Item __

Draft Proposed Statewide Cost Estimate
$8,820,764

(Approximately $801,888 Annually)

Education Code Sections 66010.2, 66010.7, and 87102, as amended by Statutes 1988, Chapter 973 and Statutes 1991, Chapter 1198

California Code of Regulations, Title 5, Sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034, as added or amended by Register 92, Number 17; Register 96, Number 23; and Register 2002, Number 35

(Consolidated With)

Government Code Section 11135, as added or amended by Statutes 1992, Chapter 913; Statutes 1994, Chapter 146; Statutes 2001, Chapter 708; Statutes 2002, Chapter 1102

California Code of Regulations, Title 5, Sections 59320, 59322, 59324, 59326, 59327, 59328, 59330 , 59332, 59334, 59336, 59338, 59340, and 59342, as added or amended by Register 81, Number 16; Register 92, Number 17; Register 96, Number 23; Register 2001, Number 6; Register 2002, Number 13; and Register 2002, Number 35

Discrimination Complaint Procedures

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

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

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STAFF ANALYSIS

Background and Summary of the Mandate

The *Discrimination Complaint Procedures* (02-TC-46) test claim addresses state antidiscrimination laws as they apply to community college districts. On March 24, 2011, the Commission adopted a statement of decision finding that the test claim statutes and regulations impose a partially reimbursable state-mandated program upon community college districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.[1] The Commission separated the activities found to be reimbursable into the following three program areas: (1) student equity; (2) equal employment opportunity; and (3) discrimination complaint procedures, which includes the state's requirement to comply with section 202 of the federal Americans with Disabilities Act (ADA) for employment programs and the accessibility requirements of section 508 of the Rehabilitation Act for information technology.

Based on the number of activities approved in the test claim and the varying subjects that the reimbursable activities addressed, the Commission chose to adopt separate parameters and

[1] Exhibit A.

guidelines based on subject matter and on the period of reimbursement in order to reduce confusion in the claiming process. The Commission adopted seven sets of parameters and guidelines for the *Discrimination Complaint Procedures* program and separated them as follows: (1) equal employment opportunity program (3 sets); (2) federal rights for individuals with disabilities (2 sets); and (3) discrimination complaint procedures (2 sets). All seven sets of parameters and guidelines were adopted on September 28, 2012.[2]

Eligible claimants were required to file initial reimbursement claims (for costs incurred between July 1, 2001, and June 30, 2012) with the State Controller's Office (SCO) by May 3, 2013. Late initial reimbursement claims may be filed until May 2, 2014, subject to a 10% penalty for late filing. Reimbursement claims for fiscal year 2012-2013 are due by February 18, 2014, but may be filed until February 17, 2015, subject to a 10% penalty for late filing.

Eligible Claimants and Period of Reimbursement

Any community college district as defined in Government Code section 17519, which incurs increased costs as a result of this mandate, is eligible to claim reimbursement.

Government Code section 17557(e) states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The test claim was filed on June 27, 2003, establishing eligibility for reimbursement for the 2001-2002 fiscal year. Therefore, the costs incurred for compliance with the mandated activities are reimbursable on or after July 1, 2001.

Reimbursable Activities

Reimbursement is authorized for the activities listed in the parameters and guidelines.[3]

Statewide Cost Estimate

Assumptions

Staff reviewed the reimbursement claims data submitted by two community college districts (Long Beach and Los Rios) and compiled by the SCO. The *Discrimination Complaint Procedures* program has seven sets of parameters and guidelines. Three of the sets of parameters and guidelines cover multiple fiscal years. Each set of parameters and guidelines includes specific reimbursable activities over specific fiscal years that may be claimed by eligible claimants. The actual claims data showed that Los Rios Community College District filed 22 claims under 6 of the 7 sets of parameters and guidelines for this program. Long Beach Community college filed 11 claims under 3 of the 7 sets of parameters and guidelines for this program. There were a total of 33 claims filed for fiscal years 2001-2002 through 2011-2012 for a total of $8,820,764.[4] Based on this data, staff made the following assumptions and used the following methodology to develop a statewide cost estimate for this program.

- *The actual amount claimed for reimbursement may increase and exceed the statewide cost estimate.*
    - There are currently 72 community college districts in California. Of those, only two districts filed initial reimbursement claims totaling $8,820,764 for this program for

[2] Exhibit B.

[3] See Exhibit B.

[4] Claims data reported as of May 17, 2013.

fiscal years 2001-2002 through 2011-2012. If other eligible claimants file late or amended initial claims, the amount of reimbursement claims may exceed the statewide cost estimate. Late initial claims for this program for fiscal years 2001-2002 through 2011-2012 may be filed until May 3, 2014.

- *The number of claims filed will vary from year to year based on the number of community college districts that are required to update their policies and procedures regarding discrimination complaint procedures during that fiscal year.*

  Community college districts are required to review the equal employment opportunity plan, excluding goals and timetables, at least every three years and if necessary revise the plan and submit it to the Chancellor's Office for approval. Since this is not an annual activity for each district, there will be some variation in the amount of claims filed from year to year.

- *The number of claims filed may increase as community college districts update and expand their use of information technology systems and equipment.*

  The test claim statutes require community college districts to comply with the accessibility requirements of section 508 of the Rehabilitation Act, and its implementing regulations in developing, procuring, maintaining, or using electronic or information technology (IT), which are otherwise only applicable to federal agencies. It is reasonable to assume that the integration of IT in community college programs will increase as new technology becomes available and as community colleges provide services such as online courses and other distance learning tools, as well as new classroom technologies, to a growing student population. As a result, the activities required to comply with the accessibility requirements of section 508 of the Rehabilitation Act and its implementing regulations, and the costs incurred as a result, are expected to increase as well.

- T*he number of reimbursement claims filed will vary from year to year depending on the number of discrimination complaints filed with the community college districts.*

  Community college districts are required to investigate complaints of unlawful discrimination (i.e., discrimination on the basis of ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation) in district programs or activities and to seek to resolve those complaints. This activity is driven by the complaints filed rather than by scheduled program requirements. The number of complaints may increase as enrollment does but may also decrease as a result of ongoing policy and program implementation aimed at curbing incidences of discrimination.

- *The total amount of reimbursement for this program may be lower than the statewide cost estimate because the SCO may audit and reduce reimbursement claims.*

  The SCO may conduct audits and reduce any claims it deems to be excessive or unreasonable.

