

SixTen and Associates Mandate Reimbursement Services

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Commission on
State Mandates

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June 23, 2011

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

Re: CSM. 02-TC-27
Test Claim of Santa Monica Community College District
Employment of College Faculty and Administrators

Dear Mr. Bohan:

I have received the Commission's Draft Staff Analysis (DSA) for the above referenced test claim dated June 3, 2011, to which I respond on behalf of the test claimant.

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

PART 1. SPECIFIC SUFFICIENT ADDITIONAL REVENUE Government Code Section 17556, subdivision (e)

The DSA concludes that several code and regulation sections require activities by community college districts that are new programs or higher levels of service subject to reimbursement. However, none of these activities are proposed for reimbursement because the DSA (69) has concluded that the Legislature has provided 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 which is an exception to a finding of "costs mandated by the state" pursuant to Government Code Section 17556, subdivision (e).

A. Source of the Revenue

This is a legal threshold issue. A source of additional revenue is identified for the purpose of funding the new programs. The legislation (Education Code Section 84755, as added by Statutes of 1988, Chapter 973, Section 21.7) recognizes new state mandates that require state reimbursement, provides an initial funding source, and assigns the first use of that "program-based funding" to fund the new mandates that are the subject of this test claim.¹ In Section 70 (an uncodified section) of Statutes of

¹ Education Code Section 84755, as added by Statutes of 1988, Chapter 973, Section 21.7

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

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

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

- (1) Developing articulated programs provided for in Section 69 of Chapter 973 of the Statutes of 1988 with school districts and campuses of the University of California and California State University.
- (2) Applying minimum qualifications to all newly hired faculty and administrators, including candidates for these positions as required by Section 87356.
- (3) Developing and administering a process for waiver of minimum qualifications as required by Section 87359.
- (4) Establishing and applying local hiring criteria as required by Section 87360.
- (5) Establishing and applying faculty service areas and competency

criteria as required by Sections 87743 to 87743.5, inclusive.

(6) Evaluating temporary employees, instituting peer review evaluation, and widely distributing evaluation procedures as required by Section 87663.

(7) Establishing and applying new processes for tenure evaluation required by Section 87610.1.

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

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

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

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

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

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

(14) Augmenting budgets for plant maintenance and operations.

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

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

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

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

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

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

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

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

1988, Chapter 973, “[b]ased on estimates provided . . . , the Legislature finds and declares that its estimate of this funding amount is seventy million dollars (\$70,000,000), in addition to the seventy million dollars (\$70,000,000) estimated under subdivision (d) [for Phase I].” Section 70 states that Phase II money is intended to “fully fund” any state mandate created. For subsequent years, the DSA (68) asserts, but without foundation, that sufficient funds are appropriated by State Budget Act line item 6870-101-001.

Therefore, the condition of Section 17556, subdivision (e), that requires “additional revenue” that is “specifically intended to fund the costs of the mandates” *appears* to have been addressed for the initial periods by the mandate legislation and for subsequent periods by the Budget Acts. What remains then is the factual determination of whether the additional revenue appropriated initially and every year since the effective date of the new programs is “in an amount sufficient to fund the cost of the state mandate.”

B. Board of Governors Certification

The Board of Governors certifications alone are factually and legally insufficient for purposes of a Commission finding for Government Code Section 17556, subdivision (e). Neither the Legislature nor the Board of Governors has any quasi-judicial authority for mandate determinations. Only the Commission can make findings of law and fact for test claims and cannot rely upon legislative disclaimers or delegate the adjudication of the test claim to other state agencies. As a matter of law, the Commission cannot rely upon the two initial funding certifications of the Board of Governors without an independent evaluation of the factual basis for the certifications sufficient for the Commission to make an independent determination. There is no provision in the Government Code for the Commission to delegate this function to another state agency.

