Hearing Date: July 27, 2012
J:\MANDATES\2002\tc\02-tc-46 (DCP)\Ps&Gs\REVISED DSA.docx

ITEM __

REVISED DRAFT STAFF ANALYSIS
PROPOSED PARAMETERS AND GUIDELINES

Education Code Sections 66010.2, 66010.7, and 87102

Statutes 1988, Chapter 973 and Statutes 1991, Chapter 1198

California Code of Regulations, Title 5, Sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034

Register 92, Number 17; Register 96, Number 23; and Register 2002, Number 35

(Consolidated With)

Government Code Section 11135

Statutes 1992, Chapter 913; Statutes 1994, Chapter 146; Statutes 2001, Chapter 708; Statutes 2002, Chapter 1102

California Code of Regulations, Title 5, Sections 59320, 59322, 59324, 59326, 59327, 59328, 59330 , 59332, 59334, 59336, 59338, 59340, and 59342

Register 81, Number 16; Register 92, Number 17; Register 96, Number 23; Register 2001, Number 6; Register 2002, Number 13; and Register 2002, Number 35

Discrimination Complaint Procedures

02-TC-46
(And a Portion of 02-TC-25 and 02-TC-31)

Santa Monica Community College District
Los Rios Community College District, and
West Kern Community College District, Co-Claimants

EXECUTIVE SUMMARY

An informal conference regarding the parameters and guidelines for this program was held on May 24, 2012. As indicated by staff at the conference, this is a revised draft staff analysis and proposed parameters and guidelines, which replace the draft staff analysis and proposed parameters and guidelines issued on May 15, 2012.

The Executive Summary will be provided with the final staff analysis.

STAFF ANALYSIS

Claimants

Santa Monica Community College District, Los Rios Community College District, and West Kern Community College District

Chronology

06/25/2003	Claimant, Santa Monica Community College District, filed test claim *Discrimination Complaint Procedures* (02-TC-46) with the Commission on State Mandates (Commission)
06/22/2010	Commission staff issued a notice severing statutes and administrative regulations from consolidated test claim *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31) originally filed June 5, 2003 and June 13, 2003, and consolidating them with *Discrimination Complaint Procedures* (02-TC-46)
03/24/2011	Commission adopted statement of decision
03/29/2011	Commission issued statement of decision and timeline for submitting parameters and guidelines
04/27/2011	Claimants filed proposed parameters and guidelines
05/15/2012	Commission staff issued draft staff analysis
05/24/2012	Prehearing held regarding proposed parameters and guidelines

I. Background

Summary of the Mandate

The *Discrimination Complaint Procedures* (02-TC-46) test claim addresses state antidiscrimination laws as they apply to community college districts.[1] On March 24, 2011, the Commission adopted a statement of decision finding that the test claim statutes and regulations impose a partially reimbursable state-mandated program upon community college districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission separated the activities found to be reimbursable into the following three program areas: (1) student equity; (2) equal employment opportunity; and (3) discrimination complaint procedures, which includes the state's requirement to comply with section 202 of the federal Americans with Disabilities Act (ADA) for employment programs and

[1] On June 22, 2010, the Commission severed a portion of the consolidated test claim, *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), and consolidated the severed portion with this test claim, *Discrimination Complaint Procedures* (02-TC-46). The portions of the *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31) test claim that were severed and consolidated with the *Discrimination Complaint Procedures* test claim consist of the "Student Equity Guidelines" and the Education Code sections and title 5 regulations that are discussed in the "minimum conditions," "equal employment opportunity," and "student equity" sections of the Commission's statement of decision.

the accessibility requirements of section 508 of the Rehabilitation Act for information technology.

The Commission approved this test claim for the reimbursable activities associated with equal employment opportunity, student equity, and discrimination complaints procedures for community college districts identified on pages 238-255 of the Commission's statement of decision and included in the proposed parameters and guidelines.

Background for Parameters and Guidelines

Pursuant to Government Code section 17557 and Section 1183.11 of the Commission's regulations, the claimants submitted proposed parameters and guidelines to the Commission on April 27, 2011. The claimants propose separating the parameters and guidelines into the following four separate single subject parameters and guidelines in order to reduce confusion in the claiming process for districts and for ease in case of amendments required by future legislation or litigation: (1) student equity; (2) equal employment opportunity program; (3) Americans with Disabilities Act; and (4) discrimination complaint procedures.

In addition, the claimants propose that the "equal employment opportunity program," "Americans with Disabilities Act," and "discrimination complaint procedures" subject areas have two sets of parameters and guidelines, one for costs resulting from activities reimbursable only in the 2001-2002 fiscal year, and another for all subsequent fiscal years. The claimants suggest that this will aid the State Controller's Office's preparation of claiming instructions by removing obsolete code and regulation sections as of the 2002-2003 fiscal year.

Neither the Department of Finance nor the State Controller's Office filed comments on the claimants' proposed parameters and guidelines.

II. Discussion

Staff reviewed the claimants' proposed parameters and guidelines. Based on the number of activities approved in this test claim and the varying subjects that the reimbursable activities address, staff generally agrees with the claimants' proposals regarding the adoption of separate parameters and guidelines based on subject matter and on the period of reimbursement in order to reduce confusion in the claiming process. Neither the Department of Finance nor the State Controller's Office has filed an objection to the separation recommended for these parameters and guidelines. However, staff recommends adopting three separate parameters and guidelines for the equal employment opportunity activities based on fiscal year. One for costs incurred during the 2001-2002 fiscal year, a second set for costs incurred during the 2002-2003 fiscal year, and a third set for costs incurred in fiscal year 2003-2004 and subsequent fiscal years.

Also, staff recommends severing the student equity activities from these parameters and guidelines and including them with parameters and guidelines for the *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31) test claim.

Also, staff recommends amending the captions for the proposed parameters and guidelines titled by the claimants, "Americans with Disabilities Act," to: (1) Federal Rights for Individuals with Disabilities for Employment – Set One (Fiscal Year 2001-2002 only); and (2) Federal Rights for Individuals with Disabilities for Employment and Information Technology – Set Two (Beginning Fiscal Year 2002-2003).

In addition, staff makes non-substantive, technical changes for purposes of clarification, consistency, and conformity to the statement of decision and statutory language. The following analysis addresses some of the non-substantive changes, and all of the substantive changes that staff recommends to each of the proposed single-subject parameters and guidelines.

A. Student Equity - Effective Beginning July 1, 2001 (Ed, Code, §§ 66010.2(b) and 66010.7(b) and (c), Stats. 1991, Ch. 1198)

The claimants' proposed parameters and guidelines for the *Discrimination Complaint Procedures* test claim include the activities approved by the Commission to provide "student equity" in the programs and services to students. The "student equity" activities address requirements associated with the duty to provide educational programs and services free from discrimination harassment to students. Staff recommends severing the "student equity" activities from the parameters and guidelines for this test claim and including those activities with the reimbursable state-mandated activities found in the *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31) test claim. The purpose of this recommendation is for ease of claiming and to reduce the number of single-subject parameters and guidelines adopted.

In addition, the student equity activities fit programmatically within the activities approved in the *Minimum Conditions for State Aid* test claim. Thus, the "student equity" activities will be analyzed in that claim. The proposed parameters and guidelines for *Minimum Conditions for State Aid* are tentatively set for hearing on September 28, 2012.

B. Equal Employment Opportunity Program – Set One (Fiscal Year 2001-2002 Only) (Ed. Code, § 87102(a) and (b); and Cal. Code Regs., tit. 5, §§ 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034)

The activities approved by the Commission in the Equal Employment Opportunity section of the statement of decision address steps to achieve diversity or equal employment opportunity in a community college district's workforce, including establishing hiring goals, monitoring the district workforce, reporting workforce data to the Chancellor's Office, and establishing a process to address complaints of violations of the equal employment opportunity program regulations.