<u>Methodology</u>

Fiscal Years 2001-2002 through 2011-2012

The statewide cost estimate for fiscal years 2001-2002 through 2011-2012 was developed by totaling the 33 reimbursement claims filed with the SCO for these years, for a total of $8,820,764. This averages to $801,888 annually in costs for the state over this eleven-year period. Following is a breakdown of estimated total costs per fiscal year:

Fiscal Year	Number of Claims Filed with SCO	Estimated Cost
2001-2002	3	$397,260
2002-2003	3	$490,407
2003-2004	3	$490,536
2004-2005	3	$605,753
2005-2006	3	$672,353
2006-2007	3	$756,708
2007-2008	3	$1,002,349
2008-2009	3	$952,585
2009-2010	3	$934,866
2010-2011	3	$1,065,667
2011-2012	3	$1,452,280
TOTAL	**33**	**$8,820,764**

Staff Recommendation

Staff recommends the Commission adopt the proposed statewide cost estimate of **$8,820,764** for costs incurred in complying with the *Discrimination Complaint Procedures* program.

Hearing Date: July 26, 2013
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ITEM __

DRAFT STAFF ANALYSIS

AND

PROPOSED STATEWIDE COST ESTIMATE

$8,820,764

(Approximately $801,888 Annually)

Education Code Sections 66010.2, 66010.7, and 87102, as amended by Statutes 1988, Chapter 973 and Statutes 1991, Chapter 1198

California Code of Regulations, Title 5, Sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034, as added or amended by Register 92, Number 17; Register 96, Number 23; and Register 2002, Number 35

(Consolidated With)

Government Code Section 11135, as added or amended by Statutes 1992, Chapter 913; Statutes 1994, Chapter 146; Statutes 2001, Chapter 708; Statutes 2002, Chapter 1102

California Code of Regulations, Title 5, Sections 59320, 59322, 59324, 59326, 59327, 59328, 59330 , 59332, 59334, 59336, 59338, 59340, and 59342, as added or amended by Register 81, Number 16; Register 92, Number 17; Register 96, Number 23; Register 2001, Number 6; Register 2002, Number 13; and Register 2002, Number 35

Discrimination Complaint Procedures

02-TC-46

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

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

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Exhibit A

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 212, 212.5, 213, 214, 221.5, 221.7, 66010.2, 66010.7, 66016, 66030, 66251, 66252, 66261, 66261.5, 66262, 66262.5, 66263, 66264, 66270, 66271.7, 66281.5, 66290, 66291, 66292, 66292.3, 72011, 72012, 72013, 72014, 87101, and 87102

Statutes 1976, Chapter 1010; Statutes 1981, Chapter 470; Statutes 1982, Chapter 1117; Statutes 1983, Chapter 143; Statutes 1984, Chapter 1371; Statutes 1988, Chapters 973; Statutes 1990, Chapter 1372; Statutes 1991, Chapter 1198; Statutes 1998, Chapter 914; Statutes 1999, Chapter 587; and Statutes 2002, Chapter 1169

California Code of Regulations, Title 5, Sections 53001, 53002, 53003, 53004, 53005, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, 53033, 53034, and 54220

"Student Equity: Guidelines for Developing a Plan" Fall 2002, The Academic Senate for California Community Colleges (Appendix 1: Chancellor's Office "Student Equity Plan Review Procedures and Instructions"), (Appendix 3: Chancellor's Office "Student Equity: Regulations and Guidelines," Revised May 14, 1997, Adopted by the Academic Senate Fall 2002)

(Consolidated With)

Government Code Sections 11135, 11136, 11137, 11138, and 11139

Statutes 1977, Chapter 972; Statutes 1992, Chapter 913; Statutes 1994, Chapter 146; Statutes 1999, Chapter 591; Statutes 2001, Chapter 708; Statutes 2002, Chapter 300;

Case No.: 02-TC-46 and a portion of 02-TC-25 and 02-TC-31

Discrimination Complaint Procedures

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7

(Adopted March 24, 2011)

Statutes 2002, Chapter 1102

California Code of Regulations, Title 5, Sections 59300, 59303, 59304, 59310, 59311, 59320, 59322, 59324, 59326, 59327, 59328, 59329, 59330 , 59332, 59334, 59336, 59338, 59339, 59340, 59342, 59350, 59351, 59352, 59354, 59356, 59358, 59360, and 59362 Register 96, number 23; Register 2001, number 6; Register 2002, number 13; and Register 2002, number 35;

Filed on June 27, 2003 (02-TC-46), June 5, 2003 (02-TC-25), and June 13, 2003 (02-TC-31)

By Santa Monica Community College District, Los Rios Community College District, and West Kern Community College District, Claimants.

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on March 24, 2011. Keith Petersen appeared on behalf of Santa Monica Community College District, Los Rios Community College District, and West Kern Community College District. Susan Geanacou appeared on behalf of the Department of Finance.

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

The Commission adopted the staff analysis at the hearing by a vote of 6-1 to partially approve this test claim.

Summary of Findings

This test claim was filed by Santa Monica Community College District, Los Rios Community College District, and West Kern Community College District during the 2002-2003 fiscal year. The test claim addresses state antidiscrimination laws as they apply to community college districts and the procedures districts must use to address complaints of discrimination. The statutes, regulations, and alleged executive order that are alleged to impose reimbursable state-mandated activities by the claimants fall within five categories: (1) Student Equity Guidelines ("Student Equity: Guidelines for Developing a Plan" Fall 2002); (2) minimum conditions (Cal. Code Regs., tit. 5, §§ 51010 and 51026); (3) equal employment opportunity (Ed. Code, §§ 87101 and 87102; and Cal. Code Regs., Tit. 5, §§ 53001, 53002, 53003, 53004, 53005, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, 53033, and 53034); (4) student equity (Ed. Code, §§ 212, 212.5, 213, 214, 221.5, 221.7, 66010.2, 66010.7, 66016, 66030, 66251, 66252, 66261, 66261.5, 66262, 66262.5, 66263, 66264, 66270, 66271.7, 66281.5, 66290, 66291, 66292, 66292.3, and 72011-72014; and Cal. Code Regs., tit. 5, § 54220); and (5) discrimination

complaint procedures (Gov. Code, §§ 11135, 11136, 11137, 11138, 11139; and Cal. Code Regs., tit. 5, §§ 59300, 59303, 59304, 59310, 59311, 59320, 59322, 59324, 59326, 59327, 59328, 59329, 59330, 59332, 59334, 59336, 59338, 59339, 59340, 59342, 59350, 59351, 59352, 59354, 59356, 59358, 59360, and 59362).

