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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-46
(02-TC-25 and 02-TC-31)
Discrimination Complaint Procedures

Dear Mr. Bohan:

I have received the Commission's Draft Staff Analysis (DSA) for the above referenced consolidated test claim dated September 15, 2010, to which I respond on behalf of the test claimants. By letters dated January 9, 2008, and June 22, 2010, the Commission consolidated two programs from the Minimum Conditions for State Aid (02-TC-25 and 02-TC-31) test claim with the Discrimination Complaint Procedures test claim: the equal employment opportunity program and the student equity plan program. The DSA (8) has incorporated the whole record for Minimum Conditions for State Aid.

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. ABANDONMENT OF THE PRE-*CONNERLY* REIMBURSEMENT PERIOD

As a result of the *Connerly* decision, the Commission must make a distinction between reimbursable activities prior to the court decision date of September 4, 2001, and activities reimbursable thereafter. The pre-*Connerly* reimbursement period is about two months, based on the July 1, 2001, effective date of the test claim. Because of this short-period of reimbursement and the complexity of making the pre- and post-*Connerly* distinctions in the parameters and guidelines later, the test claimants abandon their request for reimbursement during the pre-*Connerly* period. However, this is not

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intended to prejudice any Commission approved activities based on the continuity of the law for the program activities since January 1,1975, that is, mandated activities that are deemed new programs or increased levels of service pre- and post-*Connerly*, nor is it intended to circumscribe the test claimants' dispute regarding pre- and post-*Connerly* activities not approved for reimbursement by the Commission. This letter is notice that the test claimants have abandoned the pre-*Connerly* reimbursement period for the relevant statutes and regulations.

PART 2. NEW PROGRAM STANDARD OF REVIEW

The DSA (10) 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 Discrimination Complaints Procedures test claim was filed June 27, 2003. The Minimum Conditions for State Aid test claim was filed June 23, 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)[1], 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. FEDERAL MANDATE STANDARD OF REVIEW

A. Effective Date of Federal Mandates

The DSA analyses of each of the federal mandates do not indicate how the effective dates of the federal mandates comport with the two versions (1984 and 2004) of Government Code Section 17513. The language of Government Code Section 17513, added by Statutes of 1984, Chapter 1459, extant at the time the test claim was filed, with the changes indicated that resulted from Statutes of 2004, Chapter 890, is as

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[1] 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)

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follows:

> "Costs mandated by the federal government" means any increased costs incurred by a local agency or school district after January 1, 1973, in order to comply with the requirements of a federal statute or regulation. "Costs mandated by the federal government" includes costs resulting from enactment of a state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements imposed upon the state would result in substantial monetary penalties or loss of funds to public or private persons in the state whether the federal law was enacted before or after the enactment of the state law, regulation, or executive order. "Costs mandated by the federal government" does not include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the option of the state, local agency, or school district.

The language of Government Code Section 17556, subdivision (c), as last amended by Statutes of 1989, Chapter 589, extant at the time the test claim was filed, with the changes indicated that result from Statutes of 2004, Chapter 895, is as follows:

> "The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: . . .
>
> (c) The statute or executive order ~~implemented a~~ imposes a requirement that is mandated by a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs ~~which~~ that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued."

Therefore, at the time the test claims were filed, it is relevant whether the federal mandate cited by the DSA was imposed before or after the state statute or regulation alleged as the source of the mandate to which the alleged federal rate is being applied. For example, the DSA (171, 196, 198, 200, etc.) cites the Code of Federal Regulations as it existed in 2009, which would not necessarily be applicable to the state mandate as of July 1, 2001. Similarly, several references to the United States Code do not indicate the effective date of the code sections cited. The DSA should be revised to cite the version of the federal law contemporaneous to the effective date of the test claim.

B. Direct and Coercive Federal Mandates

As a general matter, the DSA applies the existing statutory and court tests for federal mandates consistent with previous test claim decisions. The federal mandates are directly imposed upon the local governmental entity based on its status as an employer

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or a recipient of federal funds. Or, the federal program is deemed to be coercive, and the claimants are practically compelled to comply because of the pervasive nature of federal funding, potential termination of funding where noncompliance is discovered, and potential litigation by an aggrieved person. Note, however, that the DSA does not quantify the amount of federal funds at risk, other than state that they are pervasive as a matter of law (*Hayes*), nor quantify the actual risk and liability of potential litigation.

Most of the cited federal mandates have been the subject of previous test claims and there is no reason here for the Commission to depart from the standard of review historically utilized to determine if a federal mandate exists. However, this is not a waiver by the test claimants of any issues regarding the standard of review, just a recognition that previous arguments are not productive at this juncture as a matter of administrative futility.

The DSA has concluded that the following federal laws are federal mandates that reduce the scope of the state statutes and regulations:

1. Title VII of the Civil Rights Act of 1964
   (42 U.S.C., Sections 2000e et seq.)

Regarding the Equal Employment Opportunity (EEO) program, the DSA (64) concludes that there is a direct federal mandate that prohibits discrimination in all operations of a community college district pursuant to 29 CFR, Section 1607 et seq. The DSA (69) concludes that there is a federal mandate directly upon the college districts to keep records relevant to assigned positions of employees by job category, gender, and ethnicity, preserve those records, and to report this information every two years pursuant to 29 CFR, Section 1602.48 and the IPEDS Survey material for FY 2009-10.

2. The Americans with Disabilities Act
   (42 U.S.C., Sections 12111-12117 and 12131-12134)

Regarding the EEO program, the DSA (70) concludes that the Americans with Disabilities Act applies directly to all employers of 15 or more employees and that it applies independent of the receipt of federal funds. The federally mandated duties are identified as making a reasonable accommodation to job applicants pursuant to 29 CFR, Section 1630.9, and posting notices pursuant to 42 U.S.C, Section 12101, et seq. Regarding the Student Equity Plan (SEP) program, the DSA (170) cites to 28 CFR, Section 35.130 (2009) for a federal mandate that prohibits discrimination based on disability.

Regarding the Discrimination Complaint Procedures (DCP) program, the DSA (200) cites to 28 CFR, Section 35.107 (no date cited) for the federal mandate to designate a coordinator, notify persons of the identity of the coordinator, and to adopt a grievance procedure.

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3. Title VI of the Civil Rights Act of 1964
(42 U.S.C., Sections 2000d et seq.)

Regarding the SEP program, the DSA (167) concludes that there is a coercive federal mandate that prohibits discrimination in all programs as a condition of the receipt of any federal financial assistance pursuant to 34 CFR, Section 100 et seq. The DSA concludes that colleges are practically compelled to comply with Title VI because of the pervasive nature of federal funding (*Hayes*), potential termination or refusal of funding where noncompliance is discovered, and potential litigation by an aggrieved person. The federally mandated duties are identified (168) as prohibiting discrimination in all operations of a college receiving federal financial assistance pursuant to 34 CFR, Section 100.3 (2009).

Regarding the DCP program, the DSA (198) makes the same citation to 34 CFR, Section 100.3 (2009), which prohibits discrimination in all operations other than employment of a community college district receiving federal financial assistance.

4. Section 504 of the Rehabilitation Act
(29 U.S.C., Section 794)

Regarding the EEO program, the DSA (71) concludes that Section 504 coercively applies to all "programs" as a condition of receiving federal financial assistance, which applies to government and other institutions of higher education pursuant to 34 CFR, Section 104. The DSA concludes (73) that colleges are "practically compelled" to comply with Section 504, because of the pervasive nature of federal funding (*Hayes*), potential termination or refusal of funding where noncompliance is discovered, and potential litigation by aggrieved persons. The federally mandated duties are to designate a person to coordinate efforts to comply with 34 CFR, Section 104.7 (a), adopt grievance procedures (104.7(b)), and make reasonable accommodations (104.12).

Regarding the SEP program, the DSA (170) cites 34 CFR, Section 104.4 (2009), for the federally mandated prohibition of discrimination based on disability in all operations of the college.

Regarding the DCP program, the DSA (200) cites 34 CFR, Sections 104.4, 104.7, and 104.8 for the federal mandate to prohibit discrimination based on disability in all operations of the college, adopt grievance procedures, and provide notice to persons of the name of the district coordinator.

5. Title IX of Education Amendments of 1972
(20 U.S.C., Sections 1681 et seq.)

Regarding the EEO program, the DSA (74) concludes that Title IX, which prohibits sex

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discrimination in any program receiving federal financial assistance, coercively applies to community college districts because of the pervasive nature of federal funding (*Hayes*), potential termination of funding where noncompliance is discovered, and potential litigation by aggrieved persons. The federally mandated duties are to designate a person to coordinate efforts and to adopt complaint resolution procedures to comply with 34 CFR, Section 106.8.

Regarding the SEP program, the DSA (169) cites 34 CFR, Section 106.8 (2009), for several specific federally mandated duties: 1) prohibition of discrimination, 2) notification of the identity of the coordinator, 3) adoption of grievances procedures, 4) notification of nondiscrimination, 5) written policy statements, and 6) providing equal athletic opportunity (at Section 106.41).

