updating, with representatives of the governing board and the academic senate hiring criteria, policies, and procedures for new faculty members. In the event a joint agreement is not yet reached, the existing district process in January 1, 1989, shall remain in effect (§ 87360(a)).

H) Consulting with the faculty's exclusive representative prior to engaging in collective bargaining on these procedures in those districts where tenure evaluation procedures are collectively bargained pursuant to Section 3543 of the Government Code, (§ 87610.1(a)).

I) Participating in arbitration procedures in response to grievance allegations that the community college district in a decision to grant tenure made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740 (§ 87610.1(b)).

J) Participating in arbitration procedures in response to grievance allegations that the community college district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740 (§ 87610.1(b)).

K) In the event there is no contractual grievance procedure resulting in arbitration pursuant to section 87610.1(b) conducting the hearing and making a decision in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency in that chapter, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing the accusation.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if a request is made therefore within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the colleges and the faculty. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations,

or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board or on any court in future litigation. Copies of the proposed decision shall be submitted to the governing board and to the employee. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds (§ 87740(c)).

L) Complying with an arbitrator's make-whole remedies, which may include, but need not be limited to, backpay and benefits, reemployment in a probationary position, and reconsideration (§ 87610.1(d)).

M) The legal cost of appearing in a court or before any other hearing panel when appealing, or in response to a petition appealing, a final decision reached following a grievance or hearing conducted pursuant to subdivision (b) of Section 87610.1 (§ 87611).

N) Conducting evaluations of faculty members of a community college district using a peer review process on a departmental or divisional basis, which shall address the forthcoming demographics of California and the principles of affirmative action (§ 87663(c) & (d)).

(1) When negotiated as part of the collective bargaining process, conducting evaluations of faculty members of a community college district pursuant to the terms of that agreement (§ 87663(e)).

(2) In those districts where faculty evaluation procedures are collectively bargained, consulting with the faculty's exclusive representative prior to engaging in collective bargaining regarding those procedures (§ 87663(f)).

(3) Conducting evaluations of faculty members of a community college district to the extent practicable using student evaluations (§ 87663(g)).

(4) Evaluating a probationary faculty member under clear, fair, and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative (§ 87663(h)).

(5) Evaluating administrators pursuant to evaluation procedures established by the governing board and, to the extent possible, to include faculty evaluation (§ 87663(i)).

O) Providing affidavits, at times required by the board of governors, that, during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed (§ 87714).

P) Establishing and updating faculty service areas, within the scope of meeting and negotiating pursuant to Section 3543.2 of the Government Code. The exclusive representative shall consult with the academic senate in developing its proposals (§ 87743.2).

Q) Receiving and determining faculty applications to add faculty service areas for which the faculty member qualifies (§ 87743.3).

R) Classifying and procedurally addressing any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area. If the district has no grievance procedure, fair and equitable procedures for the resolution of the disputes shall be developed by the academic senate and representatives of the governing board (§ 87743.3).

S) Maintaining a permanent record in each faculty member's personnel file, for each faculty member employed by the district of each faculty service area for which the faculty member possesses the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards (§ 87743.4).

T) Establishing and updating competency criteria for faculty members employed by the district within the scope of meeting and negotiating pursuant to Section 3543 of the Government Code (§ 87743.5).

Title 5, California Code of Regulations Provisions

A) Adopt and cause to be printed, and made available to each academic employee of the district, reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties (Cal. Code Regs., tit. 5, § 53130).

B) Establish and implement policies to recognize faculty who were qualified to teach in their respective discipline under the minimum qualifications when they were employed (Cal. Code Regs., tit. 5, § 53403).

C) Determine whether applicants for college faculty or educational administrator positions have qualifications that are at least equivalent to the minimum conditions specified, including verifying all of the following (Cal. Code Regs., tit. 5, § 53430(a)):

(1) All degrees and units used to satisfy minimum qualifications are from accredited institutions, unless otherwise specified (Cal. Code Regs., tit. 5, § 53406).

(2) Disciplines requiring a Master's Degree and those disciplines in which a Master's Degree is not generally expected or available by reference to publications and lists maintained by the Chancellor's Office (Cal. Code Regs., tit. 5, § 53407).

(3) The minimum qualifications for service as a community college faculty member teaching any credit course, or as a counselor or librarian (Cal. Code Regs., tit. 5, § 53410).

(4) Possession of a bachelor's degree in the discipline of the proposed assignment plus a professional license or certification (Cal. Code Regs., tit. 5, § 53410.1).

(5) Possession of the minimum qualifications for a faculty member teaching a noncredit course (Cal. Code Regs., tit. 5, § 53412).

(6) Possession of the minimum qualifications for a faculty member teaching disabled programs and services (Cal. Code Regs., tit. 5, § 53414).

(7) Possession of the minimum qualifications for a faculty member teaching as a learning assistance or learning skills coordinator or instructor, or tutoring coordinator (Cal. Code Regs., tit. 5, § 53415).

(8) Possession of the minimum qualifications for a faculty member instructing or coordinating general or occupational work experience education (Cal. Code Regs., tit. 5, § 53416).

(9) Possession of a current, valid certificate to work or a license to practice in California whenever the instructor's possession of such a certificate or license is required for program or course approval (Cal. Code Regs., tit. 5, § 53417).

(10) Possession of the minimum qualifications for service as an educational administrator (Cal. Code Regs., tit. 5, § 53420).

D) Develop and agree upon the process, as well as criteria and standards by which the governing board reaches its determinations regarding faculty, jointly by representatives of the governing board and the academic senate, and approved by the governing board. The agreed upon process shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty member employed under the authority granted by this section possess qualifications that are at least the equivalent to the applicable minimum qualifications specified in this Division (Cal. Code Regs., tit. 5, § 53430(b)).

E) The agreed upon process further requires that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination; and that the written record of the decision, including the views of the academic senate, shall be available for review, pursuant to section 87358 (Cal. Code Regs., tit. 5, § 53430(c)).

F) To be bound by the provisions of the subchapter until a joint agreement is reached and approved pursuant to subdivision (b) (Cal. Code Regs., tit. 5, § 53430, subd. (d)).

In complying with these alleged mandates, claimant alleges more than $1,000 in costs "in excess of any funding provided to community college districts and the state for the period from July 1, 2001 through June 30, 2002 …."[16]

Claimant's rebuttal comments regarding specific statutes or regulations are discussed below.

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[16] In its April 2004 rebuttal comments, claimant asserts that the March 11, 2004 comments of the California Community College Chancellor's Office are incompetent and should be excluded from the record because they are not signed under penalty of perjury "with the declaration that it is true and complete to the best of the representative's personal knowledge or information or belief" in accordance with section 1183.02(c) of the Commission's regulations. While the claimant correctly states the rule in the Commission's regulations, the Commission disagrees with the request to exclude the Chancellor's comments from the official record in this case. Most of comments from the Chancellor's Office argue an interpretation of the law, rather than constitute a representation of fact. If this case were to proceed to court on a challenge to the Commission's decision, the court would not require sworn testimony for argument on the law. The ultimate determination whether a reimbursable state-mandated program exists is a question of law. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.)

When facts are asserted and are relevant to one of the mandate elements, however, rules of evidence do come into play. The Commission may take official notice of any fact that may be judicially noticed by the courts, and the Commission takes official notice of certain facts in this case; i.e., minutes of a board of governors' meeting that certified adequate funding had been provided for Phase I and Phase II of the test claim program and State Budget Act appropriations. (Cal. Code Regs., tit. 2, § 1187.5 (c); Gov. Code. § 11515.) Official acts of the legislative and executive branches of government are properly subject to judicial notice. (Evid. Code, § 452(c).) The Commission may also consider facts provided by sworn testimony at the hearing on this item, or facts asserted in writing and supported with a declaration signed under penalty of perjury.

State Agency Position

The Chancellor's Office of the California Community Colleges filed comments on March 11, 2004, asserting that none of the activities in the statutes or regulations claimed constitute reimbursable mandates. According to the Chancellor's Office, the activities either do not mandate a program on a community college district, or do not constitute a new program or higher level of service, or do not impose "costs mandated by the state" because the activities are already funded. The comments are described in more detail below.

The Department of Finance did not file comments on the test claim.

COMMISSION FINDINGS

Issue 1: Do the test claim statutes and regulations impose a state-mandated new program or higher level of service subject to article XIII B, section 6, of the California Constitution?

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[17] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[18]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[19]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[20]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[21]

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[17] *County of San Diego, supra,* 15 Cal.4th 68, 81.

[18] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[19] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

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

4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[22]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[23] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[24] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[25]

A. Minimum Qualifications for the Employment of Faculty and Educational Administrators

As indicated in the background, the test claim statutes and regulations changed the process of credentialing faculty and educational administrators at community colleges to a process of establishing minimum qualifications for the hiring of these employees. "Faculty" is defined in section 87003 and section 53402 as:

> [T]hose employees of a community college district who are employed in academic positions that are not designated as supervisory or management . . . and for which minimum qualifications for service have been established by the board of governors . . . . Faculty include, but are not limited to, instructors, librarians, counselors, community college health services professionals, handicapped student programs and services professionals, extended opportunity programs and services professionals, and individuals employed to perform a service that, before July 1, 1990, required nonsupervisorial, nonmanagement, community college certification qualifications.

"Educational administrator" is defined in section 87002(b) and section 53402 as:

> [A]n administrator who is employed in an academic position designated by the governing board of the district as having direct responsibility for supervising the operation of or formulating the policy regarding the instructional or student services program of the college or district. Educational administrators include, but are not limited to, chancellors, presidents, and other supervisory or

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[21] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

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

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

[24] *County of San Diego, supra,* 15 Cal.4th 68, 109.

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

> management employees designated by the governing board as educational administrators.

Section 70(d), of Statutes 1988, chapter 973 that codified the Minimum Qualifications program states that the requirements imposed shall be implemented and "be mandatory" only if the state Board of Governors certifies that adequate funding has been provided for Phase I of the program.

> Sections 27 to 34, inclusive, and Sections 51 to 56, inclusive, of this act [section 28 codifies the Minimum Qualifications] shall be implemented by the board of governors and be mandatory with regard to implementation by community college districts only if the board of governors certifies in writing to the Governor and to the Legislature that adequate funding has been provided for Phase I of transitional program improvement and for any applicable state mandates, as authorized by Education Code section 84755 [program based funding]. If the board of governors so certifies, each of these sections shall be implemented on the date of certification, or upon any operative date specified for the particular section in this act, whichever is later. For purposes of this subdivision, "adequate funding" means those moneys required to provide an increased quality of instruction and programs, and to carry out applicable mandates of this act, within the California Community Colleges. Based upon estimates provided by the board of governors and exhaustive review of the community colleges' operations by the Joint Committee for the Review of the Master Plan for Higher Education, the Legislature finds and declares that its estimate of this funding amount is seventy million dollars ($70,000,000).

At its September 1989 meeting, the state Board of Governors certified that adequate funding had been provided for Phase I and, thus, community college districts were required to implement the activities mandated by the state as of that date.[26] Although the requirements were certified to have adequate funding," the analysis continues to determine which activities impose a state-mandated new program or higher level of service on community college districts. The analysis of the funding is provided under issue 2.

1. Requirements Imposed on the State Board of Governors do not Impose State-Mandated Duties on Community College Districts.

a) <u>Establishing minimum standards for employment</u>

Section 70901(b)(1)(B)[27]was added by the 1988 Reform Act and states in pertinent part the following:

> [I]n consultation with community college districts and other interested parties as specified in subdivision (e), the board of governors shall provide general supervision over community college districts, and shall, in furtherance of those purposes, perform the following functions: (1) Establish minimum standards as

[26] Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

[27] Former section 200.11 (as amended by Stats. 1970, ch. 102) stated: "The board of governors shall establish minimum standards for the employment of academic and administrative staff in community colleges."

> required by law, including, but not limited to, the following: [¶]. . . [¶] (B) Minimum standards for the employment of academic and administrative staff in community colleges.

Claimant asserts, in its April 2004 comments, that the minimum standards for the employment of academic and administrative staff must be established "in consultation with community college districts," so that consultation activities of community college districts are mandated by the state as of the enactment of Statutes 1988, chapter 973.

The Chancellor's Office, in its March 11, 2004 comments, states that this statute is not a state mandate because it does not apply to local districts, only to the Board of Governors of the California Community Colleges, a state agency. The Chancellor's Office also states that this law was in existence before 1975 (former § 200.11, Stats. 1969, ch. 1026), and therefore not required to be reimbursed under article XIII B, section 6.

The Commission finds that section 70901(b)(1) does not impose a state-mandated activity on community college districts. In determining whether consultation is required of the districts, section 70901(e), which is cited in subdivision (b), sheds light on the legislative intent. The pertinent part of subdivision (e) states:

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

There is nothing in the plain language of section 70901 that requires community college districts to consult with the Board of Governors.

In comments on the draft staff analysis, the claimant argues that consultation with the Board of Governors regarding the minimum standards for employment is mandated by the state and points out section 70902(b)(14), which requires district "[p]articipation in the consultation process established by the Board of Governors for the development and review of policy proposals." Claimant also points out section 53207, which grants release time to the president and vice-president of the academic senate for purposes of meeting and consulting with the Board of Governors. However, section 70902 and section 53207 have not been pled in this test claim. Moreover, the plain language of section 70901 imposes no duties on community college districts.

Therefore, the Commission finds that section 70901(b)(1)(B) (Stats. 1988, ch. 973, Stats. 1998, ch. 1023), does not impose any state mandated duties on community college districts within the meaning of article XIII B, section 6.

b) <u>Adopt regulations to establish minimum qualifications and discipline lists</u>

Section 87356(a) requires the state Board of Governors to:

> [A]dopt regulations to establish and maintain the minimum qualifications for service as a faculty member teaching credit instruction, a faculty member teaching noncredit instruction, a librarian, a counselor, an educational administrator, an

extended opportunity programs and services worker, a disabled students program and services worker, an apprenticeship instructor, and a supervisor of health.