The code sections and title 5 regulations that impose the reimbursable mandates approved by the Commission initially provided for "affirmative action" in employment. On September 4, 2001, after the beginning of the 2001-2002 fiscal year, the court in *Connerly v. State Personnel Bd.* found the code sections to be unconstitutional, and therefore void.[2] In addition, the court provided dicta suggesting that parts of the title 5 regulations were also unconstitutional. However, the title 5 regulations remained in place and in effect after the court's decision.

On August 11, 2002, one month into the 2002-2003 fiscal year, the Board of Governors amended the title 5 regulations to remove all reference to "affirmative action" and language that could be interpreted as providing an improper preference or authorizing discrimination on an impermissible basis. For example, the title 5 regulations were amended to remove the use of goals and timetables for the hiring of minorities and women. Instead, the language of the regulations focused on "equal employment opportunity" and activities to achieve "equal employment opportunity," many of which were already part of the "affirmative action"

[2] *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16.

regulations. In addition, a "equal employment opportunity plan" replaced a district's "faculty and staff diversity plan."

For purposes of reimbursement, the effect of the court's decision in *Connerly v. State Personnel Bd.* on the code sections is the shortening of the reimbursement period for the activities imposed by the code sections to only two months and 4 days in the 2001-2002 fiscal year. After which, the activities imposed by the code sections are no longer mandated. The title 5 regulations were not changed until the 2002-2003 fiscal year.

Section I. Summary of Mandate

Staff revised this section to detail the separation of the parameters and guidelines based on subject matter and period of reimbursement, and clarified that the parameters and guidelines are for approved "equal employment opportunity program" activities for the 2001-2002 fiscal year only.

In light of the changes made to the code sections and regulations after the beginning of the reimbursement period for this test claim (July 1, 2001), in order to reduce confusion for districts in the claiming process, staff recommends approval of the split.

Section III. Period of Reimbursement

Staff revised this section to detail the separation of the parameters and guidelines based on reimbursement period and clarified that the parameters and guidelines are for the 2001-2002 fiscal year only.

Section IV. Reimbursable Activities

1. Removal of Activities that Begin After the 2002-2003 Fiscal Year

The period of reimbursement for the "equal employment opportunity program" activities approved by the Commission for only the 2001-2002 fiscal year, begins on July 1, 2001 and ends on June 30, 2002. As a result, staff removed the activities that begin after June 30, 2002 from the Fiscal Year 2001-2002 parameters and guidelines. Activities that begin after June 30, 2002, may be claimed under the 2002-2003 fiscal year parameters and guidelines for the "equal employment opportunity program" activities.

Staff also removed all reference to the term "equal employment opportunity program" and the "equal employment opportunity plan" from the activities in the 2001-2002 fiscal year parameters and guidelines. As discussed above, many of the activities that originated as "affirmative action" activities were carried over as "equal employment opportunity" activities after the Board of Governors' amendment of the title 5 regulations in the 2002-2003 fiscal year. As a result, the statement of decision combined the activities as continuous activities. However, because of the proposed split in parameters and guidelines based on fiscal year, for purposes of clarity, it is necessary to remove all reference to the term "equal employment opportunity program" and the "equal employment opportunity plan," which did not replace the term "affirmative action" and the "faculty and staff diversity plan" until the 2002-2003 fiscal year.

2. Clarifying Changes to the Approved Activity Imposed by Education Code Section 87102(a)

In addition, staff amended the activity imposed by Education Code section 87102(a) as indicated by the strike-out below:

> Include steps in the faculty and staff diversity plan that the district will take in meeting and improving hiring goals for both full-time faculty and part-time faculty pursuant to Education Code section 87482.6 (Statutes 1988, Chapter 973)~~, and the development of the plan shall be a condition for receipt of allowances pursuant to Education Code section 87482.6~~. (Ed. Code, § 87102(a) (Statutes 1988, Chapter 973).) *This activity is reimbursable from July 1, 2001 through September 3, 2001*.

This removal is non-substantive and is done to avoid confusion regarding the possible misperception that it imposes a condition for purposes of reimbursement for the activity. Specifically, allowances received under Education Code section 87482.6 are not for the development of a district's faculty and staff diversity plan, and a district's decision to forgo allowances under Education Code section 87482.6 does not remove the requirement for a district to have a faculty and staff diversity plan. Nor does it make the reimbursable state-mandated activity found by the Commission, to include steps in the faculty and staff diversity plan to meet and improve hiring goals for full-time faculty and part-time faculty, optional.

Education Code section 87482.6 sets forth how a portion of the program improvement funds received pursuant to Education Code section 84755 should be used in order to achieve a goal that 75 percent of the hours of credit instruction be taught by full-time instructors. The code section and its implementing regulations imposed specific requirements to achieve this goal. Districts that had less than 75 percent of their hours of credit instruction taught by full-time instructors were required to expend a specific amount of program improvement funds to meet this goal. If a district chose not to improve its percentage, the district would forgo the amount of its program improvement funds that were to be used toward achieving the 75 percent goal.

Education Code section 87482.6 and its implementing regulations were analyzed in the in the *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31) test claim. Based on *Kern High School Dist*. the Commission found that the code section and regulations did not impose state-mandated activities on community college districts. Specifically, districts had the discretion to choose not to comply with the activities imposed by the code section and regulations and therefore were not legally compelled to comply. In addition, districts would only face a loss of the program improvement funds set aside specifically for compliance with the code section and regulations, and as a result, did not face practical compulsion to comply with the code section and its implementing regulations.[3]

In contrast, even if a district chooses to forgo funding under Education Code section 87482.6 and to not comply with the specific requirements set forth in section 87482.6 and its implementing regulations, the district is still mandated to include steps in its faculty and staff diversity plan that it will take to meet the 75 percent hiring goals set forth in section 87482.6. Thus, the language that is removed does not add anything to the activity found to be mandated by the Commission, and as a result, its removal is non-substantive.

3. <u>Clarifying Changes to the Approved Activity Imposed by California Code of Regulations, Title 5, Section 53003(b)-(c)</u>

---

[3] Statement of decision for the *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31) test claim, adopted May 26, 2011, at <http://www.csm.ca.gov/sodscan/060111c.pdf> as of April 23, 2012.

For purposes of clarification, staff recommends making the changes indicated by the underlined language to the following activity imposed by California Code of Regulations, title 5, section 53003, listed under the "A. District Plan Contents and Review" section of the parameters and guidelines:

3. Include in the faculty and staff diversity plan the following information:

    a. Goals and timetables, as appropriate, for hiring and promotion of persons with disabilities developed pursuant to California Code of Regulations, title 5, section 53006 for each college in the district and for the district as a whole. (Cal. Code Regs., tit. 5, § 53003(b) (Register 96, No. 23).)

    b. A process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of California Code of Regulations, title 5, section 53000 et seq., which addresses affirmative action/equal employment opportunity programs (Register 96, No. 23; Register 2002, No. 35) and of state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, § 53003(c)(4) (Register 96, No. 23).)

    c. An analysis of the number of persons with disabilities who are employed in the district's work force and the number of historically underrepresented groups (including persons with disabilities) who have applied for employment in the following job categories: (1) executive/ administrative/ managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004(a) (Register 96, No. 23)). (Cal. Code Regs., tit. 5, § 53003(c)(6) (Register 96, No. 23).)

    d. An analysis of the degree to which persons with disabilities are underrepresented in comparison to the numbers of disabled persons whom the Chancellor determines to be available and qualified to perform the work required for each job category.~~, and~~ (Cal. Code Regs., tit. 5, § 53003(c)(7) (Register 96, No. 23).)

    e. The determination of whether or not the underrepresentation for women, ethnic minorities, or persons with disabilities is significant. *This activity does not include reimbursement for the inclusion of an analysis of the degree to which any group is underrepresented. This activity only requires the inclusion of the determination of whether any underrepresentation is significant.* (Cal. Code Regs., tit. 5, § 53003(c)(7) (Register 96, No. 23).)

    f. The steps the district will take to achieve diversity in its workforce. (Cal. Code Regs., tit. 5, § 53003(c)(8) (Register 96, No. 23).)

    g. Goals for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003(c)(7) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003(c)(9) (Register 96, No. 23).)

    h. A plan for corrective action consistent with California Code of Regulations, title 5, section 53006 (Register 96, No. 23), including goals and timetables for hiring and promotion, if necessary, to remedy any significant underrepresentation identified in the faculty and staff diversity plan by achieving expected representation for all historically underrepresented groups in all job categories

> listed in California Code of Regulations, title 5, section 53004(a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003(c)(10) (Register 96, No. 23).)