Regarding the DCP program, the DSA (199) cites 34 CFR, Section 106.8 and 106.9 (2009), for the federally mandated duties of notice to persons, grievance procedures, and policy statements.

6. The Age Discrimination Act
(42 U.S.C., Section 6101)

Regarding the SEP program, the DSA (171) concludes that colleges are practically compelled to comply with the Age Discrimination Act because of the pervasive nature of federal funding (*Hayes*), potential termination of funding where noncompliance is discovered, and potential litigation by aggrieved persons. The DSA cites to 34 CFR, Sections 90.12 and 110.20 (no date cited), for the federal mandate to prohibit age discrimination and to ensure compliance with the Age Discrimination Act.

Regarding the DCP program, the DSA (198) cites 34 CFR, Sections 110.10 and 110.20 (no date cited), for the federally mandated duties to prohibit age discrimination and to ensure compliance with the Age Discrimination Act.

C. Limitations to the Application of the Federal Mandates

As previously stated, the DSA analysis of the federal mandates needs to be perfected to indicate the effective dates of the cited federal laws and regulations before they can be applied to the state mandates identified in the test claims.

Where the federal language states only a duty to prohibit discrimination or enforce the anti-discrimination laws, these general duties do not require any specific activities upon college districts so they cannot be applied to reduce any state mandated specific activities. This is the standard used by the DSA for state laws and regulations that have only duties of prohibition or enforcement (e.g., DSA 43, re: Title 5, CCR, Section 53024), so the same standard should be applied to the federal mandates.

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Where the federal mandates merely require that the districts adopt procedures, but do not mention implementing procedures, these federal mandates cannot be applied to state mandates where implementation is required, consistent with the Commission's past practice. This is similar to test claim decisions (such as Comprehensive School Safety Plans) where the Commission has determined that districts were mandated to prepare plans, but not mandated to implement them.

PART 4. MINIMUM CONDITIONS THRESHOLD ISSUE-SECTION 51000

A. Statutory Analysis

The DSA (18) has concluded that what constitutes a "minimum condition" is limited to Title 5, CCR, Chapter 2, Subchapter 1, Sections 51000-51027, pursuant to Education Code section 70901, subdivision (b) (6). This excludes Subchapter 2, Sections 51100 and 51102, regarding enforcement of Subchapter 1.

The DSA (12, 13, 19) analysis is based on standards of statutory construction that state that the fundamental task is to ascertain the intent of the lawmakers to give effect to the purpose of the statute, and if the terms of the regulation are unambiguous, the plain meaning of the language governs and a different intent cannot be concluded that is not supported by the words of the language. Further, that the interpretation cannot render any language mere surplusage. Finally, the language must be considered in the context of the regulatory framework as a whole. These standards also apply to administrative regulations.

The DSA (19) concludes that the test claimants have erred in concluding that *compliance* is required to *receive state aid*. The DSA (19) instead asserts that compliance is required only to establish *entitlement*, as if there were a legal or substantive difference between entitlement and compliance. At the very least, this only begs the question: entitlement to what? The answer must be entitlement to state funding or the entirety of the Section 51000 language is meaningless. The DSA subverts the plain language review standard by inventing an unstated intent that Section 51000 "does not preclude" districts from receiving state aid if the districts have not satisfied the minimum conditions. The DSA seeks to make the plain language meaning clearly erroneous by creating a new standard of what the language may not "preclude." The plain language of Section 51000 (as last amended by Register 94-38 and corrected by Register 95-15), clearly states that the provisions of that Chapter (commencing with Section 51000 and ending with Section 51102), establish and state positively ("fix and affirm") the minimum conditions the satisfaction of which entitles a district to receive state aid for the support of the district colleges. Compliance ("satisfaction of which") with the requirements of the Chapter is required to entitle the district to general state aid appropriations.

Regardless, the DSA concludes that since the plain language of Section 51000 "does

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not preclude" a district that has not satisfied the minimum conditions, and therefore is not entitled to receive general state aid, from receiving state aid, that there was an absence of regulatory intent to prevent entitlement to state aid where there is no satisfaction of the minimum conditions. The DSA creation of language to satisfy the opposite intent of the regulation is unnecessary and artificial. The fact that the regulation does not include this surplusage indicates that it is an unnecessary interpretation of the scope of the regulation that only becomes an issue when the DSA artificially separates entitlement from payment. The Section 51000 language stands on its own: districts must comply with the minimum conditions to be entitled to general state funding.

The DSA interpretation is inconsistent with the statutory scheme created by Education Code section 70901, subdivision (b) (6), to have the Board of Governors establish and enforce minimum conditions for entitlement to the receipt of state aid. Section 51100 (as amended by Register 94-38) requires the Chancellor to review each district, at least once very seven years, to determine if the district has met the minimum conditions contained in Subchapter 1. Section 51102 allows the Chancellor, upon the prior approval of the Board of Governors, to withhold a portion of state funds related to the gravity of the finding of noncompliance. Other possible Section 51102 responses to the review findings include agreeing with the district's explanation regarding the perceived noncompliance or accepting a district plan to mitigate the noncompliance. All of these Board of Governors compliance procedures occur after the appropriation of the general state aid. The appropriation is not conditioned on the review every seven years by the Board of Governors. The DSA incorrectly relies upon Section 51102, the Chancellor's enforcement power, as the source of actual control of general state aid, as if Section 51102 granted the Board of Governors the original power to appropriate funds. The Board of Governors cannot legislate state apportionment, it can only punish for noncompliance. The district receives the apportionment and may then be subject to post-facto punishment for noncompliance, but the appropriation remains.

B. The *Kern* analysis is Unnecessary and Not Relevant

Because the Chancellor's Section 51100 review requirement and possible enforcement actions against a district deemed to be out of compliance, the DSA (20) concludes that compliance is a "downstream activity of becoming *entitled* to receive state aid," thus invoking the *Kern* argument. This is erroneous on its face. Compliance is not a program activity. Section 51000 does not define new program activities; the referenced program regulations do that. The minimum conditions program activities (e.g., Sections 51010 and 51026) are not downstream of any other programs. Performing the program activities remains the condition precedent to obtaining state aid.

Section 51000 entitlement to state aid is based on compliance with the program regulations, not the subsequent Section 51100 compliance review. The Section 51100

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

The *Kern* issues are not reached. Section 51000 is a legally compelling regulation that needs no further qualification. Neither entitlement nor coercive compliance is a "program." The DSA treatment of program compliance as a downstream activity of "becoming entitled" is a contrived use of *Kern*.

C. The *POBRA* analysis is not relevant

The DSA (20) cites *POBRA* to assert a need for a "concrete showing" that a failure to perform the programs would result in "certain and severe penalties." This additional test is not necessary, since Section 51000 is alone legally compelling. Notwithstanding, the failure to implement a program can remove the entitlement for *all* state funding, *all* general program funding, that is, funding for other programs and needs beyond the scope of the single minimum condition program not implemented, subject only to the Board of Governors post facto unilateral unlimited discretion regarding the degree of noncompliance.

The potential loss of all funds is certainly severe. The test claim exhibits (pages 6112-6120) for the Minimum Conditions for State Aid included the minutes of the Board of Governors meeting of November 12, 2002, regarding Item 13: "Enforcement of Minimum Condition for the Receipt of State Aide at the San Mateo County Community College District." The agenda material for Item 13 is attached here. The minutes describe the extensive discussion regarding several program and contractual issues associated with the hiring process used for the interim Chancellor of SMCCD. The Item 13 agenda material, at page 5, indicates that the Chancellor recommended a penalty of $550,513 for the perceived noncompliance in this one instance. This amount is ten percent of the appropriation to the district from the Partnership for Excellence Funds, a program and funding source not related to the perceived Section 53021 violation. Since the proposed penalty bears no relationship to the perceived noncompliance and is not derived from the fund used for the equal employment opportunity program, the amount would be punitive rather than compensatory.

What degree of "certainty" is needed? Must the test claimants show that a district intentionally failed to implement a mandated program, or intentionally received and misspent the appropriations, and was severely penalized by the Chancellor upon approval of the Board of Governors? That no district was ever severely penalized is not

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the proof that the coercion for compliance exists. Does the DSA demand for proof either neglect or malfeasance on the part of one district, or worse, a pattern by many districts, that results in severe fiscal punishment by the Board of Governors at its unfettered discretion? Catastrophic malfeasance is not a practice of the professional public servants who lead the community colleges.

Regarding the magnitude of the coercion, compare the standard used by the DSA for federal mandates. Generally, the DSA concludes that it is sufficient for a finding of a practical compulsion or coercion to be based on the never quantified "pervasiveness" of federal funding (regardless of amounts actually received by the district), the potential post-facto termination or prospective refusal of program funding where noncompliance is discovered, and potential litigation by aggrieved persons. The aggrieved party for the state minimum conditions scheme is the Board of Governors whose power to fiscally penalize exceeds the scope of the funding provided for the program perceived to be out of compliance. These penalties can be imposed without the benefit of evidentiary standards of either the Administrative Procedure Act or the judicial system. The DSA thus sets a higher standard for the *state* minimum conditions coercion analysis than the federal coercion analysis, and does so without benefit of a court decision on point. There is no legal or factual basis for this higher state standard.