Section 87357(a) provides the rules for establishing and maintaining minimum qualifications pursuant to section 87356, and subdivision (b) requires the state to prescribe by regulation a working definition of "discipline." Specifically, the Board of Governors is required to:

- Consult with, and rely primarily on the advice and judgment of the statewide academic senate for the minimum qualifications of faculty;
- Consult with, and rely primarily on the advice and judgment of an appropriate statewide organization of administrators for the minimum qualifications of educational administrators;
- Consult with, and rely primarily on the advice and judgment of appropriate apprenticeship teaching faculty and labor organization representatives for the minimum qualifications of apprenticeship instructors;
- Provide a reasonable opportunity for comment by other statewide representative groups in establishing the minimum qualifications;
- Establish a process to review at least every three years the continued appropriateness of the minimum qualifications and the adequacy of the means to which they are administered. The process shall be provided for the appointment of a representative group of community college faculty, administrators, students, and trustees to conduct or otherwise assist in the review, including particularly, representatives of academic senates, collective bargaining organizations, and statewide faculty associations; and
- Relying primarily on the advice and judgment of the statewide academic senate, prescribe by regulation a working definition of the term "discipline" and prepare and maintain a list of disciplines that are reasonably related to one another. The Board of Governors shall also prepare and maintain a list of disciplines in which the master's degree is not generally expected or available.[28]

Claimant requests reimbursement to consult with and advise the Board of Governors regarding the minimum qualifications for faculty and administrators, and to conduct and to otherwise assist in the review of the continued appropriateness of the minimum qualifications for the employment of faculty and administrators. (§ 87357(a)(1) and (a)(2).) The claimant argues that these activities are mandated by the state and emphasizes the part of the statute regarding the Board of Governors relying *primarily* on the advice and judgment of the statewide academic senate and other organizations. Claimant states: "[i]t cannot be said that the Board will not

[28] Sections 53400-53420 identify the minimum qualifications for faculty and educational administrators and (except for §§ 53411 & 53413) are discussed further in this analysis. Claimant did not request reimbursement for determining the minimum qualifications for faculty and administrators hired under sections 53411 and 53413, so the Commission makes no findings on those regulations. Section 53407 of the regulations incorporates the list of disciplines published by the Chancellor's Office for those disciplines that require a master's degree, disciplines in which a master's degree is not generally expected or available, but which require a bachelor's degree; and disciplines in which the master's degree is not generally available.

consult with a wide range of community college districts. When it does so, the costs of those district activities shall be reimbursable." As for the review process, claimant submits that the section "clearly requires community college districts to 'conduct or otherwise assist' in the review." Claimant emphasizes the factors cited in *City of Sacramento v. State of California* regarding the "legal and practical consequences of nonparticipation, noncompliance or withdrawal."[29] According to claimant, "when community college districts are 'asked to participate' by the Chancellor or the Board of Governors, the 'legal and practical consequences of nonparticipation' must be seriously considered."

The Chancellor's Office states that community college districts are not required to perform these activities. Any claimant asked to participate has the option to decline. The Chancellor's Office cites the *Kern High School Dist*.[30] case for authority that no mandate exists where a district voluntarily participates in a program.

The Commission finds that section 87357(a) does not impose any state-mandated duties on community college districts. The requirement in section 87357(a)(1) is on the state Board of Governors to consult with the academic senate, or a statewide organization of administrators, or apprenticeship teaching faculty and labor organization representatives. In addition, there is no requirement in subdivision (a)(2) for districts' "faculty, administrators, students and trustees" to participate in the review process.

Moreover, there is no evidence that community college districts are practically compelled to perform these activities; i.e. that "certain and severe penalties such as double taxation or other draconian consequences" will occur if a district does not advise the Board of Governors regarding the minimum qualifications for faculty, or does not assist in the review of the minimum qualifications.[31]

Accordingly, the Commission finds that sections 87356(a) (Stats. 1993, ch. 506), and 87357(a) (Stats. 1988, ch. 973, Stats. 1990, ch. 1302), do not impose state-mandated duties on community college districts.

According to section 87357(b), the Board of Governors is required to develop a working definition of "discipline" and prepare and maintain a list of disciplines that are reasonably related to each other. The Board of Governors does this "relying primarily upon the advice and judgment of the statewide academic senate" which, in turn, is required to "consult with appropriate state-wide organizations representing administrators and faculty collective bargaining agents."

The Commission finds that section 87357(b) (Stats. 1988, ch. 973, Stats. 1990, ch. 1302), is not a mandate on a community college district. Regarding consultation, nothing in the law indicates that community college district faculty are required to participate on the academic senate, or that the academic senate's participation in consultation is anything but voluntary, so any consultation between it and the Board of Governors does not require an activity on the part of community college districts.

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[29] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76.

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

[31] *Id.* at page 751.

c) Review of community college districts' application of minimum qualifications

Section 87358 states: "The board of governors shall periodically designate a team of community college faculty, administrators, and trustees to review each community college district's application of minimum qualifications to faculty and administrators."

Claimant requests reimbursement as follows: "Pursuant to Education Code Section 87358, participating, as designated by the board of governors, in the review of each community college district's application of minimum qualifications to faculty and administrators."

The Chancellor's Office, in its March 2004 comments on the test claim, states that claimant's participation in the review is not required. "At most, the section authorizes the Board of Governors to require Claimant to demonstrate that it has been properly applying minimum qualification standards when it hires its academic employees." According to the Chancellor's Office, it has no record that the Board of Governors has ever conducted a review of claimant with respect to this issue, and further:

> Claimant has not alleged that any of its faculty, administrators, or trustees have ever participated in the review of any other district's use of minimum qualifications under this section. Even if Claimant made that allegation, it cannot demonstrate that the participation was anything but voluntary.

The Commission finds that section 87358 does not impose a state-mandated program on community college districts. The statute requires the state Board of Governors to "periodically designate a team of community college faculty, administrators, and trustees to review each … district's application of minimum qualifications." (Emphasis added.) Being designated does not mandate the district's participation. Any designated faculty, administrators, or trustees may refuse to participate in a review team, and there is nothing in the law or the record that indicates that community college districts are legally or practically compelled to participate in the review of its minimum qualifications for employment. Thus, the Commission finds that section 87358 (Stats. 1988, ch. 973) is not mandated by the state.

2. Some of the Requirements Imposed on Community College Districts for Determining the Minimum Qualifications for Faculty and Educational Administrators Mandate a New Program or Higher Level of Service.

a) Determining the minimum qualifications of applicants for faculty and educational administrator positions

Sections 87359(a) and 53430 (a) provide that no one may be hired to serve as a community college faculty or educational administrator unless the governing board of the community college district determines that the applicant possesses qualifications that are at least equivalent to the minimum qualifications required pursuant to section 87356 and the implementing title 5 regulations. The minimum qualifications have been adopted as regulations pursuant to section 87356(a) for the following positions: faculty member teaching credit instruction; a faculty members teaching noncredit instruction; librarian; counselor; educational administrator; extended opportunity programs and services worker; disabled students program and services worker; apprenticeship instructor; and supervisor of health. Sections 53410 through 53420 set forth the minimum qualifications for these positions, and generally specify the educational degrees, professional licenses and certificates, and work experience required for each position. Claimant has requested reimbursement for determining the minimum qualifications for all the

positions in these regulations except sections 53411 (minimum qualifications for health services professionals) and 53413 (minimum qualification for apprenticeship instructors), so the Commission makes no finding on those sections.

Section 53407 incorporates the list of disciplines published by the Chancellor's Office (as required by Ed. Code, § 87357(b)) for those disciplines that require a master's degree; disciplines in which a master's degree is not generally expected or available, but which require a bachelor's degree; and disciplines in which the master's degree is not generally available. And section 53406 requires that all degrees and units used to satisfy minimum qualifications are from accredited institutions,[32] unless otherwise specified in the regulations.

Section 87359(a) and section 53430(a) further require that the criteria used by the community college governing board's action in making the employment determination "shall be reflected in the governing board's action to employ the individual."

These requirements do not apply to positions relating to community service or contract classes that do not award college credit and are not supported by state apportionment. Contract classes that do award college credit are subject to these provisions, even if they are not supported by state apportionment.[33]

The claimant requests reimbursement to determine whether applicants for college faculty or educational administrators have qualifications that are at least equivalent to the minimum conditions specified.

The Chancellor's Office states that, "the shift from the credentials system to the minimum qualifications system represented new obligations for districts …" but also asserts that claimant has already been reimbursed for the activities.

Section 87359(a) and section 53430(a) require community college districts to determine whether an applicant for a faculty or educational administrator position listed below possesses qualifications that are at least equivalent to the minimum qualifications identified in the regulations:

- Extended Opportunity Programs and Services Professionals (§ 53402);
- Instructors of credit courses, counselors and librarians (§ 53410);
- Instructors of noncredit courses (§ 53412);
- Disabled Students Programs and Services Employees (§ 53414);
- Learning assistance or learning skills coordinators or instructors and tutoring coordinators (§ 53415);
- Work experience instructors or coordinators (§ 53416); and

[32] "Accredited institution," for purposes of the test claim regulations, is defined in section 53406 as: "a postsecondary institution accredited by an accreditation agency recognized by either the U.S. Department of Education or the Council on Post-secondary Accreditation. It shall not mean an institution 'approved' by the California Department of Education or by the California Council for Private Postsecondary and Vocational Education."

[33] California Code of Regulations, title 5, section 53401.

- Educational administrators (§ 53420), as applicable.

In addition, community college districts are required to determine whether the applicant possesses the following when required for the position:

- Professional licenses as alternative qualification (§ 53410.1);
- Accredited degrees and units (§ 53406);
- Discipline lists (§ 53407); and
- Licensed or certificated occupations (§ 53417).

The criteria used in making the employment determination are required to be reflected in the district's action to employ the faculty member or administrator.

Except as provided below with respect to determining the minimum qualifications for faculty and educational administrator positions for the Disabled Students Programs and Services program (DSPS), the Extended Opportunity Programs and Services program (EOPS), and noncredit courses, the Commission finds that the activities required by section 87359(a) and section 53430(a) mandate a new program or higher level of service.

Although the plain language of the statute and regulation prohibits the hiring of faculty or educational administrators unless the governing board determines the applicant possesses the minimum qualifications, when read in the context of the entire statutory and regulatory scheme, community college districts have an affirmative duty to determine the minimum qualifications of an applicant for these positions before employing the individual. Section 70902(b)(4) requires the governing board of each community college district to "employ and assign all personnel not inconsistent with the minimum standards adopted by the board of governors." Moreover, the criteria used in making the employment determination must be reflected in the district's action. All action of the community college governing board must be open and public and all votes shall be recorded.[34]

The Commission further finds that the required activities constitute a new program or higher level of service. Prior to the 1988 Reform Act and its title 5 regulations, the Chancellor's Office assessed a person's qualifications and issued a credential to become a faculty member or administrator at a community college.[35] The determination of minimum qualifications has now been shifted to community college districts.

The California Supreme Court has held that a state-mandated new program or higher level of service results from the state having control of a program that was shifted to local governments or school districts:

> Whether the shifting of costs is accomplished by compelling local governments to pay the costs of entirely new programs created by the state, or by compelling them to accept financial responsibility in whole or in part for a program which

[34] Education Code section 71021 and 71022.

[35] Chancellor of the California Community Colleges, comments filed March 2004, p. 11. See also former California Code of Regulations, title 5, section 52030 et seq., Register 83, No. 29 (July 16, 1983) page 628.15.

> was funded entirely by the state before the advent of article XIII B, the result seems equally violative of the fundamental purpose underlying section 6 of that article.[36]

These activities are uniquely imposed on community college districts and are intended to provide an increased level of service to the public, so the Commission finds that they constitute a program within the meaning of article XIII B, section 6. Statutes 1988, chapter 973, section 4(n), states that it "a general purpose of this act to improve quality education . . . ."[37] Subdivision (q) further states that the focus of the minimum qualifications program is to help the community colleges ensure they will select the faculty and administrators who are competent to work effectively at the college level, and to ensure that the minimum qualifications for faculty are the same except where clearly unreasonable or impractical.

However, determining that an applicant meets the minimum qualifications for a faculty or educational administrator position in the Disabled Students Programs and Services (DSPS, § 53414) and in the Extended Opportunity Programs and Services (EOPS), and reflecting the criteria used in the action to employ an applicant for positions in these programs are not mandated by the state. The DSPS and EOPS programs have been the subject of prior test claims, both of which were denied by the Commission on the ground that community college districts were not mandated by the state to participate in these programs. (CSM 02-TC-22, 02-TC-29.)

The DSPS program requires that as a condition of receiving funds, community college districts are required to perform accounting, reporting, and administrative activities that go beyond the federal requirements of the Americans with Disabilities Act and the Rehabilitation Act. Section 84850(d) states:

> *As a condition of receiving funds pursuant to this section,* each community college district shall certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving disabled students. Districts shall also provide the programmatic and fiscal information concerning programs and services for disabled students that the regulations of the board of governors require. (Emphasis added.)

Section 56000 implementing the DSPS program similarly provides:

> This subchapter applies to community college districts offering support services, or instruction through Disabled Student Programs and Services (DSPS), on and/or off campus, to students with disabilities pursuant to Education Code sections 67310-12 and 84850. *Programs receiving funds allocated pursuant to Education Code Section 84850 shall meet the requirements of this subchapter.* (Emphasis added.)

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[36] *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 836.

[37] See also, Statutes 1988, chapter 973, section 70(b)(1), which states the following: "It is the intent of the Legislature that those changes [referring to Phase I changes], combined in proper sequence with the professional improvement of faculty, will improve the overall quality of education within the system."

The direct costs incurred under the DSPS program, including the salaries of DSPS faculty and educational administrators are funded through the DSPS program.[38]

Similarly, the EOPS program provides academic and financial support to community college students whose educational and socioeconomic backgrounds might otherwise prevent them from successfully attending college. The activities required of the program are triggered by a community college district's decision to establish an EOPS program and to request and accept state funding. Section 69649 states:

> (a) [t]he governing board of a community college district may, with the approval of the board, establish an extended opportunity program. Except as provided in subdivision (b), *in order to be eligible to receive state funding*, the program shall meet the minimum standards established pursuant to subdivision (b) of section 69648.

The costs incurred under the EOPS program, including the salaries of EOPS faculty and educational administrators are funded through the EOPS program.[39]

Pursuant to the court's holding in *Kern High School Dist*., activities performed as a condition of the receipt of funding are not mandated by the state.[40] With respect to optional funded programs like the DSPS and EOPS programs, the court reasoned as follows:

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the . . . requirements, or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, on balance, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits.[41]

In comments on the draft staff analysis, claimant states that the DSPS and EOPS programs are improperly excluded and that "program funds are for providing program services to the students (e.g., funding faculty positions) and not for the administrative process of evaluating faculty applicants for those positions." Claimant further states:

> This is not a *Kern* precursor optional program followed by a mandate conditioned on participating in the precursor program. The mandate at issue is limited to the evaluation of faculty and other staff applicants and is not contingent on the funding status of the courses to be instructed. The DSA inappropriately extends the perceived discretionary status of the courses to the scope of subsequent and

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[38] California Code of Regulations, title 5, section 56064.

[39] California Code of Regulations, title 5, section 56295.

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

[41] *Id*. at page 753.

> independent mandate that is explicitly defined by incorporated regulations that enumerate the faculty and other positions to be included n the evaluation process.

The Commission disagrees. Since a community college district's participation in the DSPS and EOPS grant programs is optional and voluntary, the downstream activities of hiring faculty and administrators for these programs and determining the minimum qualifications for those positions are not mandated by the state.