The Commission makes the following findings:

- The "Student Equity Guidelines"
  The Student Equity Guidelines provides a reference for local academic senates in creating a student equity plan, the purpose of which is to achieve specified goals for access, retention, degree completion, basic skills completion, and transfer for the overall student population and for each population group of students.

  The claimants argue that the Student Equity Guidelines is an executive order. An executive order is defined by Government Code section 17516 as any order, plan, requirement, rule, or regulation issued by the Governor; any officer or official serving at the pleasure of the Governor; or any agency, department, board, or commission of state government. The "Student Equity Guidelines" was issued by the Academic Senate for the California Community Colleges, which is a nonprofit organization established through ratification by local academic senates or faculty councils. The Academic Senate for the California Community Colleges does not constitute an entity that can issue an executive order as defined by Government Code section 17516. Thus, the Commission finds that the "Student Equity Guidelines for Developing a Plan" does not constitute an executive order within the meaning of Government Code Section 17516 subject to article XIII B, section 6 of the California Constitution.

- Minimum Conditions (Cal. Code Regs., tit. 5, §§ 51010 and 51026)
  The claimants have pled all of the Education Code sections and title 5 regulations in the "minimum conditions," "equal employment opportunity" and "student equity" sections of this analysis as minimum conditions, satisfaction of which entitles a community college district to state aid. In addition, the claimants allege that the minimum conditions impose state-mandated activities that are reimbursable under article XIII B, section 6 of the California Constitution.

  The California Supreme Court held in *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) that when analyzing state mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[1] The court also held open the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion, where "'certain and severe … penalties' such as 'double … taxation' and other 'draconian' consequences,'"[2] would result if the local entity did not comply with the program.

  Based on the plain language of the code sections and title 5 regulations the Commission finds that only title 5, sections 51010 and 51026, which address equal employment

[1] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

[2] *Id*. at p. 751.

opportunity and student equity, constitute minimum conditions, satisfaction of which entitles a community college district to state aid.

Because community college districts perform the activities in title 5, sections 51010 and 51026, as minimum conditions for entitlement to state aid, and there is no legal requirement to become entitled to state aid, districts are not legally compelled to comply with sections 51010 and 51026. In addition, although a district may fail to comply with the minimum conditions, districts may still receive state aid. Thus, a failure to comply with the minimum conditions does not result in certain and severe consequences. As a result, community college districts are not practically compelled to become entitled to state aid. Therefore, the Commission finds that title 5, sections 51010 and 51026, do not impose activities mandated by the state pursuant to *Kern High School Dist*.

- Equal Employment Opportunity (Ed. Code, §§ 87101 and 87102; and Cal. Code Regs., Tit. 5, §§ 53001, 53002, 53003, 53004, 53005, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, 53033, and 53034)
  The code sections and title 5 regulations pled in this section formerly provided for "affirmative action" in employment within community college districts. The court in *Connerly v. State Personnel Bd.* found the code sections to be unconstitutional, and provided dicta suggesting that parts of the title 5 regulations were also unconstitutional.[3] After the *Connerly* decision, the code sections and title 5 regulations were amended to address "equal employment opportunity," which sets forth the duty of community college districts to have a plan to ensure 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. The claimants have pled both the "affirmative action" version and the "equal employment opportunity" version of the code sections and title 5 regulations.

  The Chancellor's Office argues that many of the activities required by the test claim statutes and title 5 regulations are mandated by the United States Constitution and federal statutory law. The Chancellor's Office cites to the Equal Protection Clause of the Fourteenth Amendment, Title VII, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. In addition, the Chancellor's Office argues that the activities required by the test claim statutes and title 5 regulations are not new programs or higher levels of service, or are fully funded through the Employment Opportunity Fund. As a result, the Chancellor's Office argues that the claimants should be precluded from reimbursement for the test claim statutes and title 5 regulations pled in this section of the analysis.

  Article XIII B places spending limits on both the state and local governments; however, costs mandated by courts or federal law are expressly excluded from these spending limits. When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from

[3] *Connerly v. State Personnel Bd.*, *supra*, 92 Cal.App.4th 16.

local agencies' taxing and spending limitations" under article XIII B.[4] Also, the court in *San Diego Unified School Dist*. found that "for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the underlying federal mandate."[5] However, the court in *Hayes* also found when federal law imposes a mandate on the state, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless [of] whether the costs were imposed upon the state by the federal government."[6]

Statutes subsequently held unconstitutional can constitute a reimbursable state-mandated program. As a result, both the "affirmative action" and the "equal employment opportunity" code sections and title 5 regulations must be analyzed. In addition, although the title 5 regulations were amended after the *Connerly* decision, many of the activities remained the same. Thus, many of the findings apply to both the pre-*Connerly* title 5 regulations, and the post-*Connerly* title 5 regulations.

The Commission finds that although some of the activities constitute federal mandates, are not state-mandated pursuant to *Kern High School Dist*., or are not new as compared to the legal requirements in effect immediately prior to the enactment of the code sections and title 5 regulations, the activities listed under "Equal Employment Opportunity" of the "Conclusion" section constitute a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

In addition, the Commission finds that any funds received from the Equal Employment Opportunity Fund or the Faculty and Staff Diversity Fund constitute offsetting revenues if used for the reimbursable state-mandated activities imposed by the test claim statute and title 5 regulations pled in the "equal employment opportunity" section of this analysis. In such instances, funds received from the Equal Employment Opportunity Fund would constitute offsetting revenue for the reimbursable state-mandated activities imposed by title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034, as amended by Register 2002, number 35. Funds received from the Faculty and Staff Diversity Fund would constitute offsetting revenue for the reimbursable state-mandated activities imposed by Education Code section 87102, as amended by Statutes 1988, chapter 973, and title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53026, and 53034, as amended in Register 96, number 23. In the Budget Act of 2003, $1,747,000 was appropriated for the Equal Employment

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[4] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593 (*Hayes*) citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; see also, Government Code section 17513.

[5] *San Diego Unified School Dist. v. Commission on State Mandates* (2004), 33 Cal.4th 859, 890 (*San Diego Unified School Dist*.)

[6] *Hayes*, *supra*, 11 Cal.App.4th at p. 1594.