Rather, it is the magnitude of coercion created by the threat of penalty, not any proof of actual penalty, that is the measure of the issue. To decide otherwise is to make the Section 51000 coercion language surplusage, since the Board of Governors has the independent Section 51100 duty to review compliance notwithstanding the original Section 51000 entitlement issue.

The Board of Governors has made it quite clear that the districts are required to implement the programs included in the Chapter by conditioning receipt of general college funding on that implementation and providing a post-facto audit and penalty system to evaluate the measure of compliance. The fact that no district has catastrophically failed to comply and has been severely punished thereafter does not make this regulatory structure a sham. There is no reason to reach the *POBRA* severe consequences practical compulsion issue, since the districts are already legally compelled by Section 51000 to comply with the program regulations.

PART 5. DERIVATIVE BASIS FOR MANDATES

The DSA (16, 17, 18) has concluded that the scope of the potentially mandated activities based on the minimum conditions for state aid is limited to Title 5, CCR, Section 51010, in the case of equal employment opportunity programs, and Section 51026 for the student equity plan program, and that the other code or regulation sections included in the test claim pertinent to these programs are outside the scope of what constitutes a minimum condition because the other regulations or code sections are outside of the Chapter.

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Notwithstanding and independently of the determination regarding Section 51000 above, pursuant to rules of statutory construction, for the equal employment opportunity program, the test claimants assert that because Title 5, CCR, Section 51010 cites the requirements of Sections 53000 through 53034, either specifically as in Section 51010 subdivision (a), or inclusively as in subdivision (h), compliance with Section 51010 requires compliance with any other sections cited in 51010 as required by those cited sections. Similarly, for the student equity plan program, the test claimants assert that because Section 51026 cites the requirements of Section 54220, compliance with Section 51026 requires compliance with the scope of Section 54220. Districts cannot comply with Section 51000 without complying with the sections listed in Sections 51010 and 51026 that require compliance with other sections located outside of Subchapter 1 to implement the mandated minimum condition. Section 51000 is an independent derivative basis for a finding of legal compulsion to implement the activities in Sections 53001 through 53034 and Section 54220. The Section 53000 et seq., and Section 54220 program activities derive their mandate status from the mandate established by Sections 51010 and 51026.

Similarly, for all other code sections and regulations pled, the test claimants assert the sections referenced within a statute or regulation included in the test claims as mandatory activities are to that degree derived from the source statute or regulation, but may also be independently mandated. For example, Section 51000 mandates performance of Section 51026, which then mandates performance of Section 54220. However, both 51026 and 54220 can alternatively be determined to be mandates irrespective of any determination regarding Section 51000 and the DSA has in fact analyzed them in that manner.

PART 6. EQUAL EMPLOYMENT OPPORTUNITY PROGRAM

The subject of this part is Education Code sections 87101 and 87102, and Title 5, sections 53001 through 53034 originally included in the Minimum Conditions for State Aid test claim. As stated before, Section 51010 cites the requirements of Sections 53000 through 53034, either specifically as in Section 51010 subdivision (a), or inclusively as in subdivision (h). Compliance with Section 51010 requires compliance with any other sections cited as required by those cited sections.

The DSA (104) concludes the equal employment opportunity program is discretionary and an option exercised by the college districts in order to obtain equal employment opportunity fund money. However, the only statutory requirement for receipt of the Fund money is stated in Section 87102, subdivision (a): "[a]s a condition for the receipt of funds pursuant to Section 87107, the governing board of community college district that opts to participate under the article shall periodically submit to the board of governors an affirmation of compliance with this article." The rest of the language of subdivision (a) is only descriptive of the scope of the plan, not a condition of the receipt of funds.

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The mandated program activities to develop and implement the equal employment opportunity plan are not conditioned on requesting the funds or the related periodic affirmation of compliance. Section 53033 states that "[a]ny district failing to provide the data required under Section 53004 is not in compliance with" the Subchapter. The subsequent sentence, that funds shall not be granted, is only conditioned upon the district providing a report to the Chancellor on the use of the funds no later than March 31 each year. Similarly, Section 53034 requires an annual report on September 30 on the use of funds until this information can be incorporated into the Section 53004 report. This requirement is also independent of the other mandated program activities.

Section 53030 describes the allowable uses of the funds which encompasses only some of the mandated activities. To the extent that funds are appropriated by the state for this purpose from year-to-year, and there is no finding in the DSA that these funds are consistently available, and to the extent the district requests the funds, the funds would be an appropriate offset to the cost of the discrete mandated activities to which the funds were utilized by the district as concluded by the DSA (223). The *potential* availability of the funds at the Legislature's future discretion is not a sufficient (Government Code section 17556) basis for a finding of costs not mandated by the state for any of the program activities.

The *Kern* issue is not relevant because the program activities are not a program "downstream" to a request for funds. Requesting funds is not a program. All subsequent *Kern* analyses are invalid and unnecessary, that is, the "downstream" analyses for Sections 53006 (DSA 105, 106), 53022 (DSA 106), 53024 (DSA 107), and 53034 (DSA 108). These activities are neither downstream nor conditioned on the request or receipt of funding.

As the DSA has concluded, one of the reasons the equal employment opportunity program was established to comply with state and federal mandates. Section 53000, subdivision (b) notes that compliance with the program is not automatic compliance with all applicable laws or regulations. Section 53006 recognizes that job descriptions may reflect historical specific factual needs of the districts as employers and seeks to alleviate any under representation effects those local needs may have by providing a process to mitigate those effects. Contrary to the conclusion of the DSA (105), mitigating the historic under representation is the mandate, not the scope of the local job qualification statements.

PART 7. STUDENT EQUITY PLAN PROGRAM

The subject of this part is the cited Education Code sections 212 through 221.7, 66010.2 through 66292.5, and 72011 through 72014, and Title 5, CCR, sections 51000, 51026, and 54220, all of which were originally included in the Minimum Conditions for State Aid test claim. As stated before, Section 51026 cites the requirements of Section

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54220. Compliance with Section 51026 requires compliance with the scope of Section 54220.

Consistent with Commission practice regarding statutes that only state legislative intent and prohibitions (for example, Education Code section 66016 (DSA 155)), the DSA concludes that this language does not require any activity by the districts. To the contrary, in the absence of more specific goals and measures for the student equity plan (Section 54220 speaks generally to "promote student success," and "goals for access, retention, degree . . . ESL and basic skills completion"), the intent and prohibition language in the Education Code provide the necessary framework to define the successful outcomes of the plan that defines the means and methods to achieve these outcomes.

The DSA (164) concludes that the plain language of Section 54220 only requires the one-time adoption by the July 1, 1993, of a student equity plan, which predates the July 1, 2001 reimbursement eligibility period. The July 1, 1993, adoption language was established by the original regulation (Register 93-06) and continued when the regulation was otherwise amended (Register 98-03), even though that amendment was after the July 1, 1993, filing date. It should be noted that the next amendment to Section 54220, the current version (Register 2006-17), replaces the July 1, 1993, filing date language with the requirement that "districts shall maintain a student equity plan." "Maintaining" the Plan implies that the Board of Governors understood that the Plan may need to be revised as relevant state and federal laws are revised or as other circumstances may require. Even without reliance on Register 2006-17, the Commission can reasonably conclude as a practical matter that a once-adopted plan will need amendment for the reasons cited and thus it is a continuing activity.

The DSA (177) concludes that the requirements of Education Code sections 221.5 (d), 66271.7 (d), and 72012, are "downstream activities" of a district offering career and counseling services and funding for athletic programs. The DSA (178) concludes that there is no state mandate to provide career counseling, Section 51018 (part of the Minimum Conditions for State Aid test claim not consolidated into the Discrimination Complaint Procedures test claim as later consolidated) notwithstanding. Regarding the funding for athletic programs, the DSA (178) cites Education Code section 78223 and concludes there is no state mandate to provide intercollegiate athletics. The DSA makes an unwarranted distinction between intercollegiate athletics and regular curricular athletic programs. Section 66271.7 (g) is not by its language restricted to intercollegiate athletics. The discrimination prohibition would also apply to district facilities and equipment used for athletics offered as part of the regular curriculum. The DSA has made no finding of law of fact in this test claim that general state funding for any or all community college curriculum and other services, including counseling and athletics, results in a *Hayes* exception to legal compulsion.

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PART 8. DISCRIMINATION COMPLAINT PROCEDURES PROGRAM

The subject of this part is the cited Government Code Sections 11135 through 11139 and Title 5, CCR, sections 59300 through and 59362 (not inclusive), all of which were originally included in the Discrimination Complaint Procedures test claim, as well as Sections 59300, 59303, and 59304 which were included in the Minimum Conditions for State Aid test claim.