Moreover, determining the minimum qualifications of an applicant for a faculty or educational administrator position in a noncredit course (Cal. Code Regs., tit. 5 § 53412) does not constitute a new program or higher level of service.

Adopted in 1970, former section 52600 listed the minimum qualifications for instructors of noncredit courses (or "classes for adults")[42] as follows:

> An applicant shall be eligible for a Certificate of Qualifications if the requirements of both of the following subdivisions are satisfied:
> (a) The applicant satisfies one of the following requirements.
> (1) The applicant has successfully completed four years of higher education with a major in a subject matter area.
> (2) The applicant has completed four years of occupational experience in a subject matter area.
> (b) *The district*, which maintains the community college which will employ the applicant, *certifies that the applicant has adequate training and experience* to teach the classes for which the applicant is to be employed.[43] (Emphasis added.)

And as former section 52602 of the regulations stated:

> A Certificate of Qualifications authorizes its holder to teach the noncredit classes named on the credential in a community college maintained by the district named on the credential document.[44]

This requirement for the district to certify the applicant carried forward into early versions of the test claim regulation that applies to instructors of noncredit courses. Section 53412,[45] operative November 30, 1990, required the same qualifications for instructors of noncredit courses as under prior law:

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[42] The statute that authorized this regulation is former Education Code section 87295, which states: "The board of governors shall, by regulation, establish minimum standards authorizing service for instructors of classes for adults and shall establish procedures for the issuance of appropriate certificates of qualification."

[43] Former California Code of Regulations, title 5, section 52600, Register 70, No. 20 (May 16, 1970), page 622.35, moved to former section 52275, Register 83, No. 29 (July 16, 1983) page 628.48.1.

[44] Former California Code of Regulations, title 5, section 52602, Register 70, No. 20 (May 16, 1970) page 622.35, moved to section 52277, Register 83, No. 29 (July 16, 1983) page 628.48.1.

[45] Added by Register 90, Nos. 48-50 (December 14, 1990) page 330.2, operative November 30, 1990.

> (a) Successful completion of four years of higher education with a major in a discipline, or completion of four years of occupational experience in a discipline; and
> (b) *Certification by the district* that the applicant has adequate training and experience to teach the classes for which he or she is to be employed. [Emphasis added.]

The district certification requirement was deleted effective June 26, 1992,[46] when section 53412 was amended to specify that "the minimum qualification for service as a faculty member teaching a noncredit course shall be the same as the minimum qualifications for credit instruction in the appropriate discipline." So under current law the minimum qualification to teach noncredit courses is a master's degree, except for the following courses that require a bachelor's degree in a specified discipline: interdisciplinary basic skills courses, basic skills courses in mathematics, reading and/or writing, citizenship, English as a second language, health and safety, home economics, courses intended for older adults, parent education, and a short-term vocational course.

Thus, under the pre-1992 regulation, a person could teach a noncredit course by completing four years of higher education with a major in the subject matter area, or four years of occupational experience in a subject matter area. Under current law, the applicant must have a master's degree, or in specified instances a bachelor's degree. (§ 53412.)

Although the minimum qualifications for the faculty of noncredit courses have changed since the test claim regulation, determining the minimum qualifications has not. There is nothing to indicate that determining the minimum qualification under current law is a higher level of service than granting certification to teach these courses under prior law. Each requires the community college to assess an applicant's qualifications. The state has never made this assessment for instructors of noncredit courses, so this activity was not shifted from the state to local districts.

Therefore, the Commission finds that determining the minimum qualifications of an applicant for a faculty or educational administrator position in a noncredit course (Cal. Code Regs., tit. 5 § 53412)[47] does not constitute a new program or higher level of service.

Accordingly, the Commission finds that section 87359(a) and section 53430(a) mandate a new program or higher level of service on community college districts for the following activities:

- Determine that an applicant for a faculty or educational administrator position possesses qualifications that are at least equivalent to the minimum qualifications identified in sections 53406, 53407, 53410, 53410.1, 53415, 53416, 53417, and 53420 as applicable, before an action is taken to employ the individual.
- The criteria used in making the employment determination of faculty and educational administrators shall be reflected in the district's action.

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[46] Register 92, No. 26 (June 16, 1992) page 329.

[47] Added by Register 90, No. 49 (Dec. 14, 1990) page 330.2, operative November 30, 1990; Register 91, No. 50 (July 19, 1991) page 332; Register 92, No. 26 (July 27, 1992) pages 328-329; Register 93, No. 42 (Nov. 4, 1993) pages 329-330.

Community college districts are *not* entitled to reimbursement for these activities when employing faculty or educational administrators in the following programs and courses: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.), or noncredit courses. (Cal. Code Regs., tit. 5, § 53412.)

b) <u>Development of the process, criteria, and standards for faculty determinations</u>

Section 87359(b) addresses the development of the process, criteria, and standards for qualifications that are equivalent to the minimum qualifications established by the state. This subdivision provides:

- The process, criteria, and standards for reaching determinations regarding faculty [whose qualifications are equivalent to the minimum qualifications (see subds. (a) & (b))] shall be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board.
- The agreed upon process shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty employed under the regulation's authority possess qualifications that are at least equivalent to the applicable minimum qualifications specified in the regulations.
- The process shall further require that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to section 87358.

Sections 53430(b) and (c) are the same as the requirements in section 87359(b).

The academic senates on each campus exist "[i]n order that the faculty may have a formal and effective procedure for participating in the formation and implementation of district policies on academic and professional matters."[48] Academic senates are created by a vote of the faculty. Once created, the governing board of the community college district is required to recognize the academic senate and authorize the faculty to: (1) fix and amend by vote of the full-time faculty the composition, structure, and procedures of the academic senate; and (2) "provide for the selection, in accordance with accepted democratic election procedures, the members of the academic senate."[49]

The Commission finds that the activities required by section 87359(b) and sections 53430(b) and (c) are mandated by the state, including as applied to noncredit course instructors, as there is no indication that they are excluded from the process, criteria, and standards referred to in the regulation and statute. The exception is for faculty and administrators employed under the DSPS and EOPS programs, for which developing the process, criteria, etc. is not mandated by the state. As indicated above, participation in the DSPS and EOPS programs is voluntary and the

[48] California Code of Regulations, title 5, sections 53200, 53201.

[49] California Code of Regulations, title 5, section 53202.

downstream activities of developing the hiring process and standards for these employees are not mandated by the state.

The Commission further finds that the bulleted activities are newly required of community college districts as they relate to the employment of all other faculty positions and provide a higher level of service to the public.

Thus, the Commission finds that section 87359(b) and sections 53430(b) and (c) mandate a new program or higher level of service for the following activities:

- The process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty or administrators whose qualifications are equivalent to the minimum qualifications shall be developed and agreed upon jointly by representatives of the governing board and the academic senate. (§ 87359(b); Stats. 1988, ch. 973, Stats. 1993, ch. 506, Cal. Code Regs, tit. 5, § 53430(b).)

- The agreed upon process for hiring faculty shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty employed possess qualifications that are at least equivalent to the applicable minimum qualifications specified in the regulations. (§ 87359(b), Cal. Code Regs, tit. 5, § 53430(b).)

- The process for hiring faculty shall further require that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to section 87358. (§ 87359(b), Cal. Code Regs, tit. 5, § 53430(c).)

- The governing board shall approve the process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty and administrators. (§ 87359; Cal. Code Regs, tit. 5, § 53430.)

  Community college districts are *not* entitled to reimbursement for these activities when employing faculty or administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.)

Section 87359(d) states that "[u]ntil a joint agreement is reached and approved pursuant to subdivision (b), the district process in existence on January 1, 1989, shall remain in effect." Similarly, subdivision (d) of section 53430 the title 5 regulation states: "[u]ntil a joint agreement is reached and approved pursuant to Subdivision (b), the district shall be bound by the minimum qualifications set forth in this Subchapter." Thus, until there is an agreement by the governing board and the academic senate on the process, criteria, and standards for the employment of faculty, the district cannot apply additional qualification standards to faculty applicants that go beyond the scope of the minimum conditions established by the regulations.

The Commission finds that this provision (§ 87359(c) & Cal. Code Regs., tit. 5, § 53430(d)) is not a state mandate because it does not require a community college activity. It merely requires using existing processes or the minimum qualifications regulations (already found above to be a

state-mandated new program or higher level of service) until agreement is reached with the academic senate on qualifications that are equivalent to them.

c) <u>Develop hiring criteria</u>

In establishing the hiring criteria for faculty and administrators, district governing boards shall, no later than July 1, 1990, develop criteria that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. (§ 87360(a).)

No later than July 1, 1990, hiring criteria, policies, and procedures for new faculty members shall be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board. (§ 87360(b).)

Until a joint agreement is reached and approved, the district process in existence on January 1, 1989 remains in effect. (§ 87360(b).)

The Commission finds that, based on the language in the statute, that these activities are a state mandate. Since they were not required under prior law, the Commission also finds that they are a new program or higher level of service for community college districts to do the following:

- No later than July 1, 1990, develop the hiring criteria for faculty and administrators that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. (§ 87360(a).)
- No later than July 1, 1990, develop hiring criteria, policies, and procedures for new faculty members that are developed and agreed upon jointly by representatives of the governing board, and the academic senate, and approved by the governing board. (§ 87360(b).)

d) <u>Providing an affidavit that academic employees of the district possessed the minimum qualifications for the work they performed in the preceding 12 months</u>

Section 87714 (as added by Stats. 1981, ch. 470, and amended by Stats. 1990, ch. 1302) states:

> The chief executive officer of each community college district shall, at times as required by the board of governors, provide an affidavit that, during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed.

Claimant pled the following activity based on this section: "providing affidavits, at times required by the board of governors, that, during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed."

In comments filed in March 2004, the Chancellor's Office states that this section stated as early as 1976 (Stats. 1976, ch. 1010) the following:

> Each general superintendent of community colleges shall make an annual report of the schools under his jurisdiction to the county superintendent of schools on forms furnished by the board of governors which report shall include an affidavit that all employers in positions requiring certification qualifications were properly certificated for the work performed.

The Chancellor's office also states that the obligation to ensure that all academic employees were qualified has existed since 1959. Section 13566 (Stats. 1959 chs. 2 & 458) required district superintendents of schools to annually report that all employees in positions requiring certification qualification were properly certificated for the work performed. According to the Chancellor's comments: "Because community college districts grew out of K-12 districts, the terminology has changed somewhat since 1959, but the underlying obligation has been in place."

The Chancellor's Office also states that duties to be performed by the superintendents of each community college district were added by Statutes 1963, chapter 629. Former section 939 (later former § 72413) required the chief executive officer to determine that employees who require certification have valid certificated documents.

The claimant's rebuttal comments state that former section 13566 (recodified as § 87714 by Stats. 1976, ch. 1010) required the report, including the specified affidavit, to be made to the county superintendent of schools, while the 1981 version required the report to be made to the Board of Governors. Therefore, according to the claimant, section 87714 requires a new program or higher level of service. Claimant also states that the Chancellor's reference to former section 939 is not relevant because it requires only a determination, but not a report or affidavit.

The plain language of the statute requires providing the affidavit "at times required by the board of governors." Whether an affidavit has been requested or not, the statute authorizes the state Board of Governors to require one from the district in the future. Therefore, the Commission finds that section 87714 (Stats. 1981, ch. 470, Stats. 1990, ch. 1302)[50] is a state mandate on community college districts to, at times as required by the Board of Governors, provide an affidavit that, during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed.

The Commission also finds, however, that section 87714 (Stats. 1981, ch. 470) is not a new program or higher level of service. Former section 87714 (Stats. 1976, ch. 1010) also required an affidavit. Even though before 1981, the report and affidavit were submitted to the county superintendent of schools, submitting the same information and affidavit to the Chancellor's Office is not a new program or higher level of service (the report requirement was deleted in the 1981 version). In fact, this activity was also part of the 1959 Education Code (Stats. 1959, ch. 458). Therefore, the Commission finds that section 87714 (Stats. 1981, ch. 470, Stats. 1990, ch. 1302) is not a new program or higher level of service.

In comments on the draft staff analysis, claimant states that when determining whether an activity constitutes a new program or higher level of service, the comparison needs to be between the statutes pled on the effective date of filing (here, July 1, 2001), with the law as it existed on December 31, 1974. The claimant is wrong. The California Supreme Court has repeatedly stated that to determine whether a required activity is new, thus imposing a new program or higher level of service, the test claim statute or regulation is compared to the legal requirements

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[50] The 1981 version of 87714 (Stats. 1981, ch. 470) required the same activity as the current version: "The chief executive officer of each community college district shall, at times as required by the county superintendent of schools, and at least annually, provide an affidavit that all employees in positions requiring certifications were properly certificated for the work performed."

in effect immediately before its enactment.[51] Using this test, the requirement in section 87714 is not a new program or higher level of service.

e) <u>Authority to continue to employ credentialed academic employees qualified at time of initial hire</u>.

Section 53403 states:

> Notwithstanding changes that may be made to the minimum qualifications established by this division, or to the implementing discipline lists adopted by the Board of Governors, [in § 53407] the governing board of a community college may continue to employ a person to teach in a discipline or render a service subject to minimum qualifications, if he or she, at the time of initial hire by the district, was qualified to teach in that discipline or render that service under the minimum qualifications or disciplines lists then in effect.
>
> Every person authorized to serve under a credential shall retain the right to serve under the terms of that credential, and, for that purpose, shall be deemed to possess the minimum qualifications specified for discipline or service covered by the credential until the expiration of that credential. [52]

Claimant pled the activity of establishing and implementing policies to recognize faculty who were qualified to teach in their respective disciplines under the minimum qualifications when they were employed.

The Chancellor's Office states that this section merely permits districts to "grandparent" employees in under the minimum qualifications or faculty service areas in effect when the employees were hired, even if those qualifications or faculty service areas later changed. The Chancellor's Office asserts that there is no mandate involved.

Claimant's rebuttal comments state: "While admitting the 'grandfathering' provision, [the Chancellor's Office] does not describe who, how or when this should be done. The test claim merely recognizes the need to establish and implement policies that allow implementation of the 'grandfather' provision."

The Commission finds that section 53403 is not a state-mandated new program or higher level of service. The section's plain language authorizes but does not require community college districts to retain employees who were hired before the establishment of the minimum qualifications, and deems those employees to possess the minimum qualifications, until the expiration of their credentials. It does not require the community college district to assess the qualifications of employees at the time the regulation was adopted. Because section 53403[53] does not require community college districts to engage in an activity, the Commission finds that this section is not

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[51] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 835-836.

[52] Education Code section 87355, although not a test claim statute, requires the board of governors to adopt this regulation.