Opportunity Fund.[7] In the Budget Act of 2001 and the Budget Act of 2002, $1,859,000 was appropriated for the Faculty and Staff Diversity Fund.[8]

- Student Equity (Ed. Code, §§ 212, 212.5, 213, 214, 221.5, 221.7, 66010.2, 66010.7, 66016, 66030, 66251, 66252, 66261, 66261.5, 66262, 66262.5, 66263, 66264, 66270, 66271.7, 66281.5, 66290, 66291, 66292, 66292.3, and 72011-72014; and Cal. Code Regs., Tit. 5, § 54220)
  The code sections and title 5 regulation address various duties of community college districts including the provision of educational programs and services free from discrimination and harassment, and intersegmental collaboration and coordination between the California Community Colleges, University of California (UC) and California State University (CSU).

  The Chancellor's Office argues that any activities required by the test claim statutes and title 5 regulations are mandated by federal law or were already required by state law. The Chancellor's Office cites to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI, Title IX, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and California Civil Code section 51 (the Unruh Act). As a result, the Chancellor's Office argues that the claimants are precluded from reimbursement for the activities alleged to be mandated by the test claim statutes and title 5 regulations pled in this section of the analysis.

  The Commission finds that although some of the activities required by the test claim statutes and title 5 regulations constitute federal mandates, are not state-mandated pursuant to *Kern High School Dist*., or are not new as compared to legal requirements in effect immediately prior to the enactment of the test claim statutes and title 5 regulation, the activities listed under "Student Equity" of the "Conclusion" section constitute a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

- Discrimination Complaint Procedures (Gov. Code, §§ 11135, 11136, 11137, 11138, 11139; and Cal. Code Regs., Tit. 5, §§ 59300, 59303, 59304, 59310, 59311, 59320, 59322, 59324, 59326, 59327, 59328, 59329, 59330, 59332, 59334, 59336, 59338, 59339, 59340, 59342, 59350, 59351, 59352, 59354, 59356, 59358, 59360, and 59362)
  These Government Code sections and title 5 regulations set forth the duty of community college districts to establish a process to investigate alleged acts of discrimination in violation of state and federal antidiscrimination laws.

  Finance argues that the code sections and title 5 regulations pled by the claimants implement federal law or are required by a ballot measure, and as a result, the claimants

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[7] The Budget Act of 2003 (Stats. 2003, ch. 157) for the 2003-2004 fiscal year (starting July 1, 2003), scheduled $1,747,000 for the Equal Employment Opportunity Fund. See line item 6870-101-0001, schedule 14.

[8] The Budget Act of 2001 (Stats. 2001, ch. 106) for the 2001-2002 fiscal year (starting July 1, 2001), and the Budget Act of 2002 (Stats. 2002, ch. 379) for the 2002-2003 fiscal year (starting July 1, 2002), scheduled $1,859,000 for the Faculty and Staff Diversity Fund. See line item 6870-101-0001, schedule 14.

are not entitled to reimbursement for any activities alleged to be mandated by the code sections or title 5 regulations.

Government Code section 17556, subdivision (f), prohibits a finding of costs mandated by the state for duties that are necessary to implement or expressly included in a ballot measure approved by the voters in a state-wide or local election.[9] The court in *California School Boards Association v. State of California*, found that duties imposed by a test claim statute or executive order that are not expressly included in a ballot measure approved by the voters in a statewide or local election are necessary to implement the ballot measure pursuant to Government Code section 17556, subdivision (f), when the additional requirements imposed by the state are intended to implement the ballot measure mandate, and the costs are, in context, de minimis such that the requirements are considered part and parcel of the underlying ballot measure mandate.[10]

The Commission finds that although some of the activities required by the Government Code sections and title 5 regulations constitute federal mandates, many of the activities exceed the mandates of federal law. Further, the Commission finds that the activities listed under "Discrimination Complaint Procedures" of the "Conclusion" section, which exceed federal law, constitute a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

The Commission further finds that the state-mandated new program or higher level of service is not necessary to implement or expressly included in a ballot measure approved by the voters in a state-wide or local election, and as a result, the Commission is not precluded from finding costs mandated by the state under Government Code section 17556, subdivision (f).

For the reasons discussed above, the Commission finds that the activities listed under the "Conclusion" section constitute a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Finally, the Commission finds that all other test claim statutes and regulations do not constitute a reimbursable state-mandated program because they either do not require any activities of community college districts, are mandated by federal law, are voluntary or are downstream of a voluntary activity, or are not new as compared to the legal requirements in effect immediately prior to their enactment.

BACKGROUND

On June 22, 2010, the Commission severed a portion of the consolidated test claim *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), and consolidated the severed portion with

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[9] Government Code section 17556, subdivision (f). See *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, finding that the language, "reasonably within the scope of," to be violative of the California Constitution.

[10] *California School Boards Association v. State of California*, *supra*, 171 Cal.App. 4th at p. 1217.

the *Discrimination Complaint Procedures* (02-TC-46) test claim.[11] The *Discrimination Complaint Procedures* consolidated test claim addresses state antidiscrimination laws as they apply to community college districts.[12] The test claim alleges that community college districts have incurred costs mandated by the state, due to the enactment and amendment of 36 code sections and 44 related title 5 regulations,[13] as well as the "Student Equity: Guidelines for Developing a Plan," issued by the Academic Senate for California Community Colleges in Fall 2002 (Student Equity Guidelines). The code sections and regulations will be addressed in four sections: (1) minimum conditions; (2) equal employment opportunity; (3) student equity; and (4) discrimination complaint procedures.

The "minimum conditions" section addresses title 5, sections 51010 and 51026, which are part of a larger regulatory scheme (Cal. Code Regs., tit. 5, §§ 51000-51027) setting forth "minimum conditions, satisfaction of which entitles a district maintaining community colleges to receive state aid for the support of its community colleges."[14] Although sections 51010 and 51026 address issues that are also discussed in the "equal employment opportunity" and "student equity" sections of this analysis, title 5, sections 51010 and 51026, will not be analyzed in those sections of this analysis because both title 5 regulations raise the same dispositive issue. Specifically, the "minimum conditions" section of this analysis will analyze whether minimum conditions, satisfaction of which entitles a community college district to state aid, impose state-mandated activities.