Other than that board agenda action item, there is no information in the DSA record supporting the ultimate conclusion of the Board of Governors that the funding was sufficient. As required by the legislation, the Board of Governors certified in September 1989 that the Phase I money was adequate, and similarly certified Phase II in November 1990. Based on these certifications, the DSA (68) concludes as a matter of law that “the costs of the state mandated activities were fully funded with the program improvement funding until fiscal year 1991-92.” The test claimant is informed and believes that the Chancellor of the California Community Colleges on or about 1991

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

prepared an "AB 1725" cost questionnaire to obtain from each community college an estimate of the cost of implementing the provisions of AB 1725, that the cost data was specific to each new program enacted, that most of the community colleges provided this data to the Chancellor, and that the Chancellor is in possession of this information. This information can be evaluated by the Commission in order to make an independent determination as to whether the funding was sufficient to fund all the direct and indirect costs of the mandate.

Regardless, the factual utility of these certifications is of course a question of fact. Neither the Legislature nor the Board of Governors has the legal authority to determine which activities result in costs mandated by the state. That is within the exclusive jurisdiction of the Commission on State Mandates. The Commission will make that determination based on this test claim. Therefore, although the Board of Governors was aware of the new programs, they could not have been aware of which activities are reimbursable, so the AB 1725 estimates or spending plans provided by the districts and any conclusion made by the Board of Governors therefrom are speculation. Since the certifications are based on estimates there was no actual program cost information available for the time period of the AB 1725 survey. The AB 1725 district survey responses which were the basis of the Board of Governors conclusion on the sufficiency of the \$140 million are not a part of the record and there is nothing else in the DSA record that indicates that the actual costs of implementation have ever been determined then or since these estimates were received.

There have been no subsequent certifications, so there is no ostensible basis for the Commission to utilize for the proposition that the funds are sufficient in subsequent years. Instead, for subsequent years, the DSA accepts without evaluation a representation by the Chancellor's Office staff that the programs are funded by ongoing annual appropriation, but without a representation as to sufficiency. Note that the ongoing funding, to the extent it was actually provided (there is no foundation for any such conclusion) each subsequent year, was provided by *subsequent* budget act legislation, not the original mandate program legislation which only included funding (Section 70) for the initial years of implementation. So the sufficiency of the funding also remains a question of fact each year which alone also fails the conditions of Section 17556, subdivision (e).

C. Evidentiary Burden

There is no actual cost information on the record from which to make a determination of sufficiency. Regarding Phase I costs, the DSA (62) states that "[t]here is no evidence in the record" that any district incurred costs for these activities during the period of reimbursement. For the "remaining" program costs subsequent to Phase I, the DSA (69) states that "there is no evidence in the record that the claimant's base funding, . . . is not sufficient to fully cover its costs." This is circuitous and disingenuous reasoning. The DSA offers no evidence that the funding is sufficient which is necessary to operate

the provisions of Section 17556, subdivision (e), and then shifts the burden to the test claimant to disprove the proposition stated in the DSA. The test claim filing only required the test claimant to allege at least \$1,000 in annual costs. The test claimants have met that burden. The DSA cannot shift the burden to test claimants to prove or disprove a lack of evidence for an affirmative Section 17556 exception to reimbursement argument. 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 from either the test claimant or the relevant state agency. The lack of evidence that is not required as part of the test claiming filing and was never requested is not a reasonable basis to make a finding of law that the program funding is sufficient. Regardless, the question of sufficiency need never be reached because the funding formula is legally defective.

D. Funding Formula

Notwithstanding the absence of the cost data, the colleges are not being funded based on actual program costs. Section 84755, subdivision (b), states that the new funds will be allocated to "each district on the basis of an amount per unit of average daily attendance funded in the prior fiscal year," but only after the amount is "increased or decreased to provide for equalization." The subsequent annual funding is allocated based on full time equivalent students, which is essentially the same mechanism as average daily attendance. These allocation methods effectively negate any concept of actual cost reimbursement, which is the actual cost of the new program or increased level of service (including indirect costs which are about an additional 30% to 35% of direct costs). The funding scenario bears no relationship to the actual cost of the mandate at any college district, so as a matter of law, it cannot be presumed to be sufficient, and as a matter of law, it cannot satisfy the requirements of Section 17556, subdivision (e), as reimbursement of costs.