[53] Register 92, No. 26 (June 26, 1992) operative July 27, 1992, page 328, amended by Register 93, No. 42 (Oct. 5, 1993) operative November 4, 1993, page 328.

a state-mandated new program or higher level of service within the meaning of article XIII B, section 6.

B. Faculty Evaluations

The claimant pled section 87663 as amended by Statutes 1988, chapter 973 and Statutes 1990, chapter 1302.[54] The 1988 and 1990 amendments made the following changes to subdivisions (a) and (b) regarding regular[55] and temporary[56] employees (underlines indicate additions; strikeouts indicate deletions):

> (a) Contract [or probationary] employees shall be evaluated at least once in each academic year. Regular employees shall be evaluated at least once in every ~~two~~ three academic years. Temporary employees shall be evaluated within the first year of employment. Thereafter, evaluation shall be at least once every six regular semesters, or once every nine regular quarters, as applicable.
>
> (b) Whenever an evaluation is required of a ~~certificated employee~~ faculty member by a community college district, the evaluation shall be conducted in accordance with the standards and procedures established by the rules and regulations of the governing board of the employing district.

Subdivisions (c) through (i) were added to section 87663 in 1988 (Stats. 1988, ch. 973, § 51) as follows:

> (c) Evaluations shall include, but not be limited to, a peer review process.
>
> (d) The peer review process shall be on a departmental or divisional basis, and shall address the forthcoming demographics of California, and the principles of affirmative action. The process shall require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching.
>
> (e) The Legislature recognizes that faculty evaluation procedures may be negotiated as part of the collective bargaining process.
>
> (f) In those districts where faculty evaluation procedures are collectively bargained, the faculty's exclusive representative shall consult with the academic senate prior to engaging in collective bargaining regarding those procedures.
>
> (g) It is the intent of the Legislature that faculty evaluation include, to the extent practicable, student evaluation.

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[54] The 1990 amendment changed "certificated employee" in subdivision (b) to "faculty member."

[55] "A 'regular' employee is . . . one who has achieved tenure." (§ 87609.)

[56] Temporary employees are defined several ways. They are employees who: (1) may be used to fill temporary vacancies of regular employees (§ 87478); (2) serve during the first three months of a school term to instruct temporary classes or perform other duties (§ 87480); (3) fill needs due to spikes in enrollment (§ 87482); or (4) teach not more than 67 percent of the hours per week of a full-time assignment for regular employees having similar duties (§ 87482.5).

> (h) A probationary faculty member[57] shall be accorded the right to be evaluated under clear, fair and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative. Those procedures shall ensure good-faith treatment of the probationary faculty member without according him or her de facto tenure rights.
>
> (i) Governing boards shall establish and disseminate written evaluation procedures for administrators. It is the intent of the Legislature that evaluation of administrators include, to the extent possible, faculty evaluation.

Section 70(d) of the 1988 statute further states that "Sections 51 to 56" of the bill shall be implemented and "be mandatory" only if the state Board of Governors certifies that adequate funding has been provided. At its September 1989 meeting, the state Board of Governors certified that adequate funding had been provided and, thus, community college districts were required to implement section 87663 as of that date.[58]

In addition, section 53130 requires that "[t]he governing board of a community college district shall adopt and cause to be printed and made available to each academic employee of the district reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties."

Claimant requests reimbursement for the following activities:

> Pursuant to Education Code Section 87663, subdivisions (c) and (d), conducting evaluations of faculty members of a community college district using a peer review process on a departmental or divisional basis, which shall address the forthcoming demographics of California, and the principles of affirmative action.
>
> Pursuant to subdivision (e), when negotiated as part of the collective bargaining process, conducting evaluations of faculty members of a community college district pursuant to the terms of that agreement.
>
> Pursuant to subdivision (f), in those districts where faculty evaluation procedures are collectively bargained, consulting with the faculty's exclusive representative prior to engaging in collective bargaining regarding those procedures.
>
> Pursuant to subdivision (g), conducting evaluations of faculty members of a community college district to the extent practicable using student evaluations.
>
> Pursuant to subdivision (h), evaluating a probationary faculty member under clear, fair, and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative.

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[57] Probationary faculty members are contract employees who are on a tenure track. Temporary employees are generally not on a tenure track, except as provided in section 87478.

[58] Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

> Pursuant to subdivision (i), evaluating administrators pursuant to evaluation procedures established by the governing board and, to the extent possible, to include faculty evaluation.
>
> Pursuant to title 5, California Code of Regulations, Section 53130, to adopt and cause to be printed, and made available to each academic employee of the district, reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties.

The Chancellor's Office, in its March 2004 comments, asserts that: (1) subdivision (f) requires the exclusive representative to consult with the academic senate prior to bargaining, but contains no district obligations; (2) statements of legislative intent in subdivision (g) regarding faculty evaluations including student evaluations if practicable are not a legal mandate; (3) the obligation of districts to provide for the evaluation of faculty and administrators preceded January 1, 1975; and (4) only districts that have chosen to collectively bargain their evaluation procedures are affected by subdivision (e)'s requirement to conduct evaluation pursuant to an agreement. The Chancellor cites *Kern High School Dist.*[59] for the proposition that if the district elects to do something, any downstream activity is not a reimbursable mandate. Moreover, the Chancellor's Office states that if the bargained evaluation procedures were in place before the 1988 amendments (Stats. 1988, ch. 973) the claimant has not performed a new program or higher level of service. And if the claimant has been reimbursed under the collective bargaining mandate, reimbursement under this statute would be double recovery.

Claimant, in the April 2004 rebuttal comments, states:

> Even if there is a collective bargaining agreement, it may, or may not, encompass faculty evaluation procedures. The inclusion of subdivision (e) in the test claim will allow the parameters and guidelines to provide for reimbursement for these faculty evaluation procedures, with the exception of if, or when, they are part of the district's collective bargaining agreement.

Claimant also asserts that the requirements of section 87663 have been greatly expanded since 1975, especially since the 1988 amendments.

The Commission finds, based on the plain language of subdivision (a), that it is a state mandate to evaluate a regular employee once every three academic years, and to evaluate temporary employees within the first year of employment. Thereafter, evaluation for temporary employees shall be at least once every six regular semesters, or once every nine regular quarters, as applicable. The Commission also finds that, based on the plain language in subdivision (a), evaluation of temporary employees is a state mandate, and also a new program or higher level of service because it was not required under prior law.

However, evaluating regular employees every three years is less frequent than under prior law, which called for evaluation once every two academic years. This is not a higher level of service. Therefore, the Commission finds that this amendment in subdivision (a) of section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) on evaluating regular employees is not a new program or higher level of service.

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[59] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

The Commission also finds that the amendment to section 87663(b), made by Statutes 1990, chapter 1302, does not impose a state-mandated new program or higher level of service. This amendment substituted "faculty member" for "certificated employee" but imposes no state mandates on districts.

The Commission finds that it is a state-mandated new program or higher level of service for an evaluation to include a peer review process as specified by subdivision (c), and that the peer review process conform to the requirements of subdivision (d): that it be on a departmental or divisional basis, and address the forthcoming demographics of California and the principles of affirmative action, and "for the process to require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching."

The Commission further finds that sections 87663(e) and (f) do not impose any state-mandated duties on community college districts. Subdivision (e) is legislative recognition that "faculty evaluation procedures may be negotiated as part of the collective bargaining process." Subdivision (f) requires, in districts where faculty evaluation procedures are collectively bargained, "the faculty's exclusive representative shall consult with the academic senate prior to engaging in collective bargaining regarding those procedures." In comments on the draft staff analysis, claimant states that subdivision (f) creates a mandate:

> Faculty evaluation procedures are within the scope of matters that can be collectively bargained according to the Rodda Act (citation omitted). Districts are required to collectively bargain and that mandate has been reimbursed for about 35 years. The Rodda Act [i.e., EERA] process involves district employees operating within the scope of their compensated activities. Now, these employees are required by subdivision (f) to consult with members of the academic senate who are also operating within their compensated activities. The district incurs payroll and related costs for these activities. Since the underlying collective bargaining process is an approved mandate, and subdivision (f) independently requires the consultation, it is a new program or higher level of service subject to reimbursement.

Faculty evaluation procedures are not required to be collectively bargained. They are included in the "terms and conditions of employment" (Gov. Code, § 3543.2 (a)) that may be bargained, but there is no legal requirement to collectively bargain them. Doing so is discretionary on the part of the district, so this activity is not mandated by the state.

Subdivision (h) of section 87663 states:

> A probationary faculty member shall be accorded the right to be evaluated under clear, fair and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative. Those procedures shall ensure good-faith treatment of the probationary faculty member without according him or her de facto tenure rights.

Because this section entitles the probationary faculty member to be evaluated under clear, fair and equitable evaluation procedures locally defined through the collective bargaining process, and the procedures are required to ensure good faith treatment of the probationary faculty

member, the Commission finds that subdivision (h) of section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) is a state mandate.

The Commission further finds that section 87663(h) imposes a new program or higher level of service. Under section 87602, a contract employee is a probationary employee. Under prior law, contract employees are evaluated at least once each academic year. (§ 87663, subd. (a).) Since at least 1971, districts have been required to evaluate certificated employees (i.e., faculty) "in accordance with the standards and procedures established by the rules and regulations of the governing board of the employing district."[60] Also since 1971, districts have been required to adopt rules and regulations in consultation with faculty "establishing the specific procedures for the evaluation of its contract and regular employees on an individual basis and setting forth reasonable but specific standards which it expects its certificated employees to meet in the performance of their duties." The procedures and standards are to be uniform for all contract employees with similar general duties and responsibilities, and uniform for regular employees of the district with similar general duties and responsibilities.[61]

However, under prior law, the district was not required to develop "evaluation procedures locally defined through the collective bargaining process" for probationary employees. Therefore, the Commission finds that section 87663(h) is a new program or higher level of service to develop evaluation procedures that are collectively bargained for probationary employees where the faculty has chosen to elect an exclusive representative.

Two phrases in sections 87663(g) and (i) begin with the phrase "It is the intent of the Legislature…" Subdivision (g) declares legislative intent that faculty evaluations include, to the extent practicable, student evaluation. Subdivision (i) declares legislative intent that evaluations of administrators include, to the extent practicable, faculty evaluation. Courts have held that statements of legislative intent do not give rise to a mandatory duty.[62] Therefore, the Commission finds that as declarations of legislative intent, neither subdivisions (g) nor (i) of section 87663 are state mandates.

Subdivision (i) also states: "Governing boards shall establish and disseminate written evaluation procedures for administrators." The Commission finds that this provision is a state-mandated new program or higher level of service to establish and disseminate written evaluation procedures for administrators.

Finally, section 53130 states that the district governing board "shall adopt and cause to be printed and made available to each academic employee of the district reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties." The Chancellor's Office argues that "the requirements that currently appear in section 53130 have existed without lapse since before January 1, 1975 and cannot be claimed for reimbursement under this process."

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[60] Former Education Code section 13481 (Stats. 1971, ch. 1654), Education Code section 87663(b) (Stats. 1976, ch. 1010)

[61] Former Education Code section 13481.05 (Stats. 1971, ch. 1654). Education Code section 87664 (Stats. 1976, ch. 1010, Stats 1990, ch. 1302).

[62] *Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 633-634.

Section 53150 was added to the title 5 regulations in 1991.[63] In 1971, however, section 13481.05 (Stats. 1971, ch. 1653) was enacted to provide that:

> The governing board of each district in consultation with the faculty shall adopt rules and regulations establishing the specific procedures for the evaluation of its contract and regular employees on an individual basis and setting forth reasonable but specific standards which it expects its certificated employees to meet in the performance of their duties. Such procedures and standards shall be uniform for all contract employees and shall be uniform for all regular employees of the district.

Section 13481.05 was renumbered to section 87664 in the 1976 Education Code and has not been pled in this test claim.

Even though adopting rules and regulations establishing the specific procedures for evaluating contract and regular employees was in prior law, new rules and regulations must be adopted due to the amendments to section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) that are discussed above. For example, prior law did not require a peer review process for faculty evaluations and was limited to adopting rules and regulations for the evaluation of contract and regular employees. Under section 53130, rules and regulations have to be adopted for "each academic employee."

Therefore, the Commission finds that section 53130 imposes a state-mandated new program or higher level of service on community college districts to adopt and cause to be printed and made available to each academic employee of the district amended rules and regulations that reflect the new requirements imposed by section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) and provide for the evaluation of the performance of academic employees in their assigned duties.

In sum, the Commission finds that section 87663 (Stats. 1988, ch. 973, Stats, 1990, ch. 1302) imposes a state-mandated new program or higher level of service on community college districts to do as follows:

- Evaluate a temporary employee within the first year of employment, and at least once every six regular semesters or once every nine regular quarters thereafter (§ 87663(a).).
- Include a peer review process in faculty evaluations, and for the peer review process to be on a departmental or divisional basis, and address the forthcoming demographics of California and the principles of affirmative action, and for the process to require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching (§ 87663(c) & (d)).
- Develop "evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative" for probationary faculty (§ 87663(h)).

[63] Register 91, No. 25, effective April 5, 1991.

- Establish and disseminate written evaluation procedures for administrators. (§ 87663(i).).
- Adopt and cause to be printed and made available to each academic employee of the district amended rules and regulations that reflect the new requirements imposed by section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) and provide for the evaluation of the performance of academic employees in their assigned duties. (Cal. Code Regs., tit. 5, § 53150).

Community college districts are *not* entitled to reimbursement for these evaluation activities for faculty or administrators employed in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. & 53414), and Extended Opportunity Programs and Services. (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.)

C. Tenure Grievances, Arbitration and Judicial Review

Claimant pled sections 87610.1 and 87611, added by Statutes 1988, chapter 973. Section 87610.1 provides an alternative arbitration grievance process for a probationary or contract faculty employee[64] to challenge a district's decision not to grant tenure or reappoint the employee as a contract employee for the following academic year under specified situations. The alternative process is allowed only in those community college districts where tenure evaluation procedures are collectively bargained and the grievance arbitration procedures are in the collective bargaining agreement. Pursuant to section 87611, the decision reached in the grievance arbitration proceeding is subject to judicial review pursuant to Code of Civil Procedure section 1094.5.

If there is no contractual grievance procedure resulting in arbitration, tenure grievances shall proceed under existing law pursuant to section 87740. Section 87740 provides for a hearing under the Administrative Procedure Act conducted by an administrative law judge who prepares a proposed (nonbinding) decision containing a determination as to the sufficiency of the cause and a recommendation as to disposition. The governing board makes the final determination. Section 87740 has been in law since before 1975 (Stats. 1965, ch. 1110, as former § 13443). The claimant also pled section 87740 as amended in 1995.