Staff's proposed language clarifies that the above activity is only reimbursable for the inclusion of the information above. Implementation or the development of the content of a district's plan is the subject of many of the test claim regulations pled and analyzed in the Commission's statement of decision, some of which were approved and are included in the proposed parameters and guidelines, others of which were found not to impose a new program or higher level of service and so are excluded from the proposed parameters and guidelines.

In addition, for purposes of clarification, the information required to be provided by section 53003(c)(7) is separated into two requirements (d. and e.). Under "d." *only* the inclusion in the plan of an analysis of the degree to which *persons with disabilities* are underrepresented is a reimbursable state-mandated new program or higher level of service. In its statement of decision, the Commission found that *only* the inclusion of the analysis of the degree to which *persons with disabilities* are underrepresented constituted a new program. The Commission expressly found that the inclusion of the analysis of the degree to which women and ethnic minorities are underrepresented *was not* new, and thus not reimbursable. However, the inclusion of the determination of whether any underrepresentation is *significant* for individuals with disabilities *and* women and ethnic minorities was found to constitute a new program or higher level of service.

Therefore, the italicized language in "e." clarifies that the activity of including in the plan the determination of whether underrepresentation for women, ethnic minorities, or persons with disabilities is *significant* does not include the analysis of whether or not underrepresentation exists in the first place.

4. <u>Clarifying Changes to the Approved Activity Imposed by California Code of Regulations, Title 5, Section 53020(a)</u>

For purposes of clarification, staff recommends combining the mandate imposed by title 5, section 53020(a), with the other activities approved by the Commission.

The Commission approved the following activity imposed by section 53020(a):

> Be ultimately responsible for making measurable progress toward the goals established in the district's faculty and staff diversity plan. (Cal. Code Regs., tit. 5, § 53020(a) (Register 96, No. 23).)

This activity, however, has to be read in the context of the regulatory scheme within which section 53020(a) was adopted to understand what the requirement entails. Read on its own, it is unclear what "being ultimately responsible for making measurable progress" toward the goals in a district's faculty and staff diversity plan means.

The goals established in a district's faculty and staff diversity plan refer to the goals established for the hiring and promotion of members of historically underrepresented individuals. As noted above, these goals and the activities taken to achieve them are the subject of the activities approved by the Commission. For example, the Commission approved activities imposed by title 5, sections 53004 and 53006, which require monitoring applicants for employment to evaluate the progress in implementing the goals in the faculty and staff diversity plan and establishing hiring goals for significantly underrepresented groups and timetables to meet those goals. Also, the Commission approved activities imposed by title 5, sections 53021, 53022,

53023, 53024, and 53026, which require specific recruitment procedures, specific information to be included in job announcements that have a sensitivity to diverse backgrounds, an analysis of applicant pools to ensure expected representation of historically underrepresented groups, specific screening and selection procedures to ensure no adverse impact, and the establishment of a complaint process alleging violations of the requirements of the affirmative action regulations. Thus, "[being] ultimately responsible in making measurable progress" toward the goals for hiring and promotion of members of historically underrepresented individuals, must be read as the implementation, or the doing, of the other activities already approved by the Commission.

Thus, staff recommends combining the mandate of section 53020(a), such that it is an additional citation to the other activities approved by the Commission.

5. Clarifying Changes to the Approved Activity Imposed by California Code of Regulations, Title 5, Section 53022

For purposes of clarification, staff amended the activity mandated by California Code of Regulations, title 5, section 53022, which requires the inclusion of a sensitivity to and understanding of various backgrounds in the job requirements of faculty and administrators in district job announcements. The Commission found title 5, section 53022, to impose a reimbursable state mandate within the context of the whole section which addresses job announcements. Staff amended the activity as indicated below to clarify that the job requirements are part of a district job announcement:

> Include in the job requirements in announcements for faculty and administrative positions a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students ~~in job requirements for faculty and administrative positions~~. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23).)

6. Removal of the Approved Activity Imposed by California Code of Regulations, Title 5, Section 53026 to the "Discrimination Complaint Procedures" Parameters and Guidelines for the 2001-2002 Fiscal Year

In addition, staff recommends removing the following activity related to the complaint process for alleged violations of the "equal employment opportunity program" from the parameters and guidelines for the 2001-2002 fiscal year and combining the activity with the "discrimination complaint procedures" parameters and guidelines for the 2001-2002 fiscal year:

> Process complaints which also allege discrimination prohibited by Government Code Section 11135 et seq. according to the procedures set forth in California Code of Regulations, title 5, section 59300 et seq. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

Read in context with the other state-mandated activities found in the statement of decision, the above activity requires community college districts to use the discrimination complaint process instead of the equal employment opportunity complaint process if the equal employment opportunity complaint also alleges discrimination.

Government Code section 11135 and title 5, section 59300 et seq., which set forth the process to handle complaints of violations of the discrimination, were analyzed in the "discrimination complaint procedures" portion of the Commission's statement of decision. The Commission

only approved a portion of the process in title 5, section 59300 et seq. Because of this partial approval, the removal of the above activity from the "equal employment opportunity program" parameters and guidelines and inclusion with the "discrimination complaint procedures" parameters and guidelines clarifies the scope of the mandated activity and is consistent with the Commission's statement of decision.

Section VII. Offsetting Revenues and Reimbursement

The period of reimbursement for the 2001-2002 fiscal year "equal employment opportunity program" parameters and guidelines is July 1, 2001 through June 30, 2002. The claimants identified the funds appropriated and received from the Equal Employment Opportunity Fund in the Budget Act of 2003, and funds appropriated and received from the Faculty and Staff Diversity Fund in the Budget Act of 2002 as offsetting revenue. These amounts were appropriated for the 2002-2003 and 2003-2004 fiscal years. As a result, these amounts are not relevant for purposes of offsetting revenue for the 2001-2002 fiscal year "equal employment opportunity program" parameters and guidelines. Staff removed reference to the amounts appropriated in the Budget Acts of 2002 and 2003 from the 2001-2002 parameters and guidelines.

C. Equal Employment Opportunity Program – Set Two (Fiscal Year 2002-2003 Only) (Cal. Code Regs., tit. 5, §§ 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034)

Section I. Summary of Mandate

Staff revised this section to detail the separation of the parameters and guidelines based on subject matter and period of reimbursement, and clarified that the parameters and guidelines are for costs incurred as a result of approved "equal employment opportunity program" activities in the 2002-2003 fiscal year.

As discussed above, some activities approved by the Commission end before the beginning of the 2002-2003 fiscal year, and some of the approved activities begin after the fiscal year. In order to avoid confusion in the claiming process, staff recommends approval of the split of parameters and guidelines. Neither the State Controller's Office nor the Department of Finance has objected to the proposed split of the parameters and guidelines for this test claim.

Section III. Period of Reimbursement

Staff revised this section to detail the separation of the parameters and guidelines based on reimbursement period, and clarified that the parameters and guidelines are for costs incurred on or after the 2002-2003 fiscal year.