The DSA (192-196) determined that the district-level complaint process, Sections 59327 through 59342, require districts to engage in 19 listed activities. However, the DSA concludes that the plain language of the Chancellor's process, Sections 59350 through 59362, do not require any district activity. To the contrary, the district is required by Section 59340 to submit its findings to the Chancellor. Persons not satisfied with the district process can unilaterally file an appeal. Section 59350 indicates that the lack of an appeal by the complaining person does not preclude the Chancellor's review of the district's decision. So, whether there is an appeal or not, the district process is subject to review by the Chancellor and the district is required to participate in the Chancellor's Section 59350 review process.

The appeal is an independent action by the complainant and response to the appeal is not discretionary to either the district or Chancellor. Section 59351 requires the district to respond to new issues or facts raised by the complainant on appeal to the Chancellor's office. Section 59352 provides for a Chancellor's investigation, presumably of the district's due process, which would require the participation of the district. Section 59354 provides for the Chancellor to seek an informal resolution of an alleged violation by written conciliation agreement when resolution is achieved. "Conciliation" would infer that the district would need to participate since it would be the party charged for any violation. Section 59356 requires the Chancellor to notify the district of its findings and to allow the district the choice to acquiesce, a choice that requires affirmative action by the district. Section 59358 requires the Chancellor to proceed with a formal hearing process if it finds a violation by the district and if the district does not acquiesce. The administrative adjudication referenced in this Section commences at Government Code Section 11500, and by this reference in Section 59358, this process is a mandate on the district.[2] Section 59360 enumerates the

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[2] The administrative adjudication formal hearing process commencing at Government Code Section 11500:

(A) Pursuant to Government Code Section 11505, subdivision (a), completing and returning a post card, or other form, entitled Notice of Defense which, when signed by or on behalf of the district and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506. Contacting the designated person to obtain the names and addresses of witnesses or to inspect and copy the documents described in section 11507.6. When good cause exists, notifying the agency that a hearing should be postponed.

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(B) Pursuant to Government Code Section 11506, when filing a notice of defense, making all appropriate actions, including:
(1) Requesting a hearing,
(2) Objecting to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.
(3) Objecting to the form of the accusation on the ground that is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense,
(4) Admitting the accusation in whole or in part,
(5) Presenting new matter by way of defense, or
(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights.

(C) Pursuant to Government Code Section 11507.3, subdivision (b), moving for a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues, in furtherance of convenience or to avoid prejudice or when separate hearings would be conducive to expedition and economy.

(D) Pursuant to Government Code Section 11507.6, obtaining the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and inspecting and making a copy of any of the following in the possession or custody or under the control of the other party:
(1) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to this person is the basis for the administrative proceeding;
(2) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;
(3) Statements of witnesses then proposed to be called by the party and of the persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (1) or (2) above;
(4) All writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;
(5) Any other writing or thing which is relevant and which would be admissible in evidence;
(6) Investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that these reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in (1) to (5), inclusive, or summary thereof.

(E) Pursuant to Government Code Section 11507.7, serving and filing motions to compel discovery.

(F) Pursuant to Government Code Sections 11509 and 11513, appearing at a hearing of the cause, calling and examining witnesses, introducing exhibits, cross-examining opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination, impeaching any witness regardless of which party first called him or her to testify, and rebutting evidence against him or her. If respondent district does not testify in its own behalf, being called and examined as if under cross-examination.

(G) Pursuant to Government Code Section 11511, appearing and participating in the deposition of a witness when that witness is being deposed.

(H) Pursuant to Government Code Section 11511.5, attending a prehearing conference on motion of a party or by order of an administrative law judge. Pursuant to subdivision (d), participating when the prehearing conference may be converted into alternative dispute resolution or an informal hearing.

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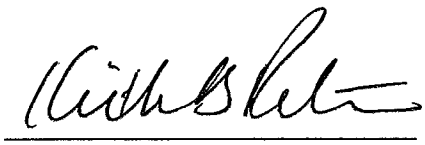
Chancellor's enforcement power which can be applied whether or not there has been a Government Code Section 11500 et seq., hearing process. All three listed actions are sufficiently coercive to practically compel the entire discrimination complaint process upon the districts. Section 59362 empowers the district to file a writ to contest the Chancellor's 59360 enforcement action and is thus an extension of the mandated process as a remedy to incorrect action by the Chancellor.

Certification

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

Executed on March 1, 2011 at Sacramento, California, by



Keith B. Petersen

(I) Pursuant to Government Code Section 11511.7, when required by an administrative law judge, attending and participating in a settlement conference.

(J) Pursuant to Government Code Section 11514, mailing or delivering to the opposing party a copy of any affidavit which the district proposes to introduce in evidence, together with a notice as provided in subdivision (b). Upon receipt of an affidavit and notice, when necessary, delivering to the proponent of the affidavit a request to cross-examine the affiant.

(K) Pursuant to Government Code Section 11515, requesting an opportunity to refute officially noticed matters by evidence or by written or oral presentation of authority.

(L) Pursuant to Government Code Section 11516, showing that the district will be prejudiced unless the case is reopened to permit the introduction of additional evidence in its behalf after an amendment of the accusation after submission of the case for decision.

(M) Pursuant to Government Code Section 11517, subdivision (c)(2)(E)(i), the cost of a copy of the record.

(N) Pursuant to Government Code Section 11518.5, applying for a correction of a mistake or clerical error in the decision, stating the specific ground on which the application is made.

(O) Pursuant to Government Code Section 11521, participating in a reconsideration of all or part of the case on the district's motion or the petition of any party.

(P) Pursuant to Government Code Section 11523, filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure when seeking judicial review of a decision.

(Q) Pursuant to Government Code Section 11524, applying for continuances when necessary or appropriate.

(R) Pursuant to Government Code Section 11506, the cost of legal counsel when necessary or appropriate when complying with the requirements relative to administrative adjudication.

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Attachment: Board of Governors Meeting, November 12-13, 2002, Item 13: "Enforcement of Minimum Condition for the Receipt of State Aid at the San Mateo County Community College District."

C: Commission electronic service list

Board of Governors
California Community Colleges
November 12-13, 2002

ENFORCEMENT OF MINIMUM CONDITIONS FOR THE RECEIPT OF STATE AID AT THE SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT

13

ACTION SCHEDULED

Committee of: *The Whole*
Richard H. Leib, President

Presentation: *Thomas J. Nussbaum, Chancellor*
Ralph Black, General Counsel

Issue

The Chancellor's Office received a complaint concerning the actions of the San Mateo County Community College District (SMCCCD) Board of Trustees in appointing the Chancellor-Superintendent of the District in May of 2001 and January 2002. The complaint included allegations of violations of the open recruitment and other requirements of the Board of Governors' regulations that establish minimum conditions for districts to receive state aid. The investigation that followed revealed that the SMCCCD Board violated minimum conditions requirements (as well as other state statutes and Board of Governors' regulations). Efforts at reaching a mutually agreeable remedy for the violations with the SMCCCD Board have thus far proven to be unsuccessful. This item presents the Board with options for responding to the violations.

Background

In accordance with its usual process, the Chancellor's Office initially attempted to resolve the complaint on an informal level. However, although the District (acting through its attorney) agreed to respond on an informal level, no response was forthcoming. Accordingly, the matter proceeded to formal investigation. The findings of that formal investigation are discussed below.

The Board of Governors is required by the Education Code to establish minimum conditions for districts to receive state aid. The minimum conditions appear as regulations that are set out in

title 5 of the California Code of Regulations[1], at sections 51000 through 51027. Section 51010, at all times pertinent to this matter, incorporated requirements set out in sections 53000 through 53034. Section 53003 required districts to adopt faculty and staff diversity plans, and section 53021 required districts to provide a program of full and open recruitment for open administrative positions.

The District's diversity plan pursuant to section 53003 requires recruitment, screening, selection and hiring processes that are in accordance with principles of equal opportunity. The District's standards for recruitment processes call for documented selection processes, including position announcements, lists of recruitment sources, logs of applicants, and reasons for the nonselection of applicants. The District's plan permits "in-house" recruitment only for interim appointments of up to one year.

Section 53021 requires recruitment that is at least statewide for educational administrators, such as the Chancellor-Superintendent position at the SMCCCD. In connection with that recruitment, the SMCCCD Board was required to seek qualified applicants listed in the Community College Registry. The SMCCCD Board was authorized to conduct an "in-house only" search for the Chancellor-Superintendent if it hired someone on an interim basis. A proper interim hire required the SMCCCD Board to comply with its established hiring procedures, to provide all in-house qualified District employees with the opportunity to apply, and to notify both the District's Faculty and Staff Diversity Advisory Committee and the Chancellor's Office at least ten working days prior to offering the position to a candidate. An initial interim appointment cannot exceed one year. The one year term allows for full and open recruitment for the position.