1. Overview of Tenure Grievance Law

The authority to grant tenure or reappoint a faculty employee for another year is addressed in sections 87600 et seq. Generally, all district academic employees are either contract employees, regular employees, or temporary employees. (§ 87604.) A contract employee is a probationary employee and a regular or tenured employee is a permanent employee. (§ 87602.) A contract employee is an employee of the district who is employed on the basis of a contract in accordance with the provisions of sections 87605 or 87608(b). (§ 87601.)

For the first academic year of employment with the district, each faculty member must be employed by contract. (§ 87605.) At the completion of the faculty member's first academic year, the district has the discretion to decide whether or not to contract with the faculty member for the following academic year, or to employ the contract employee as a regular, tenured

[64] Education Code section 87600 limits applicability of this test claim statute to faculty, not including administrators. (§ 87603.)

employee for all subsequent academic years. The decision of the district is not subject to judicial review, except as expressly provided in sections 87610.1 and 87611. (§ 87608.)

The district has the same discretion following completion of the faculty member's second academic year, except a renewal contract may be for the "following two academic years." (§ 87608.5.) If a contract employee is working under the second contract, the governing board, at its discretion and not subject to judicial review except as expressly provided in sections 87610.1 and 87611, shall elect one of the following alternatives: (a) not enter into a contract for the following academic year; (b) enter into a contract for the following two academic years; or (c) employ the contract employee as a regular, tenured employee for all subsequent academic years. (§ 87608.5.)

If a contract employee is employed under his or her third consecutive contract entered into pursuant to section 87608.5, the governing board shall either employ the probationary employee as a tenured employee for all subsequent academic years, or not grant this status and terminate the employee. (§ 87609.)[65]

Before the district can exercise discretion regarding continued employment of a contract employee, the district must evaluate the employee in accordance with the evaluation standards and procedures established pursuant to section 87660 et seq. (§ 87607.) In addition, the governing board must receive the most recent evaluations, recommendation of the superintendent of the district, and the recommendation of the president of the community college before the district exercises its discretion regarding the continued employment of a faculty member. The evaluations and recommendations are considered in a lawful meeting of the board. (§ 87607.) The governing board shall give written notice and the reasons for its decision regarding the first year and second year contract employees on or before March 15 of the academic year by registered or certified mail. Failure to give notice shall be deemed an extension of the existing contract.

For employees under their third consecutive contract for whom the board must decide to either grant tenure or not employ pursuant to section 87609, the board is required to give written notice of its decision and the reasons therefor on or before March 15 by registered or certified mail. Failure to give notice shall be deemed a decision to employ the faculty member as a tenured employee for all subsequent academic years. (§ 87610.)

As indicated above, when the contract (or probationary) employee objects to the governing board's decision to not grant tenure or not reappoint the employee to another contract year pursuant to sections 87608, 87608.5, and 87609, the governing board's decision may be reviewed in accordance with section 87610.1. That statute, added by the 1988 Reform Act, states in relevant part the following:

(a) In those districts where tenure evaluation procedures are collectively bargained pursuant to Section 3543 of the Government Code, the faculty's exclusive representative shall consult with the academic senate prior to engaging in collective bargaining on these procedures.

(b) Allegations that the community college district, in a decision to grant tenure, made a negative decision that to a reasonable person was unreasonable, or violated,

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[65] *McGuire v. Governing Board, supra,* 161 Cal.App.3d 871, 874.

misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances. Allegations that the community college district in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740.

"Arbitration" as used in this section, refers to advisory arbitration, as well as final and binding arbitration.

(c) Any grievance brought pursuant to subdivision (b) may be filed by an employee on his or her behalf, or by the exclusive bargaining representative on behalf of an employee or group of employees in accordance with [Gov. Code, § 3450 et seq.]. The exclusive representative shall have no duty of fair representation with respect to taking any of these grievances to arbitration, and the employee shall be entitled to pursue a matter to arbitration with or without the representation by the exclusive representative. However, if a case proceeds to arbitration without representation by the exclusive representative, the resulting decision shall not be considered a precedent for purposes of interpreting tenure procedures and policies, or the collective bargaining agreement, but instead shall affect only the result in that particular case. When arbitration is not initiated by the exclusive representative, the district shall require the employee submitting the grievance to file with the arbitrator or another appropriate party designed in the collective bargaining agreement, adequate security to pay the employee's share of the cost of arbitration.

(d) The arbitrator shall be without power to grant tenure, except for failure to give notice… The arbitrator may issue an appropriate make-whole remedy, which may include, but need not be limited to, backpay, and benefits, reemployment in a probationary position, and reconsideration. Procedures for reconsideration of decisions not to grant tenure shall be agreed to by the governing board and the exclusive representative of faculty pursuant to [Gov. Code 3450 et seq.].

Thus, in those community college districts where tenure evaluation procedures are collectively bargained, and there is a contractual grievance procedure resulting in arbitration, the employee can seek review before the arbitrator on the following grounds:

- With respect to a decision by the governing board to not grant tenure, the employee can allege that the governing board either made a decision that was unreasonable to a reasonable person – or the decision to not grant tenure violated, misinterpreted, or misapplied the board's policies and procedures concerning the evaluation of the employee.
- With respect to the decision to not reappoint the contract employee, the employee can allege that the governing board violated, misinterpreted, or misapplied the board's policies and procedures concerning the evaluation of the employee.

Pursuant to section 87611, the arbitrator's decision is subject to judicial review pursuant to Code of Civil Procedure section 1094.5.

If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to a hearing in accordance with section 87740 before an administrative law judge.

2. The Tenure Grievance Arbitration Procedure (§§ 87610.1 and 87611) does not Impose a State Mandate

Claimant pled the following activities regarding section 87610.1:

> In those districts where tenure evaluation procedures are collectively bargained pursuant to Section 3543 of the Government Code, consulting with the faculty's exclusive representative prior to engaging in collective bargaining on these procedures (§ 87610.1(a)).
>
> Participating in arbitration procedures in response to grievance allegations that the community college district in a decision to grant tenure made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740 (§ 87610.1(b)).
>
> Participating in arbitration procedures in response to grievance allegations that the community college district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740 (§ 87610.1(b)).
>
> Complying with an arbitrator's make-whole remedies, which may include, but need not be limited to, backpay and benefits, reemployment in a probationary position, and reconsideration (§ 87610.1(d)).

The claimant also requests reimbursement based on section 87611 for "the legal cost of appearing in a court or before any other hearing panel when appealing, or in response to a petition appealing, a final decision reached following a grievance or hearing conducted pursuant to subdivision (b) of Section 87610.1."

The Chancellor's Office March 2004 comments state that subdivision (a) requires the faculty exclusive representatives, not districts, to consult with the academic senate prior to collective bargaining, and therefore "includes no directives to districts." The Chancellor's Office also states:

> Subdivision (b) provides an <u>optional</u> mechanism for addressing decisions to discontinue the service of probationary faculty. Prior to the addition of section 87610.1, districts were required to follow section 87740 when they decided to terminate the probationary period of new faculty members. . . . Section 87610.1 represents an alternative to the provisions of section 87740. Districts are never required to proceed under section 87610.1. As the section indicates "If there is no contractual grievance procedure resulting in arbitration, these allegations [to challenge a decision not to continue a probationary faculty member] shall proceed to hearing in accordance with Section 87740." If districts <u>choose</u> to collectively bargain a grievance procedure that results in arbitration, section 87610.1 applies; otherwise, districts continue to follow section 87740. Because the decision to

> come under section 87610.1 is voluntary, the provisions of section 87610.1 cannot be the basis of a claim. (Emphasis in original.)

The Chancellor's Office also states the following regarding the remedies an arbitrator may impose in section 87610.1(d):

> If the District improperly attempts to end the employment of a probationary employee, it will be responsible for making the employee whole, including back pay and benefits in the proper case. . . . Nothing mandates that Claimant take improper action against an employee, so the State is not responsible for the Claimant's conduct in this regard.

In addition, the Chancellor's Office comments on section 87611's limited judicial review of an administrative decision under section 1094.5 of the Code of Civil Procedure, which focuses on whether or not the administrative body acted within its jurisdiction, whether there was a fair trial, or whether there was an abuse of discretion in the administrative agency's findings or conclusion. According to the Chancellor's Office, a claimant is not required to proceed under section 87610.1, and section 87611 makes no mention of any costs. Rather, it "merely indicates that arbitration decisions regarding the release of a probationary faculty member can be judicially reviewed pursuant to section 1094.5 of the Code of Civil Procedure." The Chancellor's Office also points out that "judicial review under section 1094.5 has long been available for review of community college decisions concerning probationary employees," citing *Steward v. San Mateo Junior Collect Dist. et al.* (1974) 37 Cal.App.3d 345.

According to claimant's rebuttal comments, there are a new group of allegations in section 87610.1(b) that are now required to be procedurally addressed as grievances. These allegations are that "the community college district, in a decision to grant tenure, made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees." Also, "allegations that the community college district in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances."

The Commission finds that section 87610.1 and any resulting litigation following arbitration pursuant to section 87611 do not impose state-mandated duties on community college districts. The alternative arbitration procedures provided by sections 87610.1 and 87611 only apply to "those districts where tenure evaluation procedures are collectively bargained pursuant to Section 3543 of the Government Code [the Educational Employment Relations Act, or "EERA"]…." (§ 87610.1(a).) Section 87610.1 also provides for the original hearing alternative, which has been in place since at least 1965: "If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740." (§ 87610.1(b), and former §§ 13343, 13346.25, and 13346.32.)

Courts have construed the term "mandate" according to its commonly understood meaning as an "order" or "command."[66] Government Code section 17514 defines "[c]osts mandated by the

[66] See *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174 (stating that "[w]e understand the use of 'mandates' in the ordinary sense of 'orders' or 'commands'").

state" to mean "any increased costs which a local agency or school district is *required* to incur…" (emphasis added).[67] This narrow construction of "mandate" is consistent with the analysis adopted by the court in *City of Merced v. State of California*.[68] In that case, the City of Merced sought reimbursement from the state for costs incurred as a result of a statutory requirement that when a city or county chooses to exercise its power of eminent domain it must compensate for business goodwill. The court rejected the City's argument that business goodwill compensation amounted to a reimbursable state mandate, finding that "the Legislature intended for payment of goodwill to be discretionary."[69] The court proceeded to clarify its conclusion by reasoning that:

> [W]hether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. *The fundamental concept is that the city or county is not required to exercise eminent domain.* If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost. (Emphasis added.)

City of Merced has been followed and interpreted by the California Supreme Court to stand for the proposition that activities pursued voluntarily at the discretion of a local government entity, without any legal compulsion to do so, "do not trigger a state mandate and hence do not require reimbursement of funds."[70] In *Kern High School District*, the California Supreme Court analogized the analysis of *City of Merced* to the facts before it, stating:

> [I]f a school district elects to participate in or continue participation in any underlying *voluntary* education-related program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[71]

The California Supreme Court has stated, "The proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[72] This means the focus is on the local government's initial decision to participate in the underlying program. Accordingly, where decision-making authority is reserved to a local government that chooses to participate in a voluntary underlying program, the Legislature may issue guidelines directing the entity's consequent conduct concerning that program. Any resulting "downstream" requirements with which the local government must comply are not reimbursable state mandates. This is consistent with the decisions in *City of Merced* and *Kern High School District*.[73]

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[67] Government Code section 17514.

[68] *City of Merced v. State of California* (*City of Merced*) (1984) 153 Cal.App.3d 777.

[69] *Id*. at page 783.

[70] *Kern High School Dist*., *supra*, 30 Cal.4th 727, 742.

[71] *Id.* at page 743.

[72] *Ibid*.

[73] *Ibid.*

Section 87610.1 provides an alternative arbitration procedure for processing a probationary employee's challenge to a district's decision not to grant tenure or reappoint the employee. Before the enactment of section 87610.1, an affected employee could proceed according to the procedures outlined in section 87740 by requesting that a hearing be held to determine whether there was cause for denying tenure or reappointment.

With the enactment of section 87610.1, the hearing recourse in section 87740 is left intact for employees in districts without collective bargaining provisions. But an employee challenging that same decision of the district will have recourse pursuant to the terms of a collective bargaining agreement, *if* a collective bargaining agreement is in place in that district and provides for arbitration of grievances. The issue is whether the collective bargaining route imposes a state-mandated activity.

In the context of collective bargaining, the EERA imposes on a community college district the obligation "to meet and negotiate" in good faith with the exclusive representative of a faculty bargaining unit "upon request with regard to matters within the scope of representation."[74] Falling within this scope are, "procedures for processing grievances" culminating in arbitration.[75]

Section 87610.1(b) provides that, in districts where a collective bargaining agreement is in place, allegations that a community college district wrongfully denied tenure or reappointment to a probationary employee "shall be classified and procedurally addressed as grievances."[76] The EERA recognizes the right of employees to file grievances,[77] and grievance procedures are within the scope of representation under the EERA,[78] resulting in a duty on the community college district to "meet and negotiate" over such procedures.[79] While there is a requirement under the EERA that the district exercise good faith in negotiating with the employee organization's exclusive representative, there is no requirement for the district to ultimately reach agreement with the exclusive representative. Any agreement reached pursuant to negotiations between a community college district and an employee organization's exclusive representative must be entered into voluntarily.

Claimant, in comments on the draft staff analysis, argues as follows:

> To characterize the district's duty to implement a collective bargaining contract as voluntary is to deny the mandate for good faith bargaining and the binding effect of such agreements under contract law. Further, the grievance process is not voluntary, but it is a mandatory provision of the Rodda Act [i.e., EERA] without any limitation on the scope of the subject matter of the grievance. Further, Government Code Section 3543, subdivision (b), includes the requirement that the grievance be 'adjusted.' Thus, the legal requirement is for more than just a

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[74] Government Code section 3543.5(c) declares it to be unlawful for a public school employer to "[r]efuse to meet or negotiate in good faith with an exclusive representative."

[75] Government Code section 3543.2(a).

[76] Education Code section 87610.1(b).

[77] Government Code section 3543(b).

[78] Government Code section 3543.2(a).

[79] Government Code section 3543.3.

> process, but includes a resolution. The grievance process from start to finish is not voluntary.

The Commission disagrees. A community college district is not legally required to agree to participate in any programs or procedures entered into as a result of its obligation to engage in the collective bargaining process. A community college district and an employee organization *may* agree to certain procedures for processing grievances, and the parties *may* agree that such procedures should culminate in arbitration. However, the law provides the parties a choice to resolve the issues through the existing procedures in section 87740 or through the alternative arbitration procedures in section 87610.1. The district's decision to enter into an agreement containing a grievance arbitration clause triggers the potential costs incurred by the district under the test claim statutes. Thus, as the term "mandate" has been narrowly construed by the courts, it follows that the costs incurred by a community college district to process tenure or reappointment denial grievances under section 87610.1 and to participate in the litigation of grievances post arbitration pursuant to section 87611 are not mandated by the state.