Section IV. Reimbursable Activities

1. Inclusion of Activities that end 41 Days into the 2002-2003 Fiscal Year

The 2002-2003 fiscal year begins on July 1, 2002 and ends on June 30, 2003. The claimants have mistakenly removed activities that end on August 10, 2002, 41 days into the 2002-2003 fiscal year. Although the costs incurred must have occurred during the 41-day period, eligible claimants meeting all claiming requirements are still entitled to reimbursement for the cost of the activities during that period of time. As a result, staff adds the "equal employment opportunity program" activities that end on August 10, 2002 to the parameters and guidelines for costs incurred on or after the 2002-2003 fiscal year.

2. Separation of the "Affirmative Action" Activities and the "Equal Employment" Activities

Staff also separated some of the "affirmative action" activities and "equal employment" activities that were combined as continuous activities in the Commission's statement of decision. As discussed above, many of the activities that originated as "affirmative action" activities were carried over as "equal employment opportunity" activities after the Board of Governors' amendment of the title 5 regulations in the 2002-2003 fiscal year. As a result, the statement of decision combined the activities as continuous activities. However, because of the proposed split in parameters and guidelines and because some of the "affirmative action" activities end in the 2002-2003 fiscal year, it is necessary to separate all of the "affirmative action" activities that end in the 2002-2003 fiscal year from their "equal employment" counterparts that continue after the 2002-2003 fiscal year.

3. Clarifying Changes to the Approved Activity Imposed by California Code of Regulations, Title 5, Section 53003

For the same reasons discussed for the "equal employment opportunity program" parameters and guidelines for the 2001-2002 fiscal year, staff recommends making the changes indicated by the underlined language to the following activities imposed by the version of California Code of Regulations, title 5, section 53003, operative until August 10, 2002, and the version of the section operative beginning August 11, 2002, which are listed under the "A. District Plan Contents and Review" section of the parameters and guidelines:

3. Include in the faculty and staff diversity plan the following information *only until August 10, 2002*:

   a. Goals and timetables, as appropriate, for hiring and promotion of persons with disabilities developed pursuant to California Code of Regulations, title 5, section 53006 for each college in the district and for the district as a whole. (Cal. Code Regs., tit. 5, § 53003(b) (Register 96, No. 23).)

   b. A process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of California Code of Regulations, title 5, section 53000 et seq., which addresses affirmative action/equal employment opportunity programs (Register 96, No. 23; Register 2002, No. 35) and of state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, § 53003(c)(4) (Register 96, No. 23).)

   c. An analysis of the number of persons with disabilities who are employed in the district's work force and the number of historically underrepresented groups (including persons with disabilities) who have applied for employment in the following job categories: (1) executive/ administrative/ managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004(a) (Register 96, No. 23)). (Cal. Code Regs., tit. 5, § 53003(c)(6) (Register 96, No. 23).)

   d. An analysis of the degree to which persons with disabilities are underrepresented in comparison to the numbers of disabled persons whom the Chancellor determines to be available and qualified to perform the work required for each job category.~~, and~~ (Cal. Code Regs., tit. 5, § 53003(c)(7) (Register 96, No. 23).)

e. The determination of whether or not the underrepresentation for women, ethnic minorities, or persons with disabilities is significant. *This activity does not include reimbursement for the inclusion of an analysis of the degree to which any group is underrepresented. This activity only requires the inclusion of the determination of whether any underrepresentation is significant.* (Cal. Code Regs., tit. 5, § 53003(c)(7) (Register 96, No. 23).)

f. The steps the district will take to achieve diversity in its workforce. (Cal. Code Regs., tit. 5, § 53003(c)(8) (Register 96, No. 23).)

g. Goals for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003(c)(7) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003(c)(9) (Register 96, No. 23).)

h. A plan for corrective action consistent with California Code of Regulations, title 5, section 53006 (Register 96, No. 23), including goals and timetables for hiring and promotion, if necessary, to remedy any significant underrepresentation identified in the faculty and staff diversity plan by achieving expected representation for all historically underrepresented groups in all job categories listed in California Code of Regulations, title 5, section 53004(a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003(c)(10) (Register 96, No. 23).)

4. Include in the equal employment opportunity plan the following information *beginning August 11, 2002*:

a. A process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of California Code of Regulations, title 5, section 53000 et seq., which addresses equal employment opportunity programs (Register 2002, No. 35) and of state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, § 53003(c)(4) (Register 2002, No. 35).)

b. A process for providing annual written notice to professional organizations concerning the district's equal employment opportunity plan and the need for assistance from the organizations in identifying qualified applicants. (Cal. Code Regs., tit. 5, § 53003(c)(5) (Register 2002, No. 35).)

c. An analysis of the number of ethnic majority, men, and persons with disabilities who are employed in the district's work force and the number of persons from monitored groups who have applied for employment in each of the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004(a) (Register 2002, No. 35)). (Cal. Code Regs., tit. 5, § 53003(c)(6) (Register 2002, No. 35).)

d. An analysis of the degree to which persons within the ethnic majority, men, and persons with disabilities are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category. ~~and~~ (Cal. Code Regs., tit. 5, § 53003(c)(7) (Register 2002, No. 35).)

e. The determination of whether or not the underrepresentation for any group based on gender, ethnicity, or disability is significant. *This activity does not include reimbursement for the inclusion of an analysis of the degree to which any group is underrepresented. This activity only requires the inclusion of the determination of whether any underrepresentation is significant.* (Cal. Code Regs., tit. 5, § 53003(c)(7) (Register 2002, No. 35).)

f. Methods for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003(c)(7). (Cal. Code Regs., tit. 5, § 53003(c)(8) (Register 2002, No. 35).)

g. Additional steps consistent with California Code of Regulations, title 5, section 53006, to remedy any significant underrepresentation identified in the plan. (Cal. Code Regs., tit. 5, § 53003(c)(9) (Register 2002, No. 35).)

h. Any other measures necessary to further equal employment opportunity throughout the district. (Cal. Code Regs., tit. 5, § 53003(c)(10) (Register 2002, No. 35).)

i. Any goals for hiring persons with disabilities that are required by California Code of Regulations, title 5, section 53025. (Cal. Code Regs., tit. 5, § 53003(d) (Register 2002, No. 35).)

4. Clarifying Changes to the Approved Activity Imposed by California Code of Regulations, Title 5, Section 53020(a)

For the same reasons discussed for the 2001-2002 fiscal year parameters and guidelines, staff recommends combining the mandate imposed by title 5, section 53020(a), with the other activities approved by the Commission, such that it is one of the citations listed as imposing the other activities approved by the Commission.

5. Clarifying Changes to the Approved Activity Imposed by California Code of Regulations, Title 5, Section 53022

Also, for the same reasons discussed for the 2001-2002 fiscal year parameters and guidelines, staff made the same non-substantive changes to the activity mandated by California Code of Regulations, title 5, section 53022, addressing the inclusion of a sensitivity to and understanding of various backgrounds in the job requirements of faculty and administrators in district job announcements.

6. Removal of the Approved Activity Imposed by California Code of Regulations, Title 5, Section 53026 to the "Discrimination Complaint Procedures" Parameters and Guidelines for the 2001-2002 Fiscal Year

In addition, for the same reasons discussed for the 2001-2002 fiscal year parameters and guidelines, staff recommends removing the following activity related to the complaint process for alleged violations of the "equal employment opportunity program" from the parameters and guidelines for the 2002-2003 fiscal year, and combining the activity with the "discrimination complaint procedures" parameters and guidelines for the 2002-2003 fiscal year:

> Process complaints which also allege discrimination prohibited by Government Code Section 11135 et seq. according to the procedures set forth in California Code of Regulations, title 5, section 59300 et seq. (Cal. Code Regs., tit. 5, § 53026 (Register 96,

No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

Section VII. Offsetting Revenues and Reimbursement

Because the activities imposed by Education Code section 87102 end before the 2002-2003 fiscal year, staff revised this section to remove reference to the use of funds from the Faculty and Staff Diversity Fund as offsetting revenue for reimbursable state-mandated activities imposed by Education Code section 87102. In addition, staff removed reference to the use of funds from the Equal Employment Opportunity Fund from the State Budget Act of 2003. Funds appropriated in the State Budget Act of 2003 were appropriated for the 2003-2004 fiscal year, and not relevant to the claims filed for costs incurred in the 2002-2003 fiscal year.