The "equal employment opportunity" section addresses Education Code sections 87101 and 87102, and California Code of Regulations, title 5, sections 53001-53006, 53020-53027, 53030, and 53033-53034. These code sections and regulations, which used to provide for "affirmative

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[11] The consolidated test claim *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31) consists of the *Notice to Students* (02-TC-25) test claim filed on June 5, 2003, and the *Minimum Conditions for State Aid* (02-TC-31) test claim filed on June 13, 2003. The portions of the consolidated *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31) test claim that were severed and consolidated with this test claim consist of the "Student Equity Guidelines" and the Education Code sections and title 5 regulations that are discussed in the "minimum conditions," "equal employment opportunity," and "student equity" sections of this analysis. Specifically, Education Code sections 212, 212.5, 213, 214, 221.5, 221.7, 66010.2, 66010.7, 66016, 66030, 66251, 66252, 66261, 66261.5, 66262, 66262.5, 66263, 66264, 66270, 66271.7, 66281.5, 66290, 66291, 66292, 66292.3, 72011, 72012, 72013, 72014, 87101, and 87102; and California Code of Regulations, title 5, sections 53001, 53002, 53003, 53004, 53005, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, 53033, 53034, and 54220.

[12] Due to the nature of the record for the *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31) test claim, staff has incorporated the whole record of the *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31) test claim, rather than separating portions of the record to incorporate with the *Discrimination Complaint Procedures* record. As a result, when referencing a document from the *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31) test claim, the analysis will cite to *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), and then will identify the specific exhibit or page in the *Minimum Conditions for State Aid* record.

[13] References to "title 5" are to the California Code of Regulations, unless otherwise stated.

[14] California Code of Regulations, title 5, section 51000.

action" in employment within community college districts, set forth the duty of community college districts to have a plan to ensure 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.

The "student equity" section addresses Education Code sections 212, 212.5, 213, 214, 221.5, 221.7, 66010.2, 66010.7, 66016, 66030, 66251, 66252, 66261, 66261.5, 66262, 66262.5, 66263, 66264, 66270, 66271.7, 66281.5, 66290, 66291, 66292, 66292.3, and 72011-72014; and title 5, section 54220. The code sections and regulation address various duties of community college districts including the provision of educational programs and services free from discrimination and harassment; and intersegmental collaboration and coordination between the California Community Colleges, University of California (UC), and California State University (CSU).

The "discrimination complaint procedures" section address Government Code sections 11135, 11136, 11137, 11138, 11139; and title 5, sections 59300, 59303, 59304, 59310, 59311, 59320, 59322, 59324, 59326, 59327, 59328, 59329, 59330, 59332, 59334, 59336, 59338, 59339, 59340, 59342, 59350, 59351, 59352, 59354, 59356, 59358, 59360, and 59362. These code sections and regulations set forth the duty of community college districts to establish a process to investigate alleged acts of discrimination in violation of state and federal antidiscrimination laws.

A. Claimants' Position

The claimants allege that the test claim statutes, regulations and alleged executive order impose reimbursable state-mandated activities on community college districts involving the provision of equal employment opportunity, equal opportunity in community college programs and a discrimination complaint procedure.

The claimants acknowledge that some funding may have or has been received by community college districts for some of the claimed activities. However, the claimants question the sufficiency of this funding, arguing that to the extent that funding was made available, is applicable, and continues to be made available each subsequent year, such funding might reduce the reimbursable costs, but does not preclude an initial determination of whether a reimbursable mandate exists.[15]

The claimants filed comments, dated April 30, 2004 and May 5, 2004, in rebuttal to the comments by the Chancellor's Office and the Department of Finance regarding the test claim.[16] On March 1, 2011 the claimants filed comments on the draft staff analysis. The claimants' comments generally provide: (1) an abandonment of the claimants' request for reimbursement for state-mandated activities imposed by the equal employment opportunity statutes and regulations as amended by Statutes 1988, chapter 973, and Register 96, number 23; (2) a disagreement with the standard of review the Commission uses to determine whether a program is new or imposes a higher level of service; (3) a disagreement with portions of the federal mandates analysis; (4) a disagreement with all of the "minimum conditions" analysis; and (5) a

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[15] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at pgs. 385-386.

[16] Claimant Response to Chancellor's Office and Finance Comments on 02-TC-46, dated April 30, 2004. See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Claimant Response to Chancellor's Office Comments on Test Claim 02-TC-31, May 5, 2004.

disagreement with some of the findings that some of the test claim statutes and regulations in the "equal employment opportunity," "student equity," and "discrimination complaint procedures" sections of the analysis do not impose any state-mandated activities.[17] The claimants' arguments will be addressed as necessary in the discussion below.

B. California Community Colleges-Chancellor's Office Position (Chancellor's Office)

On March 11, 2004, the Chancellor's Office submitted comments on the "minimum conditions," "equal employment opportunity" and "student equity" sections.[18] On that same date, the Chancellor's Office submitted comments on the "discrimination complaint procedures" section.[19]

Regarding the "minimum conditions," "equal employment opportunity" and "student equity" sections, the Chancellor's Office argues that any claim for reimbursement in these sections must be denied because the alleged state-mandated activities are required by federal law, some of the alleged state-mandated activities are rules of general applicability and some of the alleged state-mandated activities are downstream activities triggered by a district's decision to receive funding pursuant to a voluntary program.[20]

Regarding the "discrimination complaint procedures" section, the Chancellor's Office agrees with the claimants that Government Code sections 11135-11139, and the regulations adopted by the Board of Governors to implement the code sections, create a reimbursable state mandate.[21] The Chancellor's Office notes that it notified the Department of Finance (Finance) that the regulations would impose a mandate on community college districts prior to the adoption of the regulations, and that Finance suggested that the regulations did not create a mandate. In the event that the regulations did impose a mandate on community college districts, Finance suggested that the Chancellor's Office pursue reimbursement funding from a source other than the Governor's Budget. The Chancellor's Office indicates that "As nearly as we can determine … no funds were provided at that time or at any time thereafter."[22]

C. Department of Finance's Position

On March 23, 2004, Finance submitted comments on the "discrimination complaint procedures" section, asserting that the section should be denied in its entirety.[23] Finance asserts that the code sections and regulations pled by the claimants implement federal law or are required by a ballot measure, and that the claimants have failed to distinguish the requirements of the code sections and regulations from those required by federal law or by California voters. As a result, Finance

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[17] Claimant Comments on Draft Staff Analysis, dated March 1, 2011.

[18] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on 02-TC-31, dated March 11, 2004," p. 10-12, and 19-21.

[19] Chancellor's Office Comments on 02-TC-46, dated March 11, 2004.

[20] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on 02-TC-31, dated March 11, 2004," at pgs. 10-12 and 19-21.

[21] Chancellor's Office Comments on 02-TC-46, *supra*, at pgs. 1-2.

[22] *Id*. at pg. 2.