On May 23, 2001, the SMCCCD Board hired Mr. Ron Galatolo as its interim Chancellor-Superintendent. Prior to this appointment, Mr. Galatolo was a classified administrator with the District.

The Board conducted no recruitment activities for the position. It did not follow its own plan, it did not afford any other qualified District employees the opportunity to be considered for the position, it did not notify its Advisory Committee or the Chancellor's Office of its intention to hire on an interim basis, and the appointment exceeded the one-year limitation on the term of appointment.

The SMCCCD Board did not substantially comply with the requirements of its own Plan that was developed under section 53003. It did not conduct full and open recruitment for the position nor comply with the requirements for making an interim selection. Following one of these two options is necessary to comply with section 53021. In violating sections 53003 and 53021 in these ways, the Board also violated section 51010, which is a minimum condition for the receipt of state aid.

On January 25, 2002, the SMCCCD Board appointed Mr. Galatolo to a four-year term as Chancellor-Superintendent. The SMCCCD Board was required to use full and open recruitment that was at least statewide, and to seek qualified applicants listed in the Registry. The Board

[1] Attachment 1 contains the text of the statutes and regulations referred to herein, with the exception of sections 51001-51027, which set forth those minimum conditions that do not apply here.

again engaged in no recruitment activities and did not comply with the hiring requirements set out in its diversity plan when it appointed Mr. Galatolo for a four-year term. In violating sections 53003 and 53021 in these ways, the Board again violated section 51010.

In addition to violating the minimum conditions for the receipt of state aid, the SMCCCD Board also violated other provisions of the Education Code and title 5. Education Code section 87400 and title 5, section 53420 require districts to hire as educational administrators only persons who meet at least the minimum qualifications for employment. If persons do not meet the minimum qualifications for hire, a local board can determine that the person possesses qualifications that are equivalent to those minimum qualifications. If equivalencies are used, Education Code section 87359 and title 5, section 53430 require the board to reflect the equivalence criteria used in its hiring action.

When the SMCCCD Board hired Mr. Galatolo in January, 2002, its action cited the need to hire Mr. Galatolo on the basis of equivalencies because he did not possess the usual minimum qualifications for employment. However, when it hired him in May, 2001, it did not include any equivalency finding. Therefore, the Board violated the requirements of Education Code section 87359 and title 5, section 53430 in its May 2001 appointment.

Education Code section 87360 requires that the hiring criteria for administrators include "a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students." The SMCCCD Board could not demonstrate that it complied with this requirement.

A draft final investigative report was issued to the District to allow the District to provide further input or to make corrections. The District offered no revisions and did not contest any of the factual findings or conclusions. Accordingly, the final investigative report was issued.

The District's primary defense to the investigative findings is that it was not obligated to follow the open recruitment requirements for the January 2002 appointment because it believed, based on its attorney's legal advice, that the decision in *Connerly v. State Personnel Board*, issued September 4, 2001, invalidated the Board of Governors' regulations. According to the SMCCCD Board, it was therefore free to appoint a Chancellor-Superintendent without recruitment or following its own selection processes.

The Chancellor's Office maintains that the *Connerly* decision did not invalidate the regulations. We advised the District that the decision criticized only small portions of the regulations that might require or permit preferential treatment on an impermissible basis. Consequently, regulations requiring full and open recruitment, that do not discriminate or grant a preference on any basis, clearly applied. The portions of the District's Plan that called for equal employment opportunity also applied. We advised the SMCCCD Board that the Superior Court's judgment concurred with our analysis. We advised the SMCCCD Board that the Office of the California Attorney General confirmed our legal analysis. Moreover, the District's defense cannot excuse the SMCCCD Board's minimum conditions violations in May 2001 that occurred prior to the September 2001 *Connerly* decision.

At the same time that we issued our investigative findings, we offered the SMCCCD Board a proposed settlement to resolve the adverse findings. The settlement proposed that the District conduct a search for an interim Chancellor-Superintendent (that would give all qualified District employees the opportunity to apply) and then conduct a full and open search for the position. The interim position could not extend beyond April 1, 2003.

The full and open search would need to be at least statewide, would be based on a job description that established the qualifications for the position, and would use a well-defined and thoughtful search and selection process that would include students and representatives of the faculty and other employees. It would require that all qualified applicants be given full and fair consideration for the position. Persons serving in the selection process would be trained in equal employment opportunity requirements and the Chancellor's Office would monitor the hiring process.

The settlement agreement also proposed that the District submit selection processes for all administrative/management positions to the State Chancellor and that the State Chancellor (or designee) would review such hiring processes for a period of three years. The Chancellor would conduct an on-site review of the District's compliance with the equal employment opportunity regulations and would conduct an in-service for the SMCCCD Board on the regulations. Additionally, the Chancellor's Office would conduct a review of the District's application of minimum qualifications for hire, which review could be made by a team of community college faculty, administrators and trustees.

To assist in the resolution effort, Chancellor Nussbaum and legal staff met with representatives of the SMCCD Board to discuss the results of the investigation and explore options for resolution. However, these discussions did not lead to any agreement and the SMCCCD Board did not accept the settlement offer.

Among other things, the SMCCD Board has maintained that a settlement of a recruitment violation by another district over ten years earlier did not include a new selection process. However, the previous situation occurred under markedly different regulatory language and the actions of the SMCCCD Board reflect numerous violations. Significant differences distinguish the two circumstances, and staff does not feel that the previous resolution limits our current actions.

Nevertheless, in the interest of compromise, we modified the proposed agreement to permit an interim appointment to remain in effect for up to two years, as opposed to the few months indicated in the original proposal. Other provisions of the original settlement remained intact (e.g., a search based on a defined job description and a selection process that includes students and employees).

The SMCCCD Board rejected the modified settlement offer. The SMCCCD Board continues to assert that it was not required to follow the minimum conditions regulations for its January 2002 hiring action. It maintains the violations connected with its May 2001 hiring action or the other violations of statute and regulation described in the investigative report are not so serious as to justify proposed remedies that it views as extreme.

The SMCCCD Board submitted a counter-offer to resolve the violations. Under the counter-offer there would be no commitment to reopen the Chancellor-Superintendent position. For a period of one and a half years the Chancellor's Office would have the opportunity for a limited review of hiring processes for three positions - Chancellor, Executive Vice Chancellor, and President- should any openings occur. The District would "seriously consider" our comments, but the job descriptions, including the job-related qualifications, would not be submitted to the Chancellor's Office, nor would the paper screening criteria, the committee composition, or the interview questions be provided to the Chancellor's Office. Furthermore, the Chancellor's Office would not be permitted to review the bases for the elimination of candidates in these processes. By contrast, the resolution we proposed would have required a careful review by the Chancellor's Office of all administrative/management hiring processes for a period of three years.

In addition, the counter-offer indicates that the District "intends" to revise its hiring processes for executive management positions and that it would consult with the Chancellor about the revisions. The SMCCCD Board also agrees to abide by the new regulations on equal employment opportunity recently adopted by the Board of Governors.

Staff believes the SMCCCD Board proposal falls short of remedying the violations of the Board's minimum conditions regulations. The commitments being made are far from absolute and refuse to address ways of rectifying the violations in the hiring of the Chancellor.

Analysis

The minimum conditions that the SMCCCD Board violated relate to providing equal employment opportunity to all qualified candidates. Open recruitment and verifiable hiring processes are consistent with equal employment opportunity and important for finding the best qualified candidate for any position. The District's own plan requires open recruitment and verifiable hiring processes. In appointing an inside person without recruitment or process, the SMCCCD Board violated the minimum conditions for receipt of state aid and its own plan. The violations found in the investigation are numerous and significant, and they suggest an appropriately strong remedy.

Efforts at resolution with the SMCCCD Board have failed to produce a mutually agreeable settlement agreement that adequately addresses the extent and gravity of the violations.

The Chancellor's Office is authorized to enforce the minimum conditions for the receipt of state aid. One enforcement option is the withholding of all or part of a district's state aid. Withholding state aid from a district requires the approval of the Board of Governors. In light of the actions of the SMCCCD Board of Trustees, should the Board of Governors decide to withhold apportionment, it is recommended that the Board approve the withholding of an amount of money equal to 10 percent of the amount otherwise due to the San Mateo County Community College District from Partnership for Excellence Funds for 2002-2003. This amount would be $550,513.00.

The SMCCCD Board has been specifically invited to attend this Board meeting and to present any information it wishes to encourage the Board to adopt the settlement resolution it has proposed.

Recommended Action

That the Board consider the findings and conclusions from the investigation of the subject minimum conditions complaint and any presentation made on behalf of the San Mateo County Community College District in support of the offer made by the SMCCCD Board and provide direction to the Chancellor regarding the following actions:

1. Direct the Chancellor to continue efforts to reach a mutually agreeable resolution of the violations by the San Mateo County Community College District; or

2. Approve the proposed resolution agreement offered by the San Mateo County Community College District Board of Trustees; or

3. Approve and direct the Chancellor to withhold up to $550,513.00 from the amount otherwise due to the San Mateo County Community College District from Partnership for Excellence Funds for 2002-2003 at the earliest possible opportunity and redistribute the funds on an equal basis among the other community college districts.