D. Equal Employment Opportunity Program – Set Three (Effective Beginning Fiscal Year 2003-2004) (Cal. Code Regs., tit. 5, §§ 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034)

Staff recommends adding this set of parameters and guidelines effective beginning the 2003-2004 fiscal year for the "equal employment opportunity program" activities. Reimbursement for some activities approved by the Commission begins and reimbursement for other activities ends depending on the fiscal year. Therefore, in order to avoid confusion in the claiming process, staff recommends approval of the split of parameters and guidelines. Neither the State Controller's Office nor the Department of Finance has objected to the proposed split of the parameters and guidelines for this test claim.

Section III. Period of Reimbursement

Staff detailed the separation of the parameters and guidelines based on reimbursement period, and clarified that the parameters and guidelines are for costs incurred on or after the 2003-2004 fiscal year.

Section IV. Reimbursable Activities

The activities listed in this section are identical to the activities listed in the 2002-2003 fiscal year parameters and guidelines for the "equal employment opportunity program" activities as amended and recommended by staff, except staff removed all activities that end on August 10, 2002, which is outside of the 2003-2004 fiscal year. In addition, staff removed the statement, "This activity is reimbursable beginning August 11, 2002," which is unnecessary for the parameters and guidelines for costs incurred on or after the 2003-2004 fiscal year.

Section VII. Offsetting Revenues and Reimbursement

Staff included the following reference, including the footnote, to funds received from the Equal Employment Opportunity Fund in the State Budget Act as offsetting revenue if received by a district and used for the reimbursable state-mandated activities:

1. Funds received from the Equal Employment Opportunity Fund[4] and applied to the reimbursable state-mandated activities imposed by Title 5, sections 53003, 53004, 53006,

[4] Reference to the "Equal Employment Opportunity Fund" includes any future source of funding for the same or similar purposes for which the Equal Employment Opportunity Fund was created, regardless of any change in the name of the funding source, or line item and schedule in

53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034, as amended by Register 2002, number 35. (State Budget Act, Item 6870-101-0001.)[5]

E. Federal Rights for Individuals with Disabilities for Employment – Set One (Fiscal Year 2001-2002 only) (Gov. Code, § 11135(b), Stats. 2001, Ch. 708)

The activity approved by the Commission requires a community college district to meet the protections contained in federal law for purposes of providing access to employment and employment related activities within the district to individuals with disabilities. Specifically, the Commission approved the following activity:

> Meet the protections contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) and its implementing regulations (28 C.F.R. § 35 et seq.) in employment within community college districts. (Gov. Code, § 11135(b) (Stats. 2001, ch. 708).)

Although Section 202 of the ADA and its implementing regulations were generally determined by the Commission to constitute a federal mandate, the Commission found that Section 202 of the ADA and its implementing regulations do not constitute a federal mandate for purposes of employment. This finding was based on the 9th Circuit Court of Appeals decision in *Zimmerman v. Oregon Dept. of Justice*.[6] The majority of circuits in the United States Courts of Appeal and the United States Department of Justice and its implementing regulations take the position that that Section 202 of the ADA applies to employment discrimination.[7] However, the 9th Circuit, which is the controlling circuit in California, found in *Zimmerman v. Oregon Dept of Justice* that Section 202 of the ADA unambiguously does not apply to employment discrimination.[8] Based on the current state of the law in the Ninth Circuit, the Commission found Section 202 of the ADA to not constitute a federal mandate in regard to employment, and found compliance with Section 202 of the ADA and its implementing regulations to be a reimbursable state-mandated new program in regard to employment in community college districts.

---

the State Budget Act. In addition, appropriations for this fund have been appropriated for program 20.20.041-Equal Employment Opportunity pursuant to Ch. 1169, Stats. 2002.)

[5] The State Budget Act line item for the Equal Employment Opportunity Fund has remained the same from the 2003-2004 fiscal year to the present (6870-101-0001), with the schedule number changing from year to year. In addition, an appropriation has been made for the Equal Employment Opportunity Fund in every fiscal year from the 2003-2004 fiscal year to the 2011-2012 fiscal year.

[6] *Zimmerman v. Oregon Dept. of Justice* (9th Cir. 1999) 170 F.3d 1169.

[7] *Filush v. Town of Weston* (D.Conn. 2003) 266 F.Supp.2d 322, 326-327, noting the split of authority and the majority view.

[8] *Zimmerman v. Oregon Dept. of Justice*, *supra*, 170 F.3d 1169. The dissent in *Zimmerman v. Oregon Dept. of Justice* (9th Cir. 1999) 183 F.3d 1161, 1162, in which petition for rehearing en banc was denied, noted, "The Ninth Circuit now stands alone in adopting an interpretation of the ADA that deprives disabled persons of a right expressly granted them by Congress-the right to bring an action for employment discrimination under Title II of the ADA."

Caption

Staff revised the caption of the parameters and guidelines to "Federal Rights for Individuals with Disabilities for Employment – Set One (Fiscal Year 2001-2002 only)." This caption more accurately describes the reimbursable activity contained in the 2001-2002 fiscal year parameters and guidelines *and* the reimbursable activities contained in the 2002-2003 fiscal year parameters and guidelines.

Section I. Summary of Mandate

Staff revised this section to detail the separation of the parameters and guidelines based on subject matter and period of reimbursement, and clarified that the parameters and guidelines are for costs incurred during the 2001-2002 fiscal year only.

For purposes of clarification, staff amended the activity approved by the Commission as discussed below. Staff recommends the Commission approve these amendments.

Section III. Period of Reimbursement

Staff revised this section to detail the separation of the parameters and guidelines based on reimbursement period, and clarified that the parameters and guidelines are for costs incurred only during the 2001-2002 fiscal year.

Section IV. Reimbursable Activities

In its statement of decision the Commission found the following activity imposed by Government Code section 11135(b) to be reimbursable:

> Meet the protections contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) and its implementing regulations (28 C.F.R. § 35 et seq.) in employment within community college districts where state law does not provide stronger protections and prohibitions. (Government Code Section 11135(b) (Statutes 2001, Chapter 708, beginning July 1, 2001.)

The language of the approved activity closely follows the language of Government Code section 11135(b), with the exception of the parenthetical citation to "28 C.F.R. § 35 et seq.," and that the approved activity is limited to *employment* within community college districts.

A. Claimant's Proposed Language

The claimants proposed parameters and guidelines revise the activity approved in the Commission's statement of decision to provide:

> Meet the protections contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) and its implementing regulations (28 C.F.R. § 35 et seq.) in employment within community college districts. Activities required by state law in excess of federal law are not reimbursable. ~~where state law does not provide stronger protections and prohibitions.~~ (Government Code Section 11135(b) (Statutes 2001, Chapter 708, beginning July 1, 2001.)

The claimants' proposed language is not consistent with the Commission's statement of decision. The plain language of the section 11135 requires community college districts to meet the protections of Section 202 of the Americans with Disabilities Act (ADA) and its implementing regulations with respect to employment, "*except* if the laws of this state prescribe stronger

protections." In such instances, districts are subject to the stronger protections prescribed by the state, and *not* the requirements of Section 202 of the ADA or its implementing regulations. In contrast, the claimants' language assumes there are extra activities required by state law in excess of federal law for employment within community college districts. In addition, the claimants' language suggests districts are required to comply with both federal law and state law, but are not entitled to reimbursement for the state law requirements. As a result, staff recommends denying the claimants' proposed amendments to the activity approved by the Commission.