E. Cost Reduction

The funding scenario, to the extent actually implemented, does not meet the Government Code section 17556, subdivision (e), exception to a finding of costs mandated by the state, since the statute did not provide for offsetting savings 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 the cost* of the state mandate. On the other hand, to the extent that ongoing funding was appropriated, and continues to be made available each subsequent year, such funding will offset properly matched program activity costs, but this offset potential is factually and legally insufficient for Section 17556, subdivision (e). The application of the annual funding will properly be a reduction of activity costs reported in each district's annual claim. In the years that the funding actually is sufficient, districts will have no reimbursable annual claims. This a matter for the parameters and guidelines.

PART 2. NEW PROGRAM STANDARD OF REVIEW
Government Code Section 17514

The DSA (25) states that to determine if a program is new or imposes a higher level of service, the statutes pled “must be compared with the legal requirements in effect immediately before the enactment.” This is incorrect. The test claim was filed June 13, 2003. These filings are effective prior to the September 30, 2003, effective date of Statutes of 2002, Chapter 1124 (for mandates that became effective before January 1, 2002)², which first established at Government Code Section 17551, subdivision (c), time limits for filing on statutes enacted after December 31, 1974. Based on the date these test claims were submitted, the standard of review is to compare the statutes pled on the effective date of the test claim filing (here July 1, 2001) to the status of the law as of December 31, 1974, pursuant to Government Code Section 17514. The DSA needs to be revised to compare the statutes and laws effective July 1, 2001, to the law as it existed on December 31, 1974.

PART 3. MINIMUM QUALIFICATIONS FOR FACULTY EMPLOYMENT

A. Board of Governors Consultation Process

Education Code Section 70901 Education Code Section 87356
Education Code Section 87357 Education Code Section 87358

Education Code Section 70901, subdivision (b) (1) (B), requires the Board of Governors to consult with college districts and other interested parties to establish minimum standards for the employment of academic and administrative staff in colleges. Further, Section 70901, subdivision (e), requires the governing board to “establish and carry out” the necessary consultation process. However, the DSA (28) concludes that the plain language of Section 70901 does not require the district to participate.

Education Code Section 87356, subdivision (a), requires the Board of Governors to adopt regulations to establish and maintain the minimum qualifications for faculty members. Section 87357, subdivision (a) (1), in order to implement Section 87356, requires the Board of Governors, to “consult with, and rely primarily on the advice and judgment” of enumerated statewide representative organizations comprised primarily of

² Statutes of 2002, Chapter 1124, is generally effective September 30, 2002. However, the amendment that added Government Code Section 17551, subdivision (c), delayed the effective date of that subdivision for mandates effective before January 1, 2002, by one year to September 30, 2003:

(c) Local agency and school district test claims shall be filed not later than three years following the date the mandate became effective, *or in the case of mandates that became effective before January 1, 2002*, the time limit shall be one year from the effective date of this subdivision. (Emphasis added)

college district faculty and staff. Further, the Board is required to appoint college staff that are members of statewide representative groups to conduct the three-year review requirement of Section 87357, subdivision (a) (2). The DSA (30) concludes that college district faculty are not required to participate as anything other than volunteers. Similarly, Education Code Section 87358 requires the Board of Governors to periodically designate a team of college district administrators and faculty to review a district's application of the minimum employment qualifications. The DSA (31) concludes that the plain language merely requires "designation" of a team, but that doesn't mandate participation, and that the designees may refuse.

More to the point is the college district's cost for faculty to participate, not the individual faculty member's choice to participate. Commission staff is referred to the Commission determination on Education Code Section 70902, subdivision (b) (14), that requires the district to participate in the consultation process established by the Board of Governors and Title 5, CCR, Section 53207, regarding faculty release time for these activities, which were the subject of the recently decided Minimum Conditions for State Aid (02-TC-25/31) test claim. It is the same consultation process here.