In addition, there is no evidence that the community college district faces practical compulsion to comply with sections 87610.1 and 87611. The California Supreme Court described practical compulsion as "for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program…"[80] There is nothing in the record or in the statutes that demonstrate a substantial penalty for failure to adopt the arbitration process in section 87610.1 for tenure grievances. Thus, community colleges are not practically compelled to comply with sections 87610.1 and 87611.

Moreover, although section 87611 provides for judicial review of an arbitrator's decision made under section 87610.1 by writ of mandate, a writ of mandate was available for grievances and tenure hearings prior to the enactment of these sections.[81] Thus, district participation in judicial proceedings is not a new program or higher level of service.

Claimant also pled the activity of "complying with the arbitrator's make-whole remedies" pursuant to section 87610.1(d). The Commission finds that compliance with the remedies determined by the arbitrator is not a state mandate because the remedies would come from the arbitrator rather than the state. Moreover, the community college chose to be subject to the arbitrator under the section 87610.1 process in the first place.

In the absence of either legal or practical compulsion to use the arbitration process in section 87610.1, the Commission finds that sections 87610.1 and 87611 (Stats. 1988, ch. 973, Stats. 2000, ch. 124) do not impose a state-mandated new program or higher level of service under article XIII B, section 6.

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[80] *Kern High School Dist., supra,* 30 Cal. 4th 727, 731.

[81] In *McGuire v. Governing Board, supra,* 161 Cal.App.3d 871, a temporary employee sued for tenure using a writ of mandate, but the court denied tenure, holding that his tutorial duties did not rise to the level of classroom teaching. In *Steward v. San Mateo Junior Collect Dist. et al.* (1974) 37 Cal.App.3d 345, the court upheld a lower court mandamus proceeding finding that the dismissal of a probationary junior college teacher was invalid.

3. Education Code Section 87610.1(b) Triggers Notice and Hearing Procedures Under Section 87740 for a New Grievance Asserted by Probationary Employees and Mandates a New Program or Higher Level of Service as Specified.

As indicated above, if there is no contractual grievance procedure resulting in arbitration, section 86710.1(b) requires the tenure grievance allegations to proceed in accordance with section 87740 before an administrative law judge. Section 87740 describes notice and hearing procedures for community college districts "before an employee is given notice that his or her services will not be required for the ensuing year."

Section 87740 (as last amended by Statutes 1995, chapter 758) provides for an administrative hearing process that follows the Administrative Procedure Act, but with the following modifications:

> In the event there is no contractual grievance procedure resulting in arbitration pursuant to Education Code Sections 87610.1(b) conducting the hearing and making a decision in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code [i.e., the Administrative Procedure Act] and the governing board shall have all the power granted to an agency in that chapter, except that all of the following shall apply:
>
> The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing the accusation.
>
> The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefore within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.
>
> The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the colleges and the faculty. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board or on any court in future litigation. Copies of the proposed decision shall be submitted to the governing board and to the employee. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds. (§ 87740, subd. (c).)

The Chancellor's Office argues that section 87740's procedures have been required (as former section 13443) since 1965, and are therefore not subject to reimbursement under article XIII B, section 6.

Claimant's rebuttal comments assert that a section 87740 hearing is now triggered by section 87610.1(b) the tenure grievance procedure discussed above, for denying tenure or reappointing probationary employees and is therefore reimbursable. Claimant reasserts this argument in comments on the draft staff analysis, emphasizing that it is a new program or higher level of service for districts to hold hearings regarding two new grievances:

> Allegations that the community college district in a decision to grant tenure made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees. (§ 87610.1(b).)
>
> Allegations that the community college district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. (§ 87610.1(b).)

As a preliminary matter, section 87740, as amended by Statutes 1995, chapter 758, made only technical, nonsubstantive changes and, thus, does not itself mandate any new duties. (Stats. 1985, ch. 324, Stats. 1976, ch. 1010).[82]

Section 87610.1(b) as added in 1988, however, requires an administrative hearing pursuant to section 87740 for the two grievances described above in the event the parties do not agree to submit the issues to arbitration.

Under prior law, an employee was a contract employee on probation for the first two years of employment. (Former Ed. Code, §§ 13346.20-13346.25, Stats. 1971, ch. 1654, now Ed. Code, § 87609-87609.) After the second year of probation, the district had to either grant the employee tenure or terminate the employee.[83] If an employee was terminated, he or she had a right to a hearing, as follows:

> If the contract employee objects to the decision of the governing board made pursuant to Section 87609 [decision not to reemploy after second year of probation], he may request a hearing. The hearing shall be requested and conducted, and the proposed decision shall be prepared, in accordance with the provisions of Section 87740. (Former Ed. Code, § 87611, Stats. 1976, ch. 1010, former Ed. Code, § 13346.32, Stats. 1971, ch. 1654.)

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[82] For example, it added to subdivision (a): "No later than March 15 and before an employee is given notice by the governing board that his <u>or her</u> services will not be required for the ensuing year …" In subdivision (b), the word "must" was twice replaced by the word "shall" as follows: "A request for hearing <u>shall</u> be in writing and <u>shall</u> be delivered to the person who sent the notice …" In subdivision (c)(1), the word "in" was removed as follows: ". . . he or she shall be notified of this five-day period for filing ~~in~~ the accusation." In subdivision (c)(3), the word "schools" was replaced by the word "colleges" and edited the last sentence as follows: "The board may adopt<u>,</u> from time to time<u>,</u> ~~such~~ rules and procedures not inconsistent with ~~the provisions of~~ this section <u>that</u> may be necessary to effectuate this section. In subdivision (d), the words "school" and "schools" were replaced with the words "college" and "colleges." Subdivision (f) was amended as follows:

> If a governing board notifies a contract employee that his or her services will not be required for the ensuing year, the board ~~shall~~, within 10 days after delivery to it of the employee's written request, <u>shall</u> provide him or her with a statement of its reasons for not reemploying him or her for the ensuing ~~school~~ <u>college</u> year.

In subdivision (h), "In the event that" was changed to "if" and in subdivision (i) "which" was changed to "that."

[83] *McGuire v. Governing Board, supra,* 161 Cal.App.3d 871, 874.)

Therefore, the Commission finds that providing a hearing after a negative decision to grant tenure is not a new program or higher level of service, since prior law also afforded that right to an employee denied tenure.

The former statutes, however, contain no right to a hearing for probationary employees regarding reappointment to probationary status (subsequent contracts) in their first year of employment pursuant to section 87608. In fact, one court recognized that since 1971 (Stats. 1971, ch. 1654) a first-year employee was not entitled to a hearing in these cases.[84] In sum, before the 1988 Reform Act, the right to a hearing was accorded only to review tenure decisions for a probationary employee in his or her final year of probation, but not for reappointment of probationary employees to a subsequent year or two of probation.

Thus, the Commission finds that section 87610.1(b) (Stats. 1988, ch. 973, Stats. 2000, ch. 124) is a new program or higher level of service for districts to hold hearings under section 87740 regarding:

- Allegations that the district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. (§ 87610.1(b).)

Community college districts are *not* entitled to reimbursement for these hearing activities when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414) and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

D. Faculty Service Areas

Claimant pled sections 87743.2, 87743.3, 87743.3, and 87743.5, as added by Statutes 1988, chapter 973. These sections require community college districts to establish "faculty service areas" by July 1, 1990 (§ 87743.2). A faculty service area (FSA) is "a service or instructional subject area or group of related services or instructional subject areas performed by faculty and established by a community college district." (§ 87743.1.)

As a preliminary matter, section 70(d) of the 1988 statute states that "Sections 51 to 56" of the bill shall be implemented and "be mandatory" only if the state Board of Governors certifies that adequate funding has been provided. The faculty service area statutes were added by sections 52 through 56 and, thus, they are subject to the condition identified in section 70.

At its September 1989 meeting, the state Board of Governors certified that adequate funding had been provided and, thus, community college districts were required to implement sections 87743.2, 87743.3, 87743.3, and 87743.5 as of that date.[85] The analysis continues to determine which activities impose a state-mandated new program or higher level of service on community college districts.

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[84] *Anderson v. San Mateo Community College Dist.* (1978) 87 Cal.App.3d 441, 446.

[85] Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

1. Establish FSAs and Competency Criteria for Faculty Members

Establishing FSAs is within the scope of negotiation under the Educational Employment Relations Act (EERA), and the exclusive representative is required to consult with the academic senate in developing its proposals. (§ 87743.2.) Districts are also required to establish competency criteria for faculty members in order to determine competency to serve in an FSA by July 1, 1990, with the development, meeting and negotiating to take place according to the EERA. (§ 87743.5.)

Claimant pled the following activities:

> Establishing and updating faculty service areas, within the scope of meeting and negotiating pursuant to Section 3543.2 of the Government Code. The exclusive representative shall consult with the academic senate in developing its proposals. (§ 87743.2.)
>
> Establishing and updating competency criteria for faculty members employed by the district within the scope of meeting and negotiating pursuant to Section 3543 of the Government Code. (§ 87743.5.)

The Chancellor's Office states that there is no express updating requirement in section 87743.2, only that the FSAs be established by July 1, 1990.

The Commission finds that the plain language of sections 87743.2 and 87743.5 (Stats. 1988, ch. 973) impose the following new requirements on community college districts, which constitute state mandates:

- Not later than July 1, 1990, each community college district shall establish faculty service areas. The establishment of faculty service areas is subject to the collective bargaining process in Government Code section 3543.2. (§ 87743.2.)
- Not later than July 1, 1990, each community college shall establish competency criteria for faculty members employed by the district. The establishment of competency criteria for faculty members is subject to the collective bargaining process in Government Code section 3543. (§ 87743.5.)

The Commission also finds that sections 87743.2 and 87743.5, as added by Statutes 1988, chapter 973, mandate a new program or higher level of service, since they were not required under prior law.

2. Qualifying for FSAs

Under section 87743.3, each faculty member is required to quality for one or more FSAs at the time of initial employment, and may apply for more FSAs if he or she is qualified. Any disputes due to denial of FSA applications are treated as grievances. Section 87743.3 states the following:

> Each faculty member shall qualify for one or more faculty service areas at the time of initial employment. A faculty member shall be eligible for qualification in any faculty service area in which the faculty member has met both minimum qualifications pursuant to Section 87356 and district competency standards. After initial employment, a faculty member may apply to the district to add faculty service areas for which the faculty member qualifies. The application shall be

> received by the district on or before February 15 in order to be considered in any proceeding pursuant to Section 87743 [reduction in the number of employees due to declined average daily attendance] during the academic year in which the application is received. Any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area shall be classified and procedurally addressed as a grievance. If the district has no grievance procedure, fair and equitable procedures for the resolution of the disputes shall be developed by the academic senate and representatives of the governing board.

Claimant pled the following activities:

> Receiving and determining faculty applications to add faculty service areas for which the faculty member qualifies.
>
> Classifying and procedurally addressing any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area. If the district has no grievance procedure, fair and equitable procedures for the resolution of the disputes shall be developed by the academic senate and representatives of the governing board. (§ 87743.3.)

The Commission finds, based on the plain language of the statute, that section 87743.3 (Stats. 1988, ch. 973) imposes a state mandate on community college districts to receive faculty service area applications from faculty members and determine whether a faculty member qualifies for one or more faculty service areas at the time of initial employment, and whether the faculty member qualifies for additional faculty service areas to which he or she may apply. The Commission also finds that this activity is a new program or higher level of service because it was not required before Statutes 1988, chapter 973 was enacted.

The last two sentences of section 87743.3 state:

> Any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area shall be classified and procedurally addressed as a grievance. If the district has no grievance procedure, fair and equitable procedures for the resolution of the dispute shall be developed by the academic senate and representatives of the governing board.

The Commission finds that, based on its plain language, section 87743.3 (Stats. 1988, ch. 973) imposes a state-mandated new program or higher level of service on community college districts to procedurally address as a grievance, or to use fair and equitable procedures for resolution of, any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area.

3. Maintain FSA Records

Districts are also required to maintain permanent records of faculty members' FSAs in the faculty members' personnel files as follows:

> Each district shall maintain a permanent record for each faculty member employed by the district of each faculty service area for which the faculty member possesses the minimum qualifications for service and in which he or she has established competency pursuant to the district competency standards. The records shall be contained in the faculty member's personnel file. (§ 87743.4.)

Claimant argued that this constitutes a state mandate.

The Commission finds that, based on the plain language of section 87743.4 (Stats. 1988, ch. 973), it is a state mandate for districts to maintain a permanent record for each faculty member employed by the district, in his or her personnel file, of each faculty service area for which the faculty member possesses the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards. This is also a new program or higher level of service, since it was not required under prior law.

As discussed above, because they are voluntary programs, community college districts are *not* entitled to reimbursement for any FSA activities for faculty or educational administrators employed the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

In comments on the draft staff analysis, the claimant states that faculty or administrators in DSPS or EOPS should not be excluded, stating:

> The mandate at issue here is limited to the evaluation of faculty service area placement and is not contingent on the funding status of the courses to be instructed. The DSA inappropriately extends the perceived discretionary status of these courses to the scope of a subsequent and independent mandate that is explicitly defined in Section 87743.2 et seq.

The Commission disagrees. Because the DSPS and EOPS programs are discretionary, evaluating faculty applicants for faculty service area placement is also discretionary and not mandated by the state.

Issue 2: Do the test claim statutes and regulations impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

The final issue is whether the test claim statutes and regulations impose costs mandated by the state,[86] and whether any statutory exceptions listed in Government Code section 17556 apply to the claim. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Government Code section 17564 states that no test claim or reimbursement claim shall be made, nor shall any payment be made, unless claims exceed $1,000.

The test claim includes declarations that claimant will incur costs estimated to exceed $1,000 to implement the test claim statutes and regulations. (Exhibit 1 to test claim, page 12.)

[86] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 835; Government Code section 17514.

A. Activities Required by Phase I of the 1988 Reform Act (Phase I of Transitional Program Improvement) to be Completed by July 1, 1990 do not Impose Costs Mandated by the State

The following mandated activities were required to be completed by July 1, 1990:

- Develop hiring criteria for faculty and administrators that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. (§ 87360, subd. (a).)
- Develop hiring criteria, policies, and procedures for new faculty members that are developed and agreed upon jointly by representatives of the governing board, and the academic senate, and approved by the governing board. (§ 87360, subd. (b).)
- Establish faculty service areas, subject to the collective bargaining process in Government Code section 3543.2. (§ 87743.2.)
- Establish competency criteria for faculty members employed by the district, subject to the collective bargaining process in Government Code section 3543. (§ 87743.5.)

The period of reimbursement for this claim begins July 1, 2001, eleven years after these activities were required to be completed.[87] There is no evidence in the record that the claimant or any community college district incurred costs for these activities during the period of reimbursement.