At the time of the adoption of the Commission's statement of decision, and currently, there were and are no state laws imposing protections and prohibitions stronger than those imposed by section 202 of the ADA and its implementing regulations. As a result, consistent with the Commission's statement of decision, community college districts are mandated to meet the protections of section 202 of the ADA and its implementing regulations for employment within community college districts, and are entitled to reimbursement for this activity.

In addition, the claimants propose including the language of Section 202 of the ADA and the regulation that pertains specifically to employment in a footnote in the parameters and guidelines; 28 Code of Federal Regulations part 35.140. Specifically, claimants' footnote states the following:

> **SEC. 202. DISCRIMINATION. 42 USC 12132.** Adopted July 26, 1990
>
> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.
>
> **28 C.F.R. § [35]**
>
> **35.140 Employment discrimination prohibited**. Last revision: July 26, 1991
>
> (a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.
>
> (b) (1) For purposes of this part, the requirements of title I of the Act, as established by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I.
>
> (2) For the purposes of this part, the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41, as those requirements pertain to employment, apply to employment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of title I.

Staff recommends that the parameters and guidelines do not include the above language proposed by the claimants because the language does not clarify the scope of the mandated activity.

Section 202 of the ADA and 28 C.F.R. part 35.140(a) sets forth prohibitory language that does not clarify what is mandated of community college districts. In addition, the regulations implementing Section 202 impose a variety of activities on entities subject to Section 202. These regulations contain provisions specific to employment (i.e. 28 C.F.R. part 35.140, which the claimants propose footnoting), but also include provisions that apply generally to other services and programs provided by a district that can include employment. Thus, the reference to "implementing regulations" in the statement of decision for this activity was not intended to refer only to 28 C.F.R. part 35.140, the regulation specifically pertaining to employment discrimination.

Also, because community college districts are subject to title I of the ADA, 28 C.F.R. part 35.140 (b)(2) is not applicable to community college districts. Additionally, as discussed in the Commission's statement of decision, the requirements of title I of the ADA and its implementing regulations constitute federal mandates on community college districts, and as a result, are not reimbursable.[9] Because the language proposed by the claimants does not provide clarity to the mandated activities and could lead to confusion as to what is reimbursable, staff recommends that the Commission not include the language proposed by the claimants in the parameters and guidelines.

B. Staff's Recommendation

However, staff recognizes the need to clarify the scope of the activity approved by the Commission in its statement of decision. When interpreting an activity approved by the Commission it is necessary to read the activity in light of the law and the whole statement of decision, and not in a vacuum. To the extent that the implementing regulations of Section 202 of the ADA provide protections for employment that are required by other federal laws that were found to constitute non-reimbursable federal mandates by the Commission, those protections cannot be included in the parameters and guidelines. Thus, the approved activity must be read in light of, and be limited by, the federal mandate findings made by the Commission in the statement of decision.

As noted above, the regulations implementing Section 202 of the ADA regulations contain provisions specific to employment, but also include provisions that apply generally to other services and programs provided by a district that can include employment. As discussed above, the provisions specifically pertaining to employment were found by the Commission to constitute a federal mandate, and thus, are not reimbursable.[10]

The general provisions of the regulations implementing Section 202 of the ADA include designating an employee to coordinate district efforts to comply with the requirements of Section 202;[11] adopting grievance procedures for resolution of complaints alleging discrimination prohibited by Section 202 of the ADA;[12] and conducting a self-evaluation of

---

[9] Statement of decision for *Discrimination Complaint Procedures* (02-TC-46, and a portion of 02-TC-25 and 02-TC-31), pgs. 74-76, at < http://www.csm.ca.gov/sodscan/033011b.pdf> [as of March 29, 2012].

[10] *Ibid*.

[11] 28 Code of Federal Regulations part 35.107(a).

[12] 28 Code of Federal Regulations part 35.107(b).

district services, policies, and practices, and the effects thereof, that do not meet the requirements of the regulations, and to make necessary modifications to the services, policies and practices.[13] However, the majority of requirements imposed by the regulations implementing Section 202 of the ADA are also imposed by Section 504 of the Rehabilitation Act and its implementing regulations adopted by the Office of Civil Rights of the U.S. Department of Education (OCR),[14] which the Commission found to constitute a federal mandate.[15] Thus, most of the protections provided by the Section 202 regulations are mandated by the regulations implementing Section 504 of the Rehabilitation Act, and therefore not reimbursable. As described below, the only portion of the regulations eligible for reimbursement is a portion of the self-evaluation required by the Section 202 regulations that exceeds the requirements of Section 504.[16]

In regard to the self evaluation, the OCR's regulations implementing Section 504 of the Rehabilitation Act require a district within one year of May 9, 1980 to "Evaluate . . . its current policies and practices and the effects thereof that do not or may not meet the requirements of [the OCR regulations]."[17] In addition, the OCR's regulations require districts to "Modify . . . any policies and practices that do not meet the requirements of [the OCR regulations]."[18] Similarly, the regulations implementing Section 202 of the ADA require a district, within one year of the effective date of the regulation, to evaluate its current policies and practices and the effects thereof and to make necessary modifications to its policies and practices that do not meet the requirements of the regulations.[19] However, the language of the Section 202 regulations also requires an evaluation of a district's services which is not required by the Section 504 regulations. In addition, because the Section 504 regulations were adopted before the Section 202 regulations, the Section 202 regulations limit the self evaluation to "policies and practices that were not included in" the Section 504 self-evaluation.[20]

As a result, for purposes of reimbursement, the activity approved by the Commission is limited to the following protections imposed by the regulations implementing Section 202 of the ADA, which are one-time activities:

1. Evaluate the district's employment related services and the effects thereof, that do not or may not meet the requirements of 28 C.F.R. § 35 et seq., and to the extent that modification of any such services is required, make the necessary modifications. (28 C.F.R. § 35.105)

---

[13] 28 Code of Federal Regulations part 35.105.

[14] 28 Code of Federal Regulations part 41 et seq.

[15] *Discrimination Complaint Procedures* (02-TC-46) statement of decision, pgs. 76-79, at <http://www.csm.ca.gov/sodscan/033011b.pdf> as of June 6, 2012.

[16] 28 Code of Federal Regulations part 35.140.

[17] 34 Code of Federal Regulations part 104.6(c).

[18] *Ibid.*

[19] 28 Code of Federal Regulations part 35.105.

[20] 28 Code of Federal Regulations part 35.105(d).

2. Evaluate the district's policies and practices related to employment, and the effects thereof, that do not or may not meet the requirements of 28 C.F.R. § 35 et seq. and that were not included in the district's self-evaluation required by Section 504 of the Rehabilitation Act. To the extent that modification of any such policies and practices is required, make the necessary modifications. (28 C.F.R § 35.105)

Staff notes that a significant number of districts will not be able to claim for the above one-time activities. 28 C.F.R. § 35.105 requires a community college district to evaluate districts services, policies, and practices within one year of July 26, 1991, and thus, most community college districts should have completed these activities prior to the start of the reimbursement period (July 1, 2001). However, the time limit is directory in nature, and as a result, some community college districts may not have done the self-evaluation within the time-frame set forth in the regulation. Instead some districts may have engaged in the evaluation during the 2001-2002 fiscal year. In addition, new district formation may have occurred during the 2001-2002 fiscal year, and thus, the self-evaluation would have had to occur outside of the timeframe set forth in the regulations and within the 2001-2002 fiscal year. As a result, this activity is included in the proposed parameters and guidelines as a one-time activity.