ATTACHMENT 1

California Code of Regulations, Title 5

§51000. Scope.

The provisions of this Chapter are adopted under the authority of Education Code Section 70901(b)(6) and comprise the rules and regulations fixing and affirming the minimum conditions, satisfaction of which entitles a district maintaining community colleges to receive state aid for the support of its community colleges.

§51010. Equal Employment Opportunity.

The governing board of a community college district shall:

(a) adopt a district policy which describes its equal employment opportunity program and meets the requirements of section 53002;

(b) develop and adopt a district equal employment opportunity plan which meets the requirements of section 53003;

(c) ensure that its employment patterns are annually surveyed in the manner required by section 53004;

(d) ensure that a program of recruitment is carried out as required by section 53021;

(e) ensure that screening and selection procedures are developed and used in accordance with section 53024;

(f) ensure that, where necessary, additional steps are taken consistent with the requirements of section 53006;

(g) ensure that the pattern of hiring and retention, when viewed over time, is consistent with the objectives established in the district's equal employment opportunity plan; and

(h) substantially comply with the other provisions of subchapter 1 (commencing with section 53000) of chapter 4.

§51102. Enforcement.

(a) If any review pursuant to Section 51100 discloses that a college is not in compliance with the provisions of Subchapter 1 (commencing with Section 51100) of Chapter 2, the Chancellor shall notify the chief executive officer of the district in writing, and shall request an official written response from the district by a date which the Chancellor shall specify.

(b) After receiving the district's written response, or after the time for response has lapsed, the Chancellor shall pursue one or more of the following courses of action:

(1) accept in whole or part the district's response regarding noncompliance;

(2) require the district to submit and adhere to a plan and timetable for achieving compliance as a condition for continued receipt of state aid;

(3) withhold all or part of the district's state aid. The amount of

withholding shall be related to the extent and gravity of noncompliance and shall require approval of the Board of Governors.

(c) The Chancellor shall report to the Board of Governors on any actions taken pursuant to Subsection (b) of this Section, provided that, in the event he or she determines to withhold all or

a portion of a district's state aid, the Chancellor shall inform and obtain the approval of the Board prior to the withholding.

§53000. Scope and Intent.

(a) This subchapter implements and should be read in conjunction with Government Code sections 11135-11139.5, Education Code sections 66010.2, 66030, and Chapter 4.5 of Part 40 of Title 3, commencing with section 66250; Title VI of the Civil Rights Act of 1964 (42 U.S.C. s 2000d), Title IX of the Education Amendments of 1972 (20 U.S.C. s 1681), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. s 794), the Americans with Disabilities Act of 1990 (42 U.S.C. s 12100 et seq.) and the Age Discrimination Act (42 U.S.C. s 6101). Nothing in this subchapter shall be construed to conflict with or be inconsistent with the provisions of article 1, section 31 of the California Constitution or to authorize conduct that is in conflict with or is inconsistent with such provisions.

(b) The regulations in this subchapter require steps to promote faculty and staff equal employment opportunity which are in addition to and consistent with the nondiscrimination requirements of state or federal law. Therefore, compliance with these regulations or approval of the district's equal employment opportunity plan pursuant to section 53003 does not imply and should not be construed to mean that a district has necessarily complied with its obligations under any other applicable laws or regulations. The Chancellor shall assist districts in identifying other applicable state or federal laws which may affect district equal employment opportunity or nondiscrimination policies.

§53001. Definitions.

As used in this subchapter:

(a) Adverse Impact. "Adverse impact" means that a statistical measure (such as those outlined in the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures") is applied to the effects of a selection procedure and demonstrates a disproportionate negative impact on any group defined in terms of ethnic group identification, gender, or disability. A disparity identified in a given selection process will not be considered to constitute adverse impact if the numbers involved are too small to permit a meaningful comparison.

(b) Business Necessity. "Business necessity" means circumstances which justify an exception to the requirements of section 53021 because compliance with that section would result in substantial additional financial cost to the district or pose a significant threat to human life or safety. Business necessity requires greater financial cost than does mere business convenience. Business necessity does not exist where there is an alternative that will serve business needs equally well.

(c) Equal Employment Opportunity. "Equal employment opportunity" means that all qualified individuals have a full and fair opportunity to compete for hiring and promotion and to enjoy the benefits of employment with the district. Equal employment opportunity should exist at all levels and in all job categories listed in section 53004(a). Ensuring equal employment opportunity also involves creating an environment which fosters cooperation, acceptance, democracy, and free expression of ideas and is welcoming to men and women, persons with

disabilities, and individuals from all ethnic and other groups protected from discrimination by this subchapter.

(d) Equal Employment Opportunity Plan. An "equal employment opportunity plan" is a written document in which a district's work force is analyzed and specific plans and procedures are set forth for ensuring equal employment opportunity.

(e) Equal Employment Opportunity Programs. "Equal employment opportunity programs" means all the various methods by which equal employment opportunity is ensured. Such methods include, but are not limited to, using nondiscriminatory employment practices, actively recruiting, monitoring and taking additional steps consistent with the requirements of section 53006.

(f)(1) Ethnic Minorities. "Ethnic minorities" means American Indians or Alaskan natives, Asians or Pacific Islanders, Blacks/African-Americans, and Hispanics/Latinos.

(2) Ethnic Group Identification. "Ethnic group identification" means an individual's identification in one or more of the ethnic groups reported to the Chancellor pursuant to section 53004. These groups shall be more specifically defined by the Chancellor consistent with state and federal law.

(g) Goals for Persons with Disabilities. "Goals for persons with disabilities" means a statement that the district will strive to attract and hire additional

qualified persons with a disability in order to achieve the level of projected representation for that group by a target date established by taking into account the expected turnover in the work force and the availability of persons with disabilities who are qualified to perform a particular job. Goals are not "quotas" or rigid proportions.

(h) In-house or Promotional Only Hiring. "In-house or promotional only" hiring means that only existing district employees are allowed to apply for a position.

(i) Monitored Group. "Monitored group" means those groups identified in section 53004(b) for which monitoring and reporting is required pursuant to section 53004(a).

(j) Person with a Disability. "Person with a disability" means any person who (1) has a physical or mental impairment as defined in Government Code section 12926 which limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. A person with a disability is "limited" if the condition makes the achievement of the major life activity difficult.

(k) Projected Representation. "Projected representation" means the percentage of persons from a monitored group determined by the Chancellor to be available and qualified to perform the work in question.

(l) Reasonable Accommodation. "Reasonable accommodation" means the efforts made on the part of the district to remove artificial or real barriers which prevent or limit the employment and upward mobility of persons with disabilities. "Reasonable accommodations" may include the items designated in section 53025.

(m) Screening or Selection Procedure. "Screening or selection procedure" means any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques, including but not limited to, traditional paper and pencil tests, performance tests, and physical, educational, and work experience requirements, interviews, and review of application forms.

(n) Significantly Underrepresented Group. "Significantly underrepresented group" means any monitored group for which the percentage of persons from that group employed by the

district in any job category listed in section 53004(a) is below eighty percent (80%) of the projected representation for that group in the job category in question.

(o) Target Date. "Target date" means a point in time by which the district plans to meet an established goal for persons with disabilities and thereby achieve projected representation in a particular job category.

(p) Timetable. "Timetable" means a set of specific annual hiring objectives that will lead to meeting a goal for persons with a disability by a projected target date.

§53002. Policy Statement.

The governing board of each community college district shall adopt a policy statement setting forth the district's commitment to an equal employment opportunity program. This statement may also incorporate the nondiscrimination policy statement required pursuant to section 59300 and other similar nondiscrimination or equal employment opportunity statements which may be required under other provisions of state and federal law.

§53003. District Plan.

(a) The governing board of each community college district shall develop and adopt a district-wide written equal employment opportunity plan to implement its equal employment opportunity program. Such plans and revisions shall be submitted to the Chancellor's Office for review and approval.

(b) Such plans shall be reviewed at least every three years and, if necessary, revised and submitted to the Chancellor's Office for approval. Each community college district shall notify the Chancellor at least 30 days prior to adopting any other amendments to its plan.

(c) In particular, the plan shall include all of the following:

(1) the designation of the district employee or employees who have been delegated responsibility and authority for implementing the plan and assuring compliance with the requirements of this subchapter pursuant to section 53020;

(2) the procedure for filing complaints pursuant to section 53026 and the person with whom such complaints are to be filed;

(3) a process for notifying all district employees of the provisions of the plan and the policy statement required under section 53002;

(4) a process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of this subchapter and of state and federal nondiscrimination laws;

(5) a process for providing annual written notice to appropriate community- based and professional organizations concerning the district's plan and the

need for assistance from the community and such organizations in identifying qualified applicants;

(6) an analysis of the number of persons from monitored groups who are employed in the district's work force and those who have applied for employment in each of the job categories listed in section 53004(a);

(7) an analysis of the degree to which monitored groups 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 such job category and whether or not the underrepresentation is significant;

(8) methods for addressing any underrepresentation identified pursuant to subparagraph (7)

(9) additional steps consistent with section 53006 to remedy any significant underrepresentation identified in the plan; and

(10) any other measures necessary to further equal employment opportunity throughout the district.