Moreover, pursuant to the plain language of the statutes, these activities are one-time activities. Based on certification by the Board of Governors, these activities have been "adequately funded." Section 70(d) of the 1988 test claim statute placed these activities within Phase I of the program and required that these activities be implemented only upon certification by the Board of Governors that adequate funding has been provided. "Adequate funding" is defined as "those moneys required to provide an increased quality of instruction and programs, and to carry out applicable mandates of this act, within the California Community Colleges." Section 70(d) further states that "[b]ased on estimates provided by the board of governors and exhaustive review of the community colleges' operations by the Joint Committee for the Review of the Master Plan for Higher Education, the Legislature finds and declares that its estimate of this funding amount is seventy million dollars ($70,000,000)." At its September 1989 meeting, the Board of Governors certified that adequate funding has been provided to community college districts for completion of these one-time activities.[88]

Accordingly, the activities required by sections 87360, 87743.2, and 87743.5 do not impose increased costs mandated by the state within the meaning of Government Code section 17514.

B. The Remaining Activities Do Not Impose Costs Mandated by the State

The remaining activities mandated by the state require community college districts to:

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[87] The test claim was filed June 13, 2003, so reimbursement is only available starting in the 2001-2002 fiscal year pursuant to Government Code section 17557, subdivision (e).

[88] Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

1. Determine the Minimum Qualifications of Applicants for Faculty and Educational Administrator Positions as follows (§ 87359, subd. (a), as added by Stats. 1988, ch. 973; Cal. Code Regs, tit. 5, § 53430, subd. (a).):
   - Determine that an applicant for a faculty or educational administrator position possesses qualifications that are at least equivalent to the minimum qualifications identified in sections 53406, 53407, 53410, 53410.1, 53415, 53416, 53417, and 53420 as applicable, before an action is taken to employ the individual.
   - The criteria used in making the employment determination of faculty and educational administrators shall be reflected in the district's action. (§ 53430, subd. (a).)

   Community college districts are *not* entitled to reimbursement for these activities above when employing faculty or educational administrators in the following programs and courses: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.), and noncredit courses (Cal. Code Regs., tit. 5, § 53412).

2. Develop Process, Criteria, and Standards for Determinations on Faculty (§ 87359(b), Stats. 1988, ch. 973; Stats. 1993, ch. 506; Cal. Code Regs, tit. 5, § 53430(b) & (c).):
   - The process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty whose qualifications are equivalent to the minimum qualifications shall be developed and agreed upon jointly by representatives of the governing board and the academic senate. (§ 87359, subd. (a); Cal. Code Regs, tit. 5, § 53430(b).)
   - The agreed upon process for hiring faculty shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty employed possess qualifications that are at least equivalent to the applicable minimum qualifications specified in the regulations. (§ 87359(a), Cal. Code Regs, tit. 5, § 53430(b).)
   - The process for hiring faculty shall further require that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to section 87358. (§ 87359(a), Cal. Code Regs, tit. 5, § 53430(c).)
   - The governing board shall approve the process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty and administrators. (§ 87359(a); Cal. Code Regs, tit. 5, § 53430(b).)

Community college districts are *not* entitled to reimbursement for the activities listed above when employing faculty or administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

3. Faculty Evaluations:

- Evaluate a temporary employee within the first year of employment, and at least once every six regular semester or once every nine regular quarters thereafter. (§ 87663 subd. (a), Stats. 1988, ch. 973, Stats. 1990, ch. 1302.)
- Include a peer review process in evaluations of academic employees, on a departmental or divisional basis, that addresses the forthcoming demographics of California and the principles of affirmative action. The process shall require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching. (§ 87663, subds. (c)and (d), Stats. 1988, ch. 973, Stats. 1990, ch. 1302.)
- Develop "evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative" for probationary faculty. (§ 87663, subd. (h).)
- Establish and disseminate written evaluation procedures for administrators (§ 87663, subd. (i), Stats. 1988, ch. 973, Stats. 1990, ch. 1302).
- Adopt and cause to be printed and made available to each academic employee of the district amended rules and regulations that reflect the new requirements imposed by Education Code section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) and provide for the evaluation of the performance of academic employees in their assigned duties. This is a one-time activity. (Cal. Code Regs., tit. 5, § 53150.)[89]

Community college districts are *not* entitled to reimbursement for these evaluations activities above when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

4. Hearings on Reappointing Probationary Employees

To hold hearings pursuant to section 87740 regarding:

- Allegations that the district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. (§ 87610.1, subd. (b).)

Community college districts are *not* entitled to reimbursement for these hearing activities when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414) and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

[89] California Code of Regulations, title 5, section 53130, Register 91, No. 23 (June 7, 1991). A new article heading was added by Register 93, No. 25 (June 18, 1993). Editorial correction of the history was made by Register 95, No. 19 (March 19, 1995).

5. Faculty Service Areas:

- Receive faculty service area applications from faculty members and determine whether a faculty member qualifies for one or more faculty service areas at the time of initial employment, and whether the faculty member qualifies for additional faculty service areas to which he or she may apply. (§ 87743.3, Stats. 1988, ch. 973.)
- Procedurally address as a grievance, or use fair and equitable procedures for resolution of, any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area. (§ 87743.3, Stats. 1988, ch. 973.)
- Maintain a permanent record for each faculty member employed by the district, in his or her personnel file, of each faculty service area for which the faculty member possess the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards. (§ 87743.4, Stats. 1988, ch. 973.)

Community college districts are *not* entitled to reimbursement for these FSA activities above when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414) and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

The next question is whether funding in an amount sufficient to fund the costs of these mandated activities has been provided to community college districts. If so, the activities would not impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556. Government Code section 17556(e) provides that the Commission shall not find costs mandated by the state if:

> The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

The 1988 Reform Act included the following legislative intent regarding funding its reforms:

> The Legislature finds and declares that the reforms enacted through this act form a mutually dependent and related set of provisions. While some few provisions could be enacted independently, other sections of this act depend upon adequate support for the programs of the community colleges. There is a direct linkage between those sections of this act which constitute the further professionalization of the faculty and the moneys required to enhance the programs of the community colleges for "transitional program improvement," as specified in Section 84755 of the Education Code.
>
> For instance, the elimination of credentials must be accompanied by the establishment of minimum qualifications by the board of governors. Minimum qualifications in turn must be implemented by districts through the establishment of faculty service areas, competency criteria, and various waiver processes. The extension of the tenure probationary period to four years as well as the revisions

> to layoff procedures also depend upon faculty service areas and competency criteria. Similarly, because so many of the reforms call for faculty involvement in the determination and implementation of policy, and because the quality, quantity, and composition of full-time faculty have the most immediate and direct impact on the quality of instruction, overall reform cannot succeed without sufficient members of full-time faculty with sufficient opportunities for continued staff development, and with sufficient opportunity for participation in institutional governance.
>
> The Legislature further finds that, absent resources to reimburse the state-mandated costs of this act, new full-time faculty to replace part-time faculty, and expanded programs for staff development, the viability or success, or both, of many of the reforms in this act will be jeopardized. The Legislature recognizes that due to unanticipated fiscal conditions the State cannot immediately fund all of the reforms contained in this act. The Legislature also recognizes, however, that if minimal funding is not soon provided that it would be inappropriate to proceed with many reforms.[90]

The 1988 Reform Act also added section 84755, as mentioned in the first paragraph of the legislative intent language quoted above. Section 84755 provides funding guidance for the minimum qualifications, evaluation, tenure grievance, and faculty service area mandates imposed on community college districts. It reads in part:

> (a) The Legislature finds and declares that program-based funding, once implemented, will more adequately and accountably fund the costs of providing quality community college education**.** Given that program-based funding will not be implemented until fiscal year 1991-92, given that community colleges will be entering a period of major reform <u>and incurrence of new state mandates commencing in January 1989</u>, and given that community colleges will be entering this period of reform having lost purchasing power since the 1977-78 fiscal year, the Legislature recognizes the need to create a transitional funding mechanism for program improvement <u>and mandate funding</u> that can operate until program-based funding is implemented.
> (b) For the purpose of improving the quality of community college educational programs and services, <u>for the purpose of reimbursing state-mandated local program costs imposed by this act</u>, and for the purposes of initially implementing specified reforms, the board of governors shall, from amounts appropriated for purposes of this section, allocate program improvement revenues to each district on the basis of an amount per unit of average daily attendance funded in the prior fiscal year [originally: generated in the 1987-88 fiscal year]. However, this amount shall be increased or decreased to provide for equalization in a manner determined by the board of governors, consistent with Sections 84703 to 84705, inclusive.
> <u>Each community college district shall use its allocation to initially reimburse state-mandated local program costs, and then to implement specified reforms</u> and make authorized program and service improvements as follows:

[90] Statutes 1988, chapter 973, section 70(a).

> [¶]…[¶]
> (2) Applying minimum qualifications to all newly hired faculty and administrators, including candidates for these positions as required by Section 87356.
> (3) Developing and administering a process for waiver of minimum qualifications as required by Section 87359.
> (4) Establishing and applying local hiring criteria as required by Section 87360.
> (5) Establishing and applying faculty service areas and competency criteria as required by Sections 87743 to 87743.5, inclusive.
> (6) Evaluating temporary employees, instituting peer review evaluation, and widely distributing evaluation procedures as required by Section 87663.
> (7) Establishing and applying new processes for tenure evaluation required by Section 87610.1.
> (8) Establishing and applying the tenure denial grievance procedure required by Section 87610.1. . . . .
>
> [¶]…[¶]
> (c) Except as provided by Section 87482.6,[91] and except as necessary to reimburse the costs of new state mandates, district governing boards shall have full authority to expend program improvement allocations for any or all of the authorized purposes specified in subdivision (b). (Emphasis added.)

Because program-based funding was not to be implemented until fiscal year 1991-1992,[92] the Legislature intended that program-improvement funding for the 1988 Reform Act be implemented in two phases of "transitional program improvement."[93] Phase I includes the remaining mandated activities in numbers 2 -6 above. (§ 84755 (b)(2)-(b)(6).) The Legislature stated its intent "that moneys appropriated during Phase I fully fund any state-mandates created pursuant to this section" and required each community college district to use its allocation to initially reimburse state-mandated local program costs.[94] Phase II includes number 8 above (§ 84755 (b)(8).) The Legislature further stated its intent "that moneys appropriated during Phase II fully fund any state-mandate created pursuant to this section."[95] After the districts used the funds to reimburse the costs of the new state mandates, the districts had authority to use the program improvement allocations as they saw fit to pay for the program.

The certification that the districts had received adequate Phase I funding was adopted by the Board of Governors at its September 14-15, 1989 meeting.[96] Similarly, the Phase II adequate

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[91] Section 87482.6 concerns districts with less than 75% of credit instruction taught by full-time instructors.

[92] Education Code Section 84755(a).

[93] Statutes 1988, chapter 973, section 70(b).

[94] Statutes 1988, chapter 973, section 70(b)(1).

[95] Statutes 1988, chapter 973, section 70(b)(2).

[96] Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

funding certification was provided in November 1990.[97] Thus, the costs of the state-mandated activities were fully funded with the program improvement funding until fiscal year 1991-1992. Claimant, in comments on the draft staff analysis, disagrees that the certification means that the activities were fully funded until 1991-1992. This does not matter, however, because the reimbursement period for this claim begins in fiscal year 2001-2002.

After program improvement funding ended in fiscal year 1991-1992, funding for the mandated activities was appropriated through program-based funding.[98] (§ 84755(a).) Before the funding could be appropriated as part of a district's base budget, however, each community college district was required to submit a plan to the Board of Governors for review and approval. The plan had to show that the district's use of the funding is consistent with the requirements of section 84755. One of the requirements of section 84755 is that "each community college district shall use its allocation to initially reimburse state-mandated local program costs, and then to implement specified reforms and make authorized program and service improvements." (§ 84755(b).) Section 84755(d) states the following:

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

Thus, by law the district's plan for using funds appropriated for its base budget must be consistent with section 84755, subdivision (b), including the requirement for districts to first use their allocations to specifically fund the costs of the following mandated activities:

- Applying minimum qualifications to all newly hired faculty and administrators including candidates for these positions as required by Section 87356 (§ 84755, subd. (b)(2));
- Developing and administering a process for waiver of minimum qualifications as required by Section 87359 (§ 84755, subd. (b)(3));
- Establishing and applying faculty service areas and competency criteria as required by Sections 87743 to 87743.5, inclusive (§ 84755, subd. (b)(5));
- Evaluating temporary employees, instituting peer review evaluation, and widely distributing evaluation procedures as required by Section 87663 (§ 84755, subd. (b)(6)); and

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[97] Board of Governors, California Community Colleges, Board Certification Regarding Adequate Funding for Phase II of AB 1725. (Agenda Item 14) November 8-9, 1990. The tenure grievance procedure (or more specifically, granting a hearing to a probationary employee who is denied further probation after the first year of employment) is part of Phase II.

[98] Program-based funding was initially included in Education Code section 84750 (Stats. 1988, ch. 973) and superseded by Education Code section 84750.5 (Stats. 2006, ch. 631).

- Establishing and applying the tenure denial grievance procedure required by section 87610.1. (§ 84755, subd. (b)(8).) As discussed above, section 86610.1(b) mandates a new program or higher level of service to grant a hearing pursuant to section 87440 resulting from allegations that the district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees.

The base funding for community college districts has been appropriated in line item 6870-101-0001 of the state budget acts. In every budget act from 2001 until 2010, the Legislature has appropriated between $2.1 and $3.9 billion for "local assistance" for community colleges.[99]

The Chancellor's Office, in its comments on the test claim, asserts that this program was funded originally, as stated in the legislative intent language above, and was built into the base for the community college districts.

Claimant disagrees that funding has been adequate and asserts that section 87455(b) states that the Board of Governors "shall, from amounts appropriated for purposes of this section, allocate program improvement revenues to each district on the basis of an amount per unit of average daily attendance funded in the prior fiscal year," but only after the amount is "increased or decreased to provide for equalization." According to claimant, this effectively negates any concept of cost reimbursement, which is the actual cost of the increased level of reimbursement. Claimant reiterates this argument in comments on the draft staff analysis, stating that the funding formula, as a matter of law, cannot be presumed to be sufficient.