Thus, staff recommends amending the activity approved by the Commission as follows:

> Meet the protections contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) and its implementing regulations (28 C.F.R. § 35 et seq.) in employment within community college districts. (Gov. Code, § 11135(b) (Statutes 2001, ch. 708).)
>
> This activity is limited to community college districts that have not engaged in the self-evaluation prior to the 2001-2002 fiscal year for the following one-time activities:
>
> a. Evaluate the district's employment related services and the effects thereof, that do not or may not meet the requirements of 28 C.F.R. § 35 et seq., and to the extent that modification of any such services is required, make the necessary modifications. (28 C.F.R. § 35.105)
>
> b. Evaluate the district's policies and practices related to employment, and the effects thereof, that do not or may not meet the requirements of 28 C.F.R. § 35 et seq. and that were not included in the district's self-evaluation required by Section 504 of the Rehabilitation Act. To the extent that modification of any such policies and practices is required, make the necessary modifications. (28 C.F.R § 35.105)

F. <u>Federal Rights for Individuals with Disabilities for Employment and Information Technology – Set Two (Beginning Fiscal Year 2002-2003) (Gov. Code, § 11135(b), Stats. 2001, Ch. 708; Stats. 2002, Ch. 1102)</u>

The activity to meet the protections contained in Section 202 of the ADA, described in the 2001-2002 fiscal year parameters and guidelines was found by the Commission to be reimbursable beginning in the 2001-2002 fiscal year. In addition, the Commission found the following activity to be reimbursable beginning in the 2002-2003 fiscal year:

> Comply with the accessibility requirements of section 508 of the Rehabilitation Act (29 U.S.C. § 794d), and its implementing regulations (36 C.F.R. § 1194 et seq.) in developing, procuring, maintaining, or using electronic or information technology. (Gov. Code, § 11135(d)(2) (Stats. 2002, ch. 1102), beginning January 1, 2003.)

The plain language of Section 508 of the Rehabilitation Act and its implementing regulations indicates that these laws apply only to *federal* agencies. However, the California Legislature amended Government Code section 11135 to specifically require compliance with Section 508 of the Rehabilitation Act and its implementing regulations in developing, procuring, maintaining, or using electronic or information technology. Absent Government Code section 11135(d)(2), community college districts would not be required to comply with the provisions of Section 508 of the Rehabilitation Act and its implementing regulations.

Caption

Staff revised the caption of the parameters and guidelines to "Federal Rights for Individuals with Disabilities for Employment and Information Technology – Set Two (Beginning Fiscal Year 2002-2003)." This caption more accurately describes the reimbursable activities contained in the 2002-2003 fiscal year parameters and guidelines.

Section I. Summary of Mandate

Staff revised this section to detail the separation of the parameters and guidelines based on subject matter and period of reimbursement, and clarified that the parameters and guidelines are for costs incurred on or after the 2002-2003 fiscal year.

For the reasons discussed in the 2001-2002 fiscal year parameters and guidelines, staff clarified the activity approved by the Commission related to Section 202 of the ADA.

Section III. Period of Reimbursement

Staff revised this section to detail the separation of the parameters and guidelines based on reimbursement period, and clarified that the parameters and guidelines are for costs incurred on or after the 2002-2003 fiscal year.

Section IV. Reimbursable Activities

The claimants' proposed parameters and guidelines for the 2002-2003 fiscal year revise the activity imposed by Government Code section 11135(b) in the same manner proposed in the 2001-2002 fiscal year.

For the same reasons discussed above for the parameters and guidelines for the 2001-2002 fiscal year, staff recommends not including the language proposed by the claimants in the parameters and guidelines. Instead for the reasons discussed for the parameters and guidelines for the 2001-2002 fiscal year, staff recommends amending the activity approved by the Commission as follows:

> Meet the protections contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) and its implementing regulations (28 C.F.R. § 35 et seq.) in employment within community college districts. (Gov. Code, § 11135(b) (Statutes 2001, ch. 708).)
>
> This activity is limited to community college districts that have not engaged in the self-evaluation prior to the 2001-2002 fiscal year for the following one-time activities:
>
> > a. Evaluate the district's employment related services and the effects thereof, that do not or may not meet the requirements of 28 C.F.R. § 35 et seq., and to the extent that modification of any such services is required, make the necessary modifications. (28 C.F.R. § 35.105)

b. Evaluate the district's policies and practices related to employment, and the effects thereof, that do not or may not meet the requirements of 28 C.F.R. § 35 et seq. and that were not included in the district's self-evaluation required by Section 504 of the Rehabilitation Act. To the extent that modification of any such policies and practices is required, make the necessary modifications. (28 C.F.R § 35.105)

In regard to the activity imposed by Government Code section 11135(d)(2), the claimants propose including some of the language of section 508 of the Rehabilitation Act (29 U.S.C. § 794d) and all of 36 C.F.R. part 1194.1, which is one of the regulations implementing section 508 of the Rehabilitation Act. Specifically the claimants propose including the following in footnotes:

Section 508 of the Rehabilitation Act (29 U.S.C. § 794d)

Section 794d. Electronic and information technology As of August 21, 2002

(a) Requirements for Federal departments and agencies

(1) Accessibility

(A) Development, procurement, maintenance, or use of electronic and information technology

When developing, procuring, maintaining, or using electronic and information technology, each Federal department or agency, including the United States Postal Service, shall ensure, unless an undue burden would be imposed on the department or agency, that the electronic and information technology allows, regardless of the type of medium of the technology,

(i) individuals with disabilities who are Federal employees to have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities; and

(ii) individuals with disabilities who are members of the public seeking information or services from a Federal department or agency to have access to and use of information and data that is comparable to the access to and use of the information and data by such members of the public who are not individuals with disabilities.

36 C.F.R. § 1194

Section 1194.1 Purpose. As of December 21, 2000

The purpose of this part is to implement section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d). Section 508 requires that when Federal agencies develop, procure, maintain, or use electronic and information technology, Federal employees with disabilities have access to and use of information and data that is comparable to the access and use by Federal employees who are not individuals with disabilities, unless an undue burden would be imposed on the agency. Section 508 also requires that individuals with disabilities, who are members of the public seeking information or services from a Federal agency, have access to and use of information and

> data that is comparable to that provided to the public who are not individuals with disabilities, unless an undue burden would be imposed on the agency.

Staff recommends that the Commission not include the above language proposed by the claimants. The claimants proposed language is unnecessary, because the reimbursable activity specifically cites to the federal code section (29 U.S.C. § 794d) and the regulations (36 C.F.R. § 1194 et seq.) that community college districts are required to comply with in developing, procuring, maintaining, or using electronic or information technology. In addition, claimants' proposal only includes part of 29 U.S.C. § 794d (i.e. subdivision (a)(1)(A)(i) and (ii)), and all of 36 C.F.R. § 1194.1. However, the reimbursable activity is not limited to the specific subdivision of 29 U.S.C. § 794d cited to by the claimants, nor is it limited to the specific regulation cited to by the claimants. As a result, inclusion of the footnotes could lead to an improper limitation of the reimbursable activity. Thus, the claimants' language is not included in the proposed parameters and guidelines.

G. Discrimination Complaint Procedures – Set One (Fiscal Year 2001-2002 Only) (Cal. Code Regs., tit. 5, §§ 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, 59340, 59342, 59351, 59352, 59354, 59356, 59358, 59360, and 59362)

The discrimination complaint procedures activities approved by the Commission include activities such as the investigation of complaints of unlawful discrimination, the establishment of polices for investigating discrimination complaints, engaging in informal resolution of discrimination complaints, and forwarding copies of information regarding discrimination complaints to the Chancellor's Office.

Section I. Summary of Mandate

Staff revised this section to detail the separation of the parameters and guidelines based on subject matter and period of reimbursement, and clarified that the parameters and guidelines are for the approved discrimination complaint procedures activities for the 2001-2002 fiscal year only.