[23] Department of Finance comments on 02-TC-46, dated March 11, 2004.

argues that the claimants are not entitled to costs pursuant to Government Code section 17556, subdivisions (c) and (f).

On February 8, 2011, Finance submitted comments on the draft staff analysis. Finance disagrees with the conclusion that Government Code section 11135, subdivision (d)(2), imposes a reimbursable state-mandated activity. Government code section 11135, subdivision (d)(2), addresses compliance with federal law regarding discrimination on the basis of disability when developing, procuring, maintaining, or using electronic or information technology. Finance argues that the plain language of subdivision (d)(2) does not impose any activities on community college districts, because the term "state governmental activities" clearly indicates that the subdivision applies only to the state.[24] Finances arguments will be addressed in the analysis below.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6, of the California Constitution[25] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[26] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[27] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[28] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[29]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state

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[24] Department of Finance comments on the draft staff analysis, dated February 8, 2011.

[25] Article XIII B, section 6, subdivision (a), provides: (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected; (2) Legislation defining a new crime or changing an existing definition of a crime; or (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[26] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[27] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[28] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[29] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.)*; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 *(Lucia Mar)*.

policy, but does not apply generally to all residents and entities in the state.[30] To determine if the program is new or imposes a higher level of service, the test claim statutes and executive orders must be compared with the legal requirements in effect immediately before the enactment.[31] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[32] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[33]

In the claimants' March 1, 2011 comments, the claimants assert that the correct standard of review is to compare the statutes pled on the effective date of the test claim filing to the status of the law as of December 31, 1974.[34] The claimants base this argument from the definition of "costs mandated by the state" contained in Government Code section 17514. However, the California Supreme Court in *San Diego Unified School Dist.* defined "new program or higher level of service" as the requirements being "new in comparison with the preexisting scheme in view of the circumstances that they did not exist prior to the enactment of" statutes pled in the test claim.[35] Thus, pursuant to the Supreme Court's decision in *San Diego Unified School Dist*., the Commission must compare the test claim statutes and executive orders pled with the legal requirements in effect immediately before the enactment.

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[36] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[37]

The following discussion will first address whether the "Student Equity Guidelines for Developing a Plan" constitutes an "executive order" within the Commission's jurisdiction. Second, the discussion will address whether the test claim statutes and title 5 regulations constitute state-mandated new programs or higher levels of service. That discussion will be broken up into four areas: (1) Minimum Conditions; (2) Equal Employment; (3) Student Equity;

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[30] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

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

[32] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

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

[34] Claimant Comments on Draft Staff Analysis, *supra*, p. 2.

[35] *San Diego Unified School Dist., supra,* 33 Cal.4th at p. 878.

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

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

and (4) Discrimination Complaint Procedures. Finally, the discussion will address whether any state-mandated new programs or higher levels of service impose costs mandated by the state.

A. The "Student Equity Guidelines for Developing a Plan" does not constitute an executive order within the meaning of Government Code section 17516 subject to article XIII B, section 6 and therefore is not within the Commission's jurisdiction

Government Code section 17516 defines "executive order" as:

> [A]ny order, plan, requirement, rule, or regulation issued by any of the following:
>
> (a) The Governor.
>
> (b) Any officer or official serving at the pleasure of the Governor.
>
> (c) Any agency, department, board, or commission of state government.

The claimants have pled the fall 2002 "Student Equity Guidelines for Developing a Plan," including Appendices 1 and 3, issued by the Academic Senate for California Community Colleges as an executive order subject to reimbursement under article XIII B, section 6 of the California Constitution.[38]

Incorporated as a 501(c)(6) nonprofit organization in 1970,[39] the Academic Senate for California Community Colleges, "established through ratification by local academic senates or faculty councils," is recognized by the Board of Governors as the representative of community college academic senates or faculty councils before the Board of Governors or the Chancellor's Office.[40] The Academic Senate for California Community Colleges is not the Governor; does not serve at the pleasure of the Governor; nor does it constitute an agency, department, board, or commission of state government. As a result, the "Student Equity Guidelines for Developing a Plan" does not constitute an executive order.

In regard to Appendices 1 and 3, there is no evidence in the record to indicate that they are documents independent of the Academic Senate for California Community Colleges' "Student Equity Guidelines for Developing a Plan" which, as discussed above, is not an executive order. The claimants refer to Appendices 1 and 3 as "Appendix 1: *Chancellor's Office* 'Student Equity Plan Review Procedures and Instructions,'" and "Appendix 3: *Chancellor's Office* 'Student Equity: Regulations and Guidelines,' Revised May 14, 1997, adopted by the Academic Senate

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[38] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31."

[39] Academic Senate for California Community Colleges, *About the Academic Senate*, <http://www.asccc.org/about> [as of September 2, 2010]. "501(c)(6) nonprofit organization" refers to Title 26 United States Code 501 (c)(6) which exempts from taxation, "Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

[40] California Code of Regulations, Title 5, section 53206, Register 2006, number 17 (Mar. 15, 2006).

Fall 2002."[41] However, the Academic Senate for California Community Colleges identifies Appendices 1 and 3 only as "Appendix 1: Student Equity Planreview [*sic*] Procedures and Instructions" and "Appendix 3: Student Equity: Regulations & Guidelines."[42]

Although the Academic Senate for California Community Colleges identifies the sources of the information in Appendices 1 and 3 as the Chancellor's Office and/or the Board of Governors,[43] there is no evidence in the record to indicate that Appendices 1 and 3 are documents *issued* by the Chancellor's Office and/or the Board of Governors and not documents containing information from the Chancellor's Office and/or the Board of Governors issued by the Academic Senate for California Community Colleges. In addition, the review procedures and instructions found in Appendix 1 are directed at and were used by the Chancellor's Review Committee, and therefore, are not orders issued to community college districts. In regard to Appendix 3, the overview and title of the appendix indicate that the content of Appendix 3 are only guidelines and that they "are not part of the regulations and, therefore, do not have the force and effect of law."[44] As a result, Appendices 1 and 3 of the Academic Senate for California Community Colleges' "Student Equity Guidelines for Developing a Plan" do not constitute executive orders within the meaning of Government Code section 17516, and therefore, are not within the Commission's jurisdiction.

B. Not all of the test claim statutes and regulations mandate a new program or higher level of service subject to article XIII B, section 6 of the California Constitution

To be subject to article XIII B, section 6 of the California Constitution, the test claim statutes and regulations must: (1) mandate a new activity upon the claimant, which (2) constitutes a new program or higher level of service.