Claimant also states that offsetting revenues in the 1988 Reform Act (Stats. 1988, ch. 973) did not provide for offsetting savings to local agencies or school districts which result in no net costs or include additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund it, in accordance with Government Code section 17556(e). According to claimant, later provided funding is a question of fact subject to the Commission's determination. The claimant argues that there is no evidence in the record that the base funding provided in the budget acts is sufficient to cover the costs of the mandated activities and that since the claimant has alleged $1,000 in costs for this test claim, it has met its burden of proof. Included in the test claim is a declaration estimating costs incurred in the amount of $1,000 to comply with all the test claim statutes and regulations. The declaration was prepared by Tom Donner, the Executive Vice President of Business and Administration for Santa Monica Community College District. With respect to alleged costs, the declaration states the following:

> It is estimated that the Santa Monica Community College District incurred more than $1,000 in staffing and other costs in excess of any funding provided to community college districts and the state for the period from July 1, 2001,

[99] Statutes 2001, chapter 106, 6870-101-0001, $2.6 billion; Statutes 2002, chapter 379, 6870-101-0001, $2.65 billion; Statutes 2003, chapter 157, 6870-101-0001, $2.18 billion; Statutes 2004, chapter 208, 6870-101-0001, $2.78 billion; Statutes 2005, chapters 38, 39, 6870-101-0001, $3.15 billion; Statutes 2006, chapter 47, 48, 6870-101-0001, $3.76 billion; Statutes 2007, chapters 171, 172, 6870-101-0001, $3.8 billion; Statutes 2008, chapters 268, 269, 6870-101-0001, $3.98 billion; Statutes 2009, chapter 1 (4th Ex. Sess.) 6870-101-0001, $3.1 billion; Statutes 2010, chapter 712, 6870-101-0001, $3.1 billion.

> through June 30, 2002 to implement these new duties mandated by the state for which the district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.[100]

Claimant states that any revenue received by the districts are merely offsets to be identified in parameters and guidelines and do not preclude reimbursement.

Claimant submitted further argument and evidence on July 20, 2011, including 11 exhibits from meetings or reports of the Board of Governors of the California Community Colleges between 1989 and 1992, and letters from the Chancellor's Office to the claimant approving claimant's plan submitted to comply with 84755. Claimant argues that the allocation method used by the Board of Governors for the money appropriated pursuant to section 84755 is based on ADA and not on actual costs mandated by the state, and is equalized to help smaller districts in a manner inconsistent with mandate reimbursement.[101] Claimant's Exhibits A-D concern program-improvement funding, which ended in 1991-1992 and was replaced by program-based funding. Claimant also included the following exhibits regarding program-based funding:

- In Exhibit E (Board of Governors agenda for March 14-15, 1991) claimant emphasizes the differences between program–based funding (in which funding is provided for five specified areas: instruction, instructional services, student services, maintenance and operations, and institutional support) and mandate reimbursement, which is based on actual costs.
- In Exhibit F (Board of Governors "Funding Gap Study" Mar. 12-13, 1992), claimant asserts that because there is a funding gap, in that the state underfunds community colleges, doubt is cast on the conclusion that the local assistance allocations since 2001 met the requirement in Gov. Code 17556(e).
- Exhibits H and I are April 1991 objections to a regulation proposed by the Board of Governors (Cal. Code Regs., tit. 5, § 51025) that requires districts to have 75 percent of courses taught by full-time faculty. Claimant argues that most of the money going to program-improvement funding was used for equalization or to increase the ratio of full-time faculty to comply with this regulation rather than funding the mandates.

The Commission disagrees with the claimant's arguments in this case. It is a general principle of law that the party bringing the claim has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim.[102] This burden of proof is recognized throughout the architecture of the mandates statutes and regulations. By statute, only the local agency or school district may bring a claim, and the local entity must present and prove that it has incurred increased costs mandated by the state pursuant to Government Code section 17514 and is therefore entitled to reimbursement.

In many cases, a declaration from the claimant that alleges that the claimant has incurred an estimate of $1,000 in costs to pay for the program satisfies the claimant's burden of proving it

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[100] Exhibit A, page 68, 79.

[101] Exhibits A and B attached to the claimants July 20, 2011 filing are agenda items for the meetings of the Board of Governors on July 13-14, 1989 and Sept. 14-15, 1989.

[102] Evidence Code section 500.

has incurred increased costs mandated by the state pursuant to Government Code section 17514. This is true, for example, when legislation mandates a new program or higher level of service, but does not appropriate any funding with the new requirements. It may also be true when the Legislature appropriates general funding for a block of programs, one of which is the test claim program, but does not establish a priority use of the funding. In this second example, local government has discretion to use the funding for any of the programs identified, and offsetting revenue may only be identified and deducted from the claim if a claimant has used the funds for the mandated program.

Here, however, there is enough evidence to show the relevance of Government Code section 17556(e); a significant amount of money has been appropriated every fiscal year to community college districts that was specifically intended by the state to fund the costs of the mandated activities. Funding between $2.1 and $3.9 billion has been specifically appropriated to community college districts in the budget acts for allocation to the districts' through their base funding appropriation between 2001 and 2010. Pursuant to sections 84755(b) and (d), the state has directed that these appropriations must be *first* used to pay for the costs of the mandated activities identified above before a community college can exercise its discretion to use the funding for other authorized purposes. Claimant has disputed neither the amount of appropriations to community colleges for "local assistance" nor the requirement in section 84755 to "use its allocation to initially reimburse state-mandated local program costs" and that the district's plan for using its allocation "be consistent with the listing of authorized expenditures provided in this section."

Although claimant has submitted evidence in the record[103] showing that the claimant's plan for expenditures prepared in accordance with section 84755(d) was, in fact, approved, there is no evidence in the record of the amount of funding actually allocated to the claimant during the period of reimbursement; or that the funding allocated to the claimant was sufficient to cover the costs of the mandated activities. However, it may be presumed that the official duties required of state and local officials by section 84755(d) have been regularly performed.[104] Thus, it is presumed that the Board of Governors complied with section 84755(d) before approving the plans and including the district's allocation as part of the district's base budget by ensuring that the proposed expenditures are consistent with the authorized expenditures in section 84755, including the requirement to pay for the mandated activities first. And it is presumed that the districts, after receiving the yearly base-funding allocation, paid for the mandated activities first. There is no evidence in this case that the state and local community college districts failed to comply with these requirements.

The cost issue in this case is similar to what occurred in the *Kern High School District* case.[105] *Kern High School Dist.* addressed legislation requiring school site councils to comply with

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[103] In its July 20, 2011 filing, claimant submits letters from the Chancellor's Office to the claimant approving its program-improvement plans for phase I (Exhibit J, letter dated March 14, 1990) and phase II (Exhibit K, letter dated March 1, 1991). Both letters say that the plan submitted was "found to be consistent with the listing of authorized expenditures in Education Code, section 84755."

[104] Evidence Code section 664.

[105] *Kern High School Dist., supra*, 30 Cal.4th 727, 746-747.

modified open meeting act requirements, including posting a notice and an agenda of their meetings. School site councils were created by several state and federal programs that included funding for "reasonable district administrative expenses."[106] The school site councils test claim was filed with the Commission in 1994. For the Commission to take jurisdiction of the test claim filing, the claimant was required to estimate costs of at least $200 pursuant to the former Government Code section 17564 and section 1183 of the Commission's regulations. Based on the statutory schemes that created the school site councils, the court noted that the program funding available for the programs was often substantial – "for example, on a statewide basis, funding provided by the state for school improvement programs [citations omitted] for the 1998-1999 fiscal year totaled approximately $394 million. (Cal.Dept. of Ed., Rep., Budget Act of 1998 (Nov. 1998) p. 52.)"[107] In addition, the statutes allowed school districts to use the program funding for "administrative expenses," but did not establish a priority use of the funds. Despite the allegations by the claimant of increased costs mandated by the state, the court still denied the claim as follows:

> Even if we assume for purposes of analysis that claimants have been legally compelled to participate in the Chacon-Moscone Bilingual-Bicultural Education program, we nevertheless conclude that under the circumstances here presented, the costs necessarily incurred in complying with the notice and agenda requirements under that funded program do not entitle claimants to obtain reimbursement under article XIII B, section 6, because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary notice and agenda related expenses.
>
> We note that, based upon the evaluations made by the Commission, the costs associated with the notice and agenda requirements at issue in this case appear rather modest.
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>> FN 16 Costs of compliance with the notice and agenda requirements have been estimated as amounting to approximately $90 per meeting for the 1994-1995 fiscal year, and incrementally larger amounts in subsequent years, up to $106 per meeting for the 2000-2001 fiscal year, for each committee or advisory council. . . . Under these formulae, a district that has 10 schools, each with one council or advisory committee that meets 10 times a year, would be forced to incur approximately $9,000 to $10,000 in costs to comply with statutory notice and agenda requirements. Presumably, such costs are minimal relative to the funds allocated by the state to the school districts under these programs. . . .
>
> And, even more significantly, we have found nothing to suggest that a school district is precluded from using a portion of the funds obtained from the state for the implementation of the underlying funded program to pay the associated notice and agenda costs. Indeed, the Chacon-Moscone Bilingual-Bicultural Education program explicitly authorizes school districts to do so. (See Ed. Code, § 52168, subd. (b) ["School districts may claim funds appropriated for purposes of this

[106] *Id.* at page 747.

[107] *Id.* at page. 732.

> article for expenditures in, but not limited to, the following categories: [¶ … [¶ (6) Reasonable district administrative expenses. …"].) We believe it is plain that the costs of complying with program-related notice and agenda requirements qualify as "[r]easonable district administrative expenses."[108]

The facts here are even more compelling than *Kern*. Here, community college districts are required by law to use the allocations received to *first* pay for the mandated activities before the funding may be spent on other authorized expenses. The declaration filed by the claimant in this case estimating increased costs of $1,000, while satisfying the test claim filing requirements when the claim was filed in 2003 and giving the Commission jurisdiction to determine the claim,[109] is not enough to show that the claimant actually incurred increased costs mandated by the state above and beyond the significant funding specifically appropriated by the state to first pay for the mandated activities. As indicated by the court in *County of Sonoma v. Commission on State Mandates*, a showing of actual increased costs is required.

> Section 6 is an obvious compliment to the goal of Proposition 4 in that it prevents the state from forcing extra programs on local governments in a manner that negates their careful budgeting of expenditures. A forced program that would negate such planning is one that results in *increased actual expenditures* of limited tax proceeds that are counted against the local government's spending limit. Section 6, located within a measure aimed at limiting expenditures, is expressly concerned with "costs" incurred by local government as a result of state-mandated programs, particularly when the costs of compliance with a new program restrict local spending in other areas. "*No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes*." [Citation omitted]. (Emphasis added.)[110]

Accordingly, the Commission finds that there is no substantial evidence in the record to support a finding that the claimant has incurred costs mandated by the state pursuant to Government Code section 17514.

Claimant's late filing does not alter this conclusion. All of claimant's exhibits are dated long before the period of reimbursement (the most recent being Exhibit G, July 9-10, 1992) and do not show that claimant has incurred increased costs mandated by the state. Also, Exhibits A-D

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[108] *Id.* at pages 746-747.

[109] This test claim was filed on June 13, 2003. Effective April 21, 2003, former section 1183 of the Commission's regulations required all test claims to include "a statement that actual and/*or estimated costs* which result from the alleged mandate exceed one thousand dollars ($1,000)." (Emphasis added.)

In 2004, Government Code section 17553 was amended to require all test claims to include information showing "the *actual* increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate," and "the actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed. (Stats. 2004, ch. 890 (AB 2856); emphasis added.)

[110] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1284.

relate to program-improvement funding, which was replaced by program based funding in fiscal year 1991-1992, and are therefore not relevant to the period of reimbursement for this claim. (§ 84755 (a).)

Claimant raises the issue of equalization funding, arguing that it is inconsistent with mandate reimbursement. Equalization (giving smaller districts more funds) is required by section 84755(b), but it does not mean that districts did not get enough funds to pay for the mandated costs. Equalization funding does not change the requirement in section 84755(b) & (d) that mandates be funded first, that there are large amounts in the annual budget allocated for local assistance to community college districts, and that there is no substantial evidence that claimant has incurred costs mandated by the state pursuant to Government Code section 17514.

Regarding Exhibit E (Board of Governors agenda for March 14-15, 1991), claimant emphasizes the differences between program–based funding (in which funding is provided for five specified areas: instruction, instructional services, student services, maintenance and operations, and institutional support) and mandate reimbursement, which is based on actual costs. Claimant does not, however, cite the statement in Exhibit E that program-based funding is a revenue-allocation method and not an expenditure model, and that districts are not required to spend funds in the five listed categories. Thus, other than the requirements in 84755 that require state mandates to be funded first[111] districts are free to spend allocations as they see fit.

As to the funding gap study in Exhibit F, the gap applies to all activities of the community colleges, but the activities in section 84755(b) apply only to the mandated activities. Exhibit F, however, does not show that the claimant has incurred increased costs for the mandated activities in this claim.

As to Exhibits H and I (District response to adoption of Cal.Code Regs, tit. 5, § 51025), section 51025 of the title 5 regulations is not part of the test claim, and there is no evidence that compliance with it consumes all the program-based funding for districts. That districts objected to section 51025 does not change the priority in section 84755 that mandates be funded first. Exhibits H and I do not show that the claimant has incurred increased costs for the mandated activities in this claim.

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[111] Section 84755(c) states that "[e]xcept as provided in Section 87482.6, and except as necessary to reimburse the costs of the new state mandates, district governing boards shall have full authority to expend *program improvement allocations* for any or all of the authorized purposes specified in subdivision (b)." (Emphasis added.) Section 87482.6(a) provides that until program-based funding is implemented by a standard adopted by the Board of Governors that establishes the appropriate percentage of hours of credit instruction that should be taught by full-time instructors, the Legislature "wishes to recognize and make efforts to address longstanding policy of the board of governors that at least 75 percent of the hours of credit instruction . . . should be taught by full-time instructors." The remaining provisions of section 87482.6 lay out the percentage of *program improvement funding* to be spent on achieving greater full-time instruction. Section 87482.6 deals with primarily with program-improvement funding, which ended in 1991-1992, it is not relevant to the issue of costs during the period of reimbursement.

Despite claimant's July 20, 2011 submission, the Commission finds that there is no substantial evidence in the record to support a finding that the claimant has incurred costs mandated by the state pursuant to Government Code section 17514. [112]

CONCLUSION

For the foregoing reasons, the Commission finds that the test claim statutes and regulations do not impose a reimbursable state mandate on community college districts within the meaning of article XIII B, section 6, of the California Constitution and Government Code sections 17514.

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[112] As a final note, the claimant's comments on the draft staff analysis states the following:

> It has been nine years since the test claim was accepted for filing and 22 years since the programs were implemented. The Commission has never requested this information [regarding the funding] from either the test claimant or the relevant state agency. The lack of evidence that is not required as part of the test claiming [sic] filing and was never requested is not a reasonable basis to make a finding of law that the program funding is sufficient.

When the draft staff analysis was issued, the transmittal letter issued by Commission staff did request the information. The letter stated the following:

> As noted in the analysis, Commission staff concludes that the activities that constitute a new program or higher level of service are already funded through the Board of Governor's base budget appropriations. We seek comments on this finding.