(d) The plan shall include any goals for hiring persons with disabilities that are required by section 53025.

(e) The plans submitted to the Chancellor shall be public records.

(f) Each community college district shall make a continuous good faith effort to comply with the requirements of the plan required under this section.

(g) In developing the availability data called for in subsection (c)(7), the Chancellor shall work through the established Consultation Process.

§53004. District Evaluation and Report to Chancellor.

(a) Each district shall annually survey its employees and shall monitor applicants for employment on an ongoing basis in order to evaluate the implementation of its equal employment opportunity plan and to provide data needed for the analyses required by sections 53003, 53006, 53023, and 53024. Each district shall annually report to the Chancellor, in a manner prescribed by the Chancellor, the results of its annual survey of employees at each college in the district. Each employee shall be reported so that he or she may be identified as belonging to one of the following seven 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.

(b) For purposes of the survey and report required pursuant to subsection (a) of this section, each applicant or employee shall be afforded the opportunity to identify his or her gender, ethnic group identification and, if applicable, his or her disability. A person may designate multiple ethnic groups with which he or she identifies, but shall be counted in only one ethnic group for reporting purposes. Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian

Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians are to be counted and reported as part of the Asian/Pacific Islander group as well as in separate subcategories. However, in determining whether additional steps are necessary to ensure that monitored groups have not been excluded on an impermissible basis, analysis of the separate subgroups is not necessary.

§53005. Advisory Committee.

Each community college district shall establish an Equal Employment Opportunity Advisory Committee to assist the district in developing and implementing the plan required under section 53003. This advisory committee shall include a diverse membership whenever possible.

§53006. Additional Steps to Ensure Equal Employment Opportunity.

(a) If a district determines that a particular monitored group is significantly underrepresented with respect to one or more job categories, the district shall take additional steps consistent with this section. At a minimum, the district shall:

(1) review its recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group;

(2) consider various other means of reducing the underrepresentation which do not involve taking monitored group status into account, and implement any such techniques which are determined to be feasible and potentially effective;

(3) determine whether the group is still significantly underrepresented in the category or categories in question after the measures described in (1) and (2) have been in place a reasonable period of time; and

(4) if significant underrepresentation persists, the staffing rate for the significantly underrepresented group in the specified job category or categories shall be monitored on an ongoing basis until the projected representation has been achieved for that group in the category or categories in question.

(b) If a reasonable period of time passes and significant underrepresentation persists for a particular group in the job category in question, the district shall:

(1) review each locally established "required," "desired" or "preferred" qualification being used to screen applicants for positions in the job category to determine if it is job-related and consistent with business necessity through a process meeting the requirements of federal law or is among those qualifications which the Board of Governors has found to be job-related and consistent with business necessity throughout the community college system;

(2) discontinue the use of any locally established qualification that has not been found to satisfy the requirements set forth in paragraph (1) of this subdivision; and

(3) continue using qualification standards meeting the requirements of paragraph (1) only where no alternative qualification standard is reasonably available which would select for the same characteristics, meet the requirements of paragraph (1) and be expected to have a less exclusionary effect.

(c) For purposes of this section, "a reasonable period of time" means three years, or such longer period as the Chancellor may approve, upon the request of the equal employment opportunity advisory committee and the chief executive officer, where the district has not filled enough positions to appreciably affect its work force in the job category in question.

(d) Nothing in this subchapter shall be construed to prohibit a district from taking any other steps it concludes are necessary to ensure equal employment opportunity, provided that such actions are consistent with the requirements of federal and state constitutional and statutory nondiscrimination law.

§53020. Responsibility; Delegation of Authority; Complaints.

(a) The governing board of each community college district is ultimately responsible for proper implementation of this subchapter at all levels of district and college operation and for making measurable progress toward equal employment opportunity by the methods described in the district's equal employment opportunity plan. In carrying out this responsibility, the governing board, upon the recommendation of the chief executive officer, shall ensure that an equal employment opportunity officer is designated to oversee the day-to-day implementation of the requirements set forth in this subchapter.

(b) The administrative structure created by any delegation of authority to the equal employment opportunity officer or others shall be described in the district's equal employment opportunity plan submitted pursuant to section 53003 and shall be designed in such a manner so as to ensure prompt and effective implementation of the requirements of this subchapter. The plan shall also designate a single officer, who may be the equal employment opportunity officer, who shall be given authority and responsibility for receiving complaints filed pursuant to section 53026, for ensuring that such complaints are promptly and impartially investigated, and ensuring that selection procedures and the applicant pool are properly monitored as required by sections 53023 and 53024.

(c) Any organization or individual, whether or not an employee of the district, who acts on behalf of the governing board with regard to the recruitment and screening of personnel is an agent of the district and is subject to all of the requirements of this subchapter.

§53021. Recruitment.

(a) Except as otherwise provided in this section, community college districts shall actively recruit from both within and outside the district work force to attract qualified applicants for all new openings. This shall include outreach designed to ensure that all persons, including persons from monitored groups, are provided the opportunity to seek employment with the district. The requirement of open recruitment shall apply to all new full-time and part-time openings in all job categories and classifications, including, but not limited to, faculty, classified employees, categorically funded positions, the chief executive officer, and all other executive/administrative/managerial positions. Recruitment for full-time faculty and educational administrator positions shall be at least statewide and, at a minimum, shall include seeking qualified applicants listed in the California Community Colleges Equal Employment Opportunity Registry. Recruitment for part-time faculty positions may be conducted separately for each new opening or by annually establishing a pool of eligible candidates, but in either case full and open recruitment is required consistent with this section.

(b) "In-house or promotional only" recruitment shall not be used to fill any new opening except when the position is being filled on an interim basis for the minimum time necessary to allow for full and open recruitment; provided however, that no interim appointment or series of interim appointments exceed one year in duration. The Chancellor may approve an extension of up to one additional year if the district demonstrates "business necessity" as defined in section 53001(b).

(c) If a district believes justification exists for use of the exception listed in subsection (b), it shall so notify the Equal Employment Opportunity Advisory Committee established pursuant to section 53005 and the Chancellor at least ten (10) working days prior to offering the position to a candidate.

(d) Even where in-house or promotional only recruitment is permitted pursuant to subsection (b), the district shall comply with its established hiring procedures and all qualified district employees shall be afforded the opportunity to apply.

(e) For purposes of this section, a new opening is not created when:

(1) there is a reorganization or series of lateral transfers that do not result in a net increase in the number of employees;

(2) a position which is currently occupied by an incumbent is upgraded, reclassified, or renamed without significantly altering the duties being performed by the individual;

(3) the faculty in a division or department elect one faculty member to serve as a chairperson for a prescribed limited term;

(4) the position is filled by a temporary, short-term, or substitute employee appointed pursuant to Education Code sections 87422, 87480, 87482.5(b) 88003, 88106 or 88109; or

(5) a part-time faculty member is assigned to teach the same or fewer hours he or she has previously taught in the same discipline without a substantial break in service. For purposes of this section, "a substantial break in service" means more than one calendar year or such different period as may be defined by a collective bargaining agreement.

§53022. Job Announcements and Required Qualifications.

Job announcements shall state clearly job specifications setting forth the knowledge, skills, and abilities necessary to job performance. For faculty and administrative positions, job requirements shall include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. Job specifications, including any "desired" or "required" qualifications beyond the state minimum qualifications (set forth in Subchapter 4, commencing with Section 53400 of this Chapter) which the district wishes to utilize, shall be reviewed before the position is announced, to ensure conformity with the requirements of this Subchapter and state and federal nondiscrimination laws.

§53023. Applicant Pool.

(a) The application for employment shall afford each applicant an opportunity to voluntarily identify his or her gender, ethnicity and, if applicable, his or her disability. This information shall be kept confidential and shall be used only in research, validation, monitoring, evaluating the effectiveness of the district's affirmative action employment program, or any other purpose specifically authorized in this Subchapter, or by any applicable statute or regulation.

(b) After the application deadline has passed, the composition of the initial applicant pool shall be analyzed to ensure that expected representation has been achieved for historically underrepresented groups. If necessary the application deadline shall be extended and additional focused recruitment shall be conducted for any historically underrepresented group for which expected representation has not been achieved. When the expected representation of historically underrepresented groups is achieved, or further recruitment efforts would be futile, applications shall be screened to determine which candidates satisfy job specifications set forth in the job announcement. Before the selection process continues, the composition of the qualified applicant pool shall be analyzed to ensure that no group, defined in terms of ethnicity, gender or disability, is adversely impacted pursuant to Section 53001(m). If adverse impact is found to exist, the chief

executive officer or his or her designee shall take effective steps to address the adverse impact before the selection process is begun. Such steps may include, but are not limited to:

(1) the deadline is extended and additional recruitment focused on historically underrepresented groups is undertaken;

(2) locally established qualifications beyond state minimum qualifications are modified or removed and the application deadline is extended.