To meet the first prong, the language of the test claim statutes and regulations must mandate an activity or task on a local governmental entity or school district. If the language does not mandate or require the claimant to perform a task, article XIII B, section 6, does not apply.

> In statutory construction cases, our fundamental task is to ascertain the intent of lawmakers so as to effectuate the purpose of the statute. [Citations.] We begin by examining the statutory language, giving the words their usual and ordinary meaning. [Citations.] If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs.[45]

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[41] Emphasis added.

[42] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31." Specifically, Exhibit 5 "Student Equity Guidelines for Developing a Plan, Table of Contents," issued by the Academic Senate for the California Community Colleges.

[43] *Id*. at p. 5 and Appendix 3.

[44] *Id*. at Appendix 3.

[45] *Estate of Griswold* (2001) 25 Cal.4th 904, 910-911.

This rule of statutory construction is applicable to administrative regulations, as courts have held that, in general, the same rules of construction apply when interpreting administrative regulations as apply when interpreting statutes.[46]

In addition, the California Supreme Court held in *Kern High School Dist*. that when analyzing state mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[47] The court also held open the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion; where "'certain and severe … penalties', such as 'double … taxation' and other 'draconian' consequences,'"[48] would result if the local entity did not comply with the program.

In order for state-mandated activities to constitute a "new program or higher level of service" the activities must carry out the governmental function of providing a service to the public, or impose unique requirements on local governments that do not apply to all residents and entities in the state in order to implement a state policy.[49] In addition, the requirements must be new in comparison with the pre-existing scheme and must be intended to provide an enhanced service to the public.[50] To make this determination, the requirements must initially be compared with the legal requirements in effect immediately prior to the mandate's enactment.[51]

When making this comparison courts have held:

> When a statute, although new in form, re-enacts an older statute without substantial change, even though it repeals the older statute, the new statute is but a continuation of the old. There is no break in the continuous operation of the old statute, and no abatement of any of the legal consequences of acts done under the old statute. Especially does this rule apply to the consolidation, revision, or codification of statutes, because, obviously, in such event the intent of the Legislature is to secure clarification, a new arrangement of clauses, and to delete superseded provisions, and not to affect the continuous operation of the law.[52]

For ease of discussion, the test claim statutes and regulations will be separated and analyzed according to the following sections: (1) minimum conditions; (2) equal employment opportunity; (3) student equity; and (4) discrimination complaint procedures.

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[46] *Cal. Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 292.

[47] *Kern High School Dist*., *supra*, 30 Cal.4th 727, 743.

[48] *Id*. at p. 751, quoting *City of Sacramento v. California* (1990) 50 Cal.3d 51, 74 (*City of Sacramento*).

[49] *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56.

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

[51] *Ibid*.

[52] *In re Dapper* (1969) 71 Cal.2d 184, 189-190, quoting *Sobey v. Molony* (1940) 40 Cal.App.2d 381, 385.

(1) Minimum Conditions (Cal. Code Regs., tit. 5, §§ 51010 and 51026)

This section addresses title 5, sections 51010 and 51026, which are part of a larger regulatory scheme consisting of title 5, sections 51000-51027 that set forth activities addressing various areas of community college operation and formation. This regulatory scheme was adopted pursuant to Education Code section 70901, subdivision (b)(6), to set forth the minimum conditions, satisfaction of which entitle community college districts to state aid. As noted above, sections 51010 and 51026 set forth activities associated with "equal employment opportunity" and "student equity" in community colleges, but are being analyzed separately from the "equal employment opportunity" and "student equity" sections of this analysis because of the unique issues associated with "minimum conditions" that do not apply to the Education Code sections and the other title 5 regulations.

The claimants, however, have pled all of the Education Code sections and regulations in the "equal employment opportunity" and "student equity" sections of this analysis, including title 5, sections 51010 and 51026, as "minimum conditions" established pursuant to Education Code section 70901, subdivision (b)(6). As a result, prior to analyzing whether title 5, sections 51010 and 51026, constitute a reimbursable state-mandated new program or higher level of service, it is necessary to determine whether the remaining Education Code sections and regulations in the "equal employment opportunity" and "student equity" sections of this analysis constitute "minimum conditions" established pursuant to Education Code section 70901, subdivision (b)(6).

a. <u>Not all of the Education Code sections and administrative regulations pled by the claimants constitute "minimum conditions" established pursuant to Education Code section 70901, subdivision (b)(6)</u>

Education Code section 70901 provides in relevant part:

> [¶] … [¶]
>
> (b) … the board of governors shall provide general supervision over community college districts, and shall, in furtherance thereof, perform the following functions:
>
> (1) Establish minimum standards as required by law, including, but not limited to, the following:
>
> (A) Minimum standards to govern student academic standards relating to graduation requirements and probation, dismissal, and readmission policies.
>
> (B) Minimum standards for the employment of academic and administrative staff in community colleges.
>
> (C) Minimum standards for the formation of community colleges and districts.
>
> (D) Minimum standards for credit and noncredit classes.
>
> (E) Minimum standards governing procedures established by governing boards of community college districts to ensure faculty, staff, and students the right to participate effectively in district and college governance, and the opportunity to express their opinions at the campus level and to ensure that these opinions are given every reasonable consideration, and the right of academic senates to assume

> primary responsibility for making recommendations in the areas of curriculum and academic standards.
>
> [¶] … [¶]
>
> (6) Establish minimum conditions entitling districts to receive state aid for support of community colleges. In so doing, the board of governors shall establish and carry out a periodic review of each community college district to determine whether it has met the minimum conditions prescribed by the board of governors.
>
> [¶] … [¶].

When discussing the regulations pled by the claimants, the Chancellor's Office makes no distinction between "minimum standards" adopted under Education Code section 70901, subdivision (b)(1) and "minimum conditions" adopted under Education Code section 70901, subdivision (b)(6).[53] The claimants, however, argue that there is a distinction between the establishment of "minimum conditions" and the establishment of "minimum standards."[54]

Generally, when interpreting statutory language the plain meaning of the language governs.[55] In addition, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning.[56] "Standard" is defined as, "A degree or level of requirement, excellence, or attainment."[57] In contrast, "condition" is defined as, "A proposition upon which another proposition depends; the antecedent of a conditional proposition."[58] The Legislature's decision to use "standard" in one section and "condition" in another, and the different meanings of these words, lead to the presumption that a distinction exists between "minimum standards" and "minimum conditions" as used in section 70901, subdivisions (b)(1) and (b)(6).