It would seem reasonable and necessary for the community college districts to actually participate in the process in order to implement the intended purposes of the statute and code sections. Education Code Section 70901, subdivision (a), directs the work of the Board of Governors to all times maintain, to the maximum degree permissible, local authority and control in the administration of the community colleges. For the college districts to not participate in the process would frustrate the stated purpose of the 1988 reform act which cannot be a reasonable construction of the meaning of the statute.

B. Evaluation of Qualifications

Education Code Section 87359 Title 5, CCR, Section 53430

Education Code Section 87359, subdivision (a), and Title 5, CCR, Section 53430, require the district to determine if specified applicants meet minimum qualifications. The DSA (33) concludes that this is an "affirmative duty" and a "new program or higher level of service (DSA 36)." However, the DSA (34) improperly excludes applicants for the EOPS and DSPS programs, because other test claims decisions have found that those programs are conditioned on the receipt of program funding, even though these positions and applicants are incorporated by reference by Section 87359, subdivision (a) (Title 5, CCR, Sections 53402 and 53414). The cited program language (DSA 34, 35) indicates that those 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, which is not mentioned in the program funding language.

For other reasons, the DSA (36 and 38) excludes from this new duty the instructors for noncredit courses, asserting that since 1983 (former section 52275), and perhaps as

early as 1970 (former section 52600), districts were required to “assess” the qualifications for instructors for “classes for adults” and that there is nothing in the record to indicate the Section 87359 process is a higher level of service. However, the DSA does not establish an uninterrupted requirement from Sections 52600, to 52275 and 52277, to 53412 (Register 90, No. 49). Nor is there anything in the staff analysis to indicate that it isn’t a higher level of service, as is asserted to the contrary (DSA 38). Regardless, the DSA has not indicated that these noncredit courses were ever mandated programs. If DSPS and EOPS instructors are being excluded from the new mandate because those programs are not mandated, it is similarly inappropriate to exclude the instructors for noncredit courses based on a duty prior to Section 53412 for possibly nonmandated noncredit courses.

Education Code Section 87359, subdivision (b), requires the district governing board to consult with the district faculty senate in making its determination regarding faculty applicants, which the DSA (39) concludes is a state mandated requirement, except for the DSPS and EOPS faculty, but including the noncredit course faculty, because “there is no indication that” the latter noncredit course instructors “are excluded from the [subdivision (b)] process.”

So, the DSA’s contradictory treatment of instructors for nonmandated courses indicates the irrelevance of the reimbursement status of the underlying course to the mandate established by Section 87359, subdivision (a). 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 independent mandate that is explicitly defined by incorporated regulations that enumerate the faculty and other positions to be included in the evaluation process

C. Faculty Evaluations

Education Code Section 87663 Title 5, CCR, Section 53130

The DSA (46) concludes that Education Code Section 87663, subdivisions (e) and (f), do not impose any state-mandated duties:

- “(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.”

Faculty evaluation procedures are within the scope of matters that can be collectively bargained according to the Rodda Act (Government Code Section 3540, et seq.). Districts are required to collectively bargain and that mandate has been reimbursed for about 35 years. The Rodda Act 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 the 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.

The DSA (48) concludes that Title 5, CCR, Section 53130 imposes the state-mandated duty for governing boards to establish and disseminate written evaluation procedures for contract and regular employees due to the amendments to Education Code Section 87663. However, the DSA (48) concludes that this is a one-time activity. This limitation ignores the fact that the evaluation process can be subsequently modified by the collective bargaining process or otherwise by district action or state law, and thus existing procedures would have to be modified and noticed to employees. This limitation also ignores the fact that district staff turnover requires new staff to be noticed even if the content of the process does not change. This is an ongoing mandate activity.