(c) If adverse impact persists after taking steps required under subdivision (b), the selection process may proceed only if:

(1) the job announcement does not require qualifications beyond the statewide minimum qualifications;

(2) locally established qualifications beyond state minimum qualifications, if any, are validated as job related and consistent with business necessity through a process meeting the requirements of federal law; or

(3) the particular requirements beyond statewide minimum qualifications which are used in the job announcement are among those which the Board of Governors has found to be job-related and consistent with business necessity throughout the community college system.

§53024. Screening or Selection Procedures.

(a) All screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole, shall be:

(1) provided to the Chancellor upon request;

(2) designed to ensure that for faculty and administrative positions, meaningful consideration is given to the extent to which applicants demonstrate a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students;

(3) based solely on job-related criteria, except as authorized by Section 53006; and

(4) designed and monitored to ensure that they do not have an adverse impact, as defined in Section 53001(m), on any group defined in terms of ethnicity, gender, or disability.

(b) If monitoring pursuant to subsection (a)(4) reveals that any selection technique or procedure has adversely impacted any such group, the chief executive officer or his/her designee shall suspend the selection process and timely and effective steps shall be taken to remedy the problem before the selection process resumes. The affirmative action officer, or other official charged with responsibility for monitoring selection procedures, may assist the screening committee by discussing the overall composition of the applicant pool and the screening criteria or procedures which have produced an adverse impact, provided that confidential information about individual candidates is not disclosed. Where necessary, the position may be re-opened at any time and a new selection process initiated in a way designed to avoid adverse impact.

(c) A district may not designate or set aside particular positions to be filled by members of any group defined in terms of race, ethnicity, gender, age, or disability, or engage in any other practice which would result in discriminatory treatment prohibited by state or federal law. Nor may a district apply the goals, if any, set forth in the district's faculty and staff diversity plan in a rigid manner which has the purpose or effect of so discriminating.

(d) Seniority or length of service may be taken into consideration only to the extent it is job related, is not the sole criterion, and is included in the job announcement consistent with the requirements of Section 53022.

(e) Selection testing for employees shall follow procedures as outlined in the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures."

(f) Selection committees shall include members of historically underrepresented groups whenever possible.

(g) Notwithstanding any other provision of this Division, the governing board or its designee shall have the authority to make all final hiring decisions based upon careful review of the candidate or candidates recommended by a screening committee. This includes the right to reject all candidates and order further review by the screening committee or reopening of the position where necessary to further achievement of the goals, if any, established in the faculty and staff diversity plan. However, consistent failure to select qualified candidates from historically underrepresented groups who are recommended by screening committees shall constitute a violation of Section 51010 of this Division.

§53025. Persons with Disabilities.

Districts shall ensure that applicants and employees with disabilities receive reasonable accommodations consistent with the requirements of Government Code Sections 11135 et seq., Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act. Such accommodations may include, but are not limited to, job site modifications, job restructuring, flexible scheduling, adaptive equipment, and auxiliary aids such as readers, interpreters, and notetakers. Such accommodations may be paid for with faculty and staff diversity funds provided pursuant to Article 3 (commencing with Section 53030) of this Subchapter.

§53026. Complaints.

Each community college district shall establish a process permitting any person to file a complaint alleging that the requirements of this Subchapter have been violated. A copy of the complaint shall immediately be forwarded to the Chancellor who may require that the district provide a written investigative report within ninety (90) days. Complaints which also allege discrimination prohibited by Government Code Sections 11135 et seq. shall be processed according to the procedures set forth in Subchapter 5 (commencing with Section 59300) of Chapter 10 of this Division.

§53027 Applicability to Districts Operating on the Merit System.

Nothing in this Subchapter shall be construed to conflict with or be inconsistent with the provisions of Article 3 (commencing with Section 88060) of Chapter 4 of Part 51 of the Education Code which apply to districts operating a merit system for classified employees .

Note: Authority cited: Sections 70901 and 87105, Education Code.
Reference: Sections 87100 et seq. and 88060 et seq., Education Code.

§53028. *Repealed*
§58029. *Repealed*

§53030. Fund Allocation.

Before the end of the fiscal year preceding the year of allocation, the Chancellor shall recommend to the Board of Governors an allocation formula for distribution of the Faculty and Staff Diversity Fund established pursuant to Education Code Section 87107. The allocation shall be consistent with the following:

(a) A portion of the fund, but not more than 25 percent, shall be set aside for the purposes of Education Code Section 87107(c), provided that:

(1) sufficient funds to provide technical assistance, service, monitoring, and compliance functions shall be designated from these monies; and

(2) the remainder of these funds shall be distributed on the basis of the full-time equivalent students of each district as a proportion of the total full-time equivalent students for all districts. These funds are to be used to reimburse costs as specified in Education Code Section 87107.

(b) That portion of the funds not allocated pursuant to Subsection (a) may be allocated to the districts in the following five categories:

(1) an amount proportional to the full-time equivalent students of each district to the total full-time equivalent students for all districts;

(2) an equal dollar amount to each district;

(3) an amount related to success in promoting diversity. Multiple methods of measuring success shall be identified by the Chancellor working through the established Consultation Process.

Note: Authority cited: Sections 70901 and 87107, Education Code.
Reference: Section 87107, Education Code.

§53031. Repealed
§53032. Repealed

§53033. Failure to Report.

Any district failing to provide the data required under Section 53004 is not in compliance with this Subchapter. Faculty and Staff Diversity funds for any given fiscal year, other than those under Section 53030(a), shall not be granted unless the district provides the data no later than March 31st of the preceding fiscal year.

§53034. Required Report.

Districts shall submit a report on the use of Faculty and Staff Diversity funds to the Chancellor's Office no later than September 30th of the fiscal year following the use of the funds. Until such time as a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required under Section 53004, districts will report that rate by a separate survey conducted, as directed by the Chancellor's Office.

§53420. Minimum Qualifications for Educational Administrators.

The minimum qualifications for service as an educational administrator shall be both of the following:

(a) Possession of a master's degree; and

(b) One year of formal training, internship, or leadership experience reasonably related to the administrator's administrative assignment.

§53430. Equivalencies.

(a) No one may be hired to serve as a community college faculty or educational administrator unless the governing board determines that he or she possesses qualifications that are at least equivalent to the minimum qualifications specified in this Article or elsewhere in this Division. The criteria used by the governing board in making the determination shall be reflected in the governing board's action employing the individual.

(b) The process, as well as criteria and standards by which the governing board reaches its determinations regarding faculty, shall be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board. The agreed upon process shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty employed under the authority granted by this Section possesses qualifications that are at least equivalent to the applicable minimum qualifications specified in this Division.

(c) The process shall further require that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination; and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to Education Code Section 87358.

(d) Until a joint agreement is reached and approved pursuant to Subdivision (b), the district shall be bound by the minimum qualifications set forth in this Subchapter.

Education Code

§87400. Employment for academic positions

Governing boards of community college districts shall employ for academic positions , only persons who possess the qualifications therefore prescribed by regulation of the board of governors. It shall be contrary to the public policy of this state for any person or persons charged, by those governing boards, with the responsibility of recommending persons for employment by those boards to refuse or to fail to do so for reasons of race, color, religious creed, sex, or national origin of those applicants for that employment.

§87359. Employment of faculty and administrators not meeting applicable minimum qualifications; process

The board of governors shall adopt regulations setting forth a process authorizing local governing boards to employ faculty members and educational administrators who do not meet the applicable minimum qualifications specified in the regulations adopted by the board of

governors pursuant to Section 87356. Unless and until amended pursuant to the process described in Section 87357, the regulations shall require all of the following:

(a) No one may be hired to serve as a community college faculty member or educational administrator under the authority granted by the regulations unless the governing board determines that he or she possesses qualifications that are at least equivalent to the minimum qualifications specified in regulations of the board of governors adopted pursuant to Section 87356. The criteria used by the governing board in making the determination shall be reflected in the governing board's action employing the individual.

(b) The process, as well as criteria and standards by which the governing board reaches its determinations regarding faculty members, shall be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board. The agreed upon process shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty member employed under the authority granted by the regulations possesses qualifications that are at least equivalent to the applicable minimum qualifications specified in regulations adopted by the board of governors. The process shall further require that the governing board provide the academic senate with an opportunity to present its views to the governing board before the board makes a determination, and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to Section 87358.

(c) Until a joint agreement is reached and approved pursuant to subdivision (b), the district process in existence on January 1, 1989, shall remain in effect.

§87360. Development of criteria; inclusions; agreement; process in effect prior to agreement; times

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

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

(c) Until a joint agreement is reached and approved pursuant to subdivision (b), the existing district process in existence on January 1, 1989, shall remain in effect.