Section III. Period of Reimbursement

Staff revised this section to detail the separation of the parameters and guidelines based on reimbursement period, and clarified that the parameters and guidelines are for the 2001-2002 fiscal year only.

Section IV. Reimbursable Activities

The claimants proposed parameters and guidelines modifies the below activity approved in the Commission's statement of decision by adding the underlined language:

> Immediately notify the complainant and the Chancellor that his or her formal complaint does not meet the requirements of California Code of Regulations, title 5, section 59328, and specify in what way the complaint is defective, if the district receives a complaint that does not meet the requirements of section 59328. (Cal. Code Regs., tit. 5, § 59332 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

Staff recommends that the Commission not include the claimants' proposed change. The activity as approved by the Commission *does not* include notifying the Chancellor's Office when a complainant's formal complaint does not meet requirements. Nor does the plain language of the

regulation impose this requirement. In addition, Government Code section 17557(a) and section 1183.1(a)(4) of the Commission's regulations authorize the Commission to include the "most reasonable methods of complying with the mandate" in the parameters and guidelines. The "most reasonable methods of complying with the mandate" are "those methods not specified in statute or executive order that are necessary to carry out the mandated program." A finding that an activity is necessary to carry out the mandated program must be supported by evidence in the record.[21] There is no explanation or evidence in the record explaining why immediately notifying the Chancellor is reasonably necessary to comply with the mandate to immediately notify the complainant that his or her formal complaint does not meet specific requirements.

The claimants proposed parameters and guidelines include the following activities associated with a community college district's administrative determination of a complaint alleging discrimination:

> (1) Forward the following to the Chancellor within 150 days of receiving a formal complaint:
>
> [¶] . . . [¶]
>
> (C) A copy of the complainant's appeal filed pursuant to California Code of Regulations, title 5, section 59338(a), or notice that the complainant has not filed an appeal and the district has closed the file. (Title 5, CCR, § 59340(b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
>
> (2) Maintain and make available to the Chancellor upon request the original complaint, the documents referenced in sections 59336, 59338, and 59340 for a period of at least three years after closing a case. (Title 5, CCR, § 59340(b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

These activities were not imposed by California Code of Regulations, title 5, section 59340, as amended by Register 2002, number 13, which was pled by the claimants. Rather, these activities were added in 2008 in Register 2008, number 34, which was not pled by the claimants. No mandate determination was made in regard to section 59340 as amended in 2008, and the Commission has no jurisdiction over the 2008 version of section 59340. As a result, these activities cannot be included in the parameters and guidelines for California Code of Regulations, title 5, section 59340, as amended by Register 2002, number 13. Staff recommends that the Commission not include these activities in the parameters and guidelines for "discrimination complaint procedures" for the 2001-2002 fiscal year.

In addition, staff removed all activities and references associated with California Code of Regulations, title 5, sections 59352, 59354, 59356, 59358, 59360, and 59362. The claimants proposed parameters and guidelines include reimbursement for the activities associated with the "Chancellor's Office Compliance Action." However, the Commission specifically found that these regulations do not impose state-mandated activities, stating:

> The claimants disagree with the finding that the appeal process on the Chancellor's Office level (as set forth in Cal. Code Regs., tit. 5, §§ 59350-59362) does not impose any activities on community college districts. The claimants

[21] Government Code section 17559; California Code of Regulations, title 2, sections 1183.14 and 1187.5.

> argue that districts have no control over an appeal to the Chancellor's Office, and as a result, the Chancellor's Office investigation requires community college districts to engage in the Chancellor's Office process. [Fn. omitted.] However, there is no language in sections 59350-59362 that requires community college districts to engage in any activity. Absent language requiring specific action to be taken by community college districts, the Commission cannot read activities into sections 59350-59362. [Fn. omitted.] Thus, based on the plain language of title 5, sections 59350-59362, do not impose any state-mandated activities on community college districts.[22]

Upon petition by any party, the Commission may reconsider or amend a test claim decision within 30 days after the statement of decision is delivered or mailed to the claimant for an alleged error of law.[23] The statement of decision for the *Discrimination Complaint Procedures* test claim was mailed on March 29, 2011. The Commission has not received a petition for reconsideration within 30 days of this date, and as a result, the Commission's statement of decision is final. Thus, staff recommends the Commission deny the claimant's request to include reference to, and to authorize reimbursement for, the proposed activities associated with California Code of Regulations, title 5, sections 59352, 59354, 59356, 59358, 59360, and 59362.

In addition, for the reasons discussed for the 2001-2002 fiscal year "equal employment opportunity program" parameters and guidelines, staff included the following activity from the "equal employment opportunity" section of the statement of decision with the "discrimination complaint procedures" parameters and guidelines:

> Process complaints of violation of the equal employment opportunity regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) which also allege discrimination prohibited by Government Code Section 11135 et seq. according to the procedures set forth in California Code of Regulations, title 5, section 59300 et seq. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

H. Discrimination Complaint Procedures – Set Two (Beginning Fiscal Year 2002-2003) (Cal. Code Regs., tit. 5, §§ 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, 59340, 59342, 59351, 59352, 59354, 59356, 59358, 59360, and 59362)

Section I. Summary of Mandate

Staff revised this section to detail the separation of the parameters and guidelines based on subject matter and period of reimbursement, and clarified that the parameters and guidelines are for costs incurred as a result of approved discrimination complaint procedures activities on or after the 2002-2003 fiscal year.

---

[22] Statement of decision for *Discrimination Complaint Procedures* (02-TC-46, and a portion of 02-TC-25 and 02-TC-31), pgs. 203-204, at < http://www.csm.ca.gov/sodscan/033011b.pdf> [as of March 29, 2012].

[23] Government Code section 17559(a) and California Code of Regulations, title 5, section 1188.4.

Section III. Period of Reimbursement

Staff revised this section to detail the separation of the parameters and guidelines based on reimbursement period, and clarified that the parameters and guidelines are for costs incurred on or after the 2002-2003 fiscal year.

Section IV. Reimbursable Activities

The claimants proposed parameters and guidelines for costs incurred on or after the 2002-2003 fiscal year include all of the proposed amendments and additions discussed above in the 2001-2002 fiscal year discrimination complaint procedures parameters and guidelines. For the same reasons discussed in that section, staff recommends denying the claimants' proposed amendments and additions.

In addition, staff recommends the inclusion of the following activity within the parameters and guidelines for costs incurred in or after the 2002-2003 fiscal year:

> Process complaints of violation of the equal employment opportunity regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) which also allege discrimination prohibited by Government Code Section 11135 et seq. according to the procedures set forth in California Code of Regulations, title 5, section 59300 et seq. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

Staff Recommendation

Staff recommends that the Commission adopt this analysis as its statement of decision and the attached seven sets of proposed parameters and guidelines as amended by staff:

Parameters and Guidelines 1: Discrimination Complaint Procedures (Equal Employment Opportunity Program – Set One) (Fiscal Year 2001-2002 only)

Parameters and Guidelines 2: Discrimination Complaint Procedures (Equal Employment Opportunity Program – Set Two) (Fiscal Year 2002-2003 only)

Parameters and Guidelines 3: Discrimination Complaint Procedures (Equal Employment Opportunity Program – Set Three) (Beginning Fiscal Year 2003-2004)

Parameters and Guidelines 4: Discrimination Complaint Procedures (Federal Rights for Individuals with Disabilities for Employment – Set One) (Fiscal Year 2001-2002 only)

Parameters and Guidelines 5: Discrimination Complaint Procedures (Federal Rights for Individuals with Disabilities for Employment and Information Technology – Set Two) (Beginning Fiscal Year 2002-2003)

Parameters and Guidelines 6: Discrimination Complaint Procedures – Set One (Fiscal Year 2001-2002 only)

Parameters and Guidelines 7: Discrimination Complaint Procedures – Set Two (Beginning Fiscal Year 2002-2003)

Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.