PART 4. TENURE GRIEVANCE ARBITRATION

Education Code Section 87610.1
Education Code Section 87740

Education Code Section 87611

Education Code Section 87610.1 provides a new process for arbitrating tenure and retention decisions as a grievance for those districts where tenure evaluation procedures are collectively bargained. Faculty tenure procedures are within the scope of matters that can be collectively bargained according to the Rodda Act. The grievance process as defined by the collective bargaining contract is specifically and currently reimbursable. Government Code Section 3540 states that collective bargaining requirements shall not supersede other provisions of the law that "establish and regulate tenure or a merit or civil service system, . . . so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements." This provision makes collectively bargained terms controlling over previous or other tenure procedures.

The DSA (56) concludes that while districts must negotiate, "there is no requirement for the district to ultimately reach agreement with the exclusive representative." Therefore, any agreement would be "entered into voluntarily" and that the district "is not legally required to agree to participate in any programs or procedures" that result for the districts "obligation to engage in the collective bargaining process." 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 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 process, but includes a resolution. The grievance process from start to resolution is not voluntary.

Education Code Section 87740 provides for due process hearings when a probationary employee is not reemployed. Due process requirements were originally added in 1965 to former Education Code Section 13443. Section 13443 was recodified and renumbered as Section 87740 by Chapter 1010, Statutes of 1976, Section 2. The difference between the current and former versions of Section 87740 is not "how" the proceedings are conducted, but "when" they are conducted.

Both subdivisions (b) of former Section 13443 and Section 87740 allow an employee to request a hearing to determine if there is "cause" for not reemploying him or her for the ensuing year. Both subdivisions (d) of former Sections 13443 and 87740 require the determination not to reemploy a contract employee to be "for cause." Where the two sections differ is that Section 87740 is now also triggered by Education Code Section 87610.1 where, for the first time, subdivision (b) requires:

- (1) that 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 shall be classified and procedurally addressed as grievances, and,
- (2) that 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.

Therefore, Section 87740, as triggered by Section 87610.1 goes beyond the pre-1975 requirement that the determination was only to decide if there was "cause." As coupled with Section 87610.1, "cause" is now expanded and defined to include a standard of reasonableness and due process.

Education Code Section 87611 provides that a final decision reached following a grievance or hearing conducted pursuant to subdivision (b) of Section 87610.1 shall be subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedures. Since these new requirements were mandated after 1975, they are "new" grounds for which a petition for writ of mandate may be granted, and could not have been mandatory subjects for judicial review prior to 1975. However, because the DSA

concludes that Section 87610.1 is discretionary, it did not reach the merits of Section 87611. The DSA should be corrected to recognize the new tenure grievance arbitration mandate and court action pursuant to the arbitrator's decision.

PART 5. FACULTY SERVICE AREAS

Education Code Section 87743.2

Education Code Section 87743.3

Education Code Section 87743.4

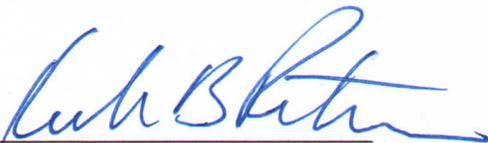
Education Code Section 87743.5

Pursuant to Education Code Section 87743, faculty service areas serve the purpose of determining staff retention priorities when there is a reduction in the number of permanent faculty. The DSA (59-61) concludes that Sections 87743.2 through 87743.5 require districts to establish faculty service areas, faculty competency criteria, respond to faculty qualification applications, treat appeals of those determinations as a grievance, and to maintain specific records. However, the DSA (61) improperly excludes from this mandate any such activities as they pertain to DSPS and EOPS faculty, because the Commission in other test claims has determined that these programs are voluntary. The cited language (DSA 34, 35) indicates that those program funds are for providing program services to the students (e.g., funding faculty positions), and not for the administrative process of evaluating of faculty eligibility for faculty service area placement, which is not stated in the program funding language. 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.

Certification

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

Executed on June 23, 2011 at Sacramento, California, by



Keith B. Petersen

C: Commission electronic service list