In addition to the distinction between "minimum standards" and "minimum conditions," the claimants further assert that the "minimum standards" established by the Board of Governors under Education Code section 70901, subdivision (b)(1), "are *only* applicable to" the areas of community college operation set forth by subdivisions (b)(1)(A) – (E).[59] The claimants argue that the test claim statutes and executive orders claimed in this test claim do not constitute

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[53] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on Test Claim 02-TC-31, dated March 11, 2004," p. 4.

[54] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Claimant Response to Chancellor's Office Comments on Test Claim, 02-TC-31, dated May 5, 2004," p. 8.

[55] *Estate of Griswold*, *supra*, 25 Cal.4th at pgs. 910-911.

[56] *Campbell v. Zolin* (1995) 33 Cal.App.4th 489, 497.

[57] American Heritage Dictionary (new college ed. 1979) p. 1256.

[58] American Heritage Dictionary (new college ed. 1979) p. 277.

[59] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Response to Chancellor's Office Comments on Test Claim, 02-TC-31, dated May 5, 2004," at p. 12. (Emphasis added.)

"minimum standards." Claimants state "[t]his test claim is about the 'minimum conditions' for the receipt of state aid which were established in 1988."[60]

Although the Commission agrees that there is a distinction between the "minimum standards" established pursuant to subdivision (b)(1) and the "minimum conditions" established pursuant to subdivision (b)(6), the limited scope of subdivision (b)(1) and the broad scope of subdivision (b)(6) asserted by the claimants is contrary to the plain language of Education Code section 70901 and the plain language of the regulations implementing subdivision (b)(6).

Subdivision (b)(1) provides, in relevant part, that the Board of Governors shall "[e]stablish minimum standards as required by law, *including, but not limited to*, [subdivision (b)(1)(A) – (E)]."[61] Thus, contrary to the claimants' assertion that the minimum standards established pursuant to Education Code section 70901, subdivision (b)(1), "are only applicable to" the areas of community college operation set forth in subdivisions (b)(1)(A) – (E), subdivision (b)(1) provides the Board of Governors with broad authority to establish "minimum standards" regarding the general operation of community colleges.

Although the language of Education Code section 70901, subdivision (b)(6), also provides the Board of Governors with broad authority to establish "minimum conditions" entitling districts to receive state aid, within the regulations that implement subdivision (b)(6) the Board of Governors has chosen to limit the scope of what constitutes a "minimum condition." Title 5, section 51000, which sets forth the scope of what constitutes minimum conditions established by the Board of Governors pursuant to Education Code section 70901, subdivision (b)(6), provides:

> 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. (Emphasis added.)

Based on the plain language of section 51000, the scope of what "comprise[s] the rules and regulations fixing and affirming the minimum conditions, satisfaction of which entitles a district … to receive state aid" is limited to the "provisions of this Chapter." The "Chapter" referenced in section 51000, consists of title 5, sections 51000, 51002, 51004, 51006, 51008, 51010, 51012, 51014, 51016, 51018, 51020 – 51027, 51100, and 51102. As a result, pursuant to the plain language of section 51000, only title 5, sections 51000, 51002, 51004, 51006, 51008, 51010, 51012, 51014, 51016, 51018, 51020 – 51027, 51100, and 51102 comprise the rules and regulations fixing and affirming the minimum conditions, satisfaction of which entitles a community college district to receive state aid.

The Office of Administrative Law, however, issued a Nomenclature Cross-Reference for title 5,[62] effective April 1, 1990, that provides:

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[60] *Id*. at p. 13.

[61] Education Code section 70901, subdivision (b)(1). (Emphasis added.)

[62] Nomenclature Cross-Reference was issued under the authority of the Office of Administrative Law pursuant to Government Code sections Government Code section 11344.

> Effective April 1, 1990, the Office of Administrative Law authorized the renaming of the hierarchical headings used within the Titles of the *California Code of Regulations*. Until the agencies implement these changes in their regulations, use the following Cross-Reference Table for the new organizational headings used in this Title.[63]

The Cross-Reference Table then provides that "Part" should be read as "Division," "Division" as "Chapter," "Chapter" as "Subchapter," "Subchapter" as "Article," "Article" as "Subarticle," and "Section" remains as "Section."

Title 5, sections 51000, 51002, 51004, 51006, 51008, 51010, 51012, 51014, 51016, 51018, 51020 – 51027, 51100, and 51102, are located under "Chapter 2. Community College Standards." "Chapter 2. Community College Standards" consists of two subchapters, "Subchapter 1. Minimum Conditions," and "Subchapter 2. Investigation and Enforcement of Minimum Conditions." "Subchapter 1. Minimum Conditions" consists of sections 51000, 51002, 51004, 51006, 51008, 51010, 51012, 51014, 51016, 51018, and 51020 – 51027. "Subchapter 2. Investigation and Enforcement of Minimum Conditions" consists of sections 51100 and 51102.

From a plain reading of section 51000 it is unclear whether the Board of Governors has implemented the changes in hierarchical headings in section 51000. As a result, an ambiguity arises as to whether the provisions of "Chapter 2. Community College Standards" (Cal. Code Regs. §§ 51000 – 51102), or only the provisions of "Subchapter 1. Minimum Conditions," (Cal. Code Regs. §§ 51000 – 51027), "comprise the rules and regulations fixing and affirming the minimum conditions . . . ."

In order to determine whether the Board of Governors implemented the changes in hierarchical headings, it is necessary to look at the hierarchical headings and the language used in section 51000 prior to and after the effective date of the Nomenclature Cross-Reference for title 5. Immediately prior to the effective date of the Nomenclature Cross-Reference for title 5, section 51000 was part of "Chapter 1. Minimum Standards," while sections 51100 and 51102 were part of "Chapter 2. Investigation and Enforcement of Minimum Standards."[64] In 1991, "Chapter 1. Minimum Standards" and "Chapter 2. Investigation and Enforcement of Minimum Standards" were brought under "Chapter 2. Community College Standards" and were renamed to "Subchapter 1. Minimum Conditions" and "Subchapter 2. Investigation and Enforcement of Minimum Conditions" by the Office of Administrative Law.[65]

However, the language of section 51000 continued to provide, before and after the effective date of the Nomenclature Cross-Reference, "The provisions of this *chapter* … ."[66] As a result, it is evident that the Board of Governors has not implemented the changes in hierarchical headings in regard to section 51000, and thus, pursuant to the Nomenclature Cross-Reference for title 5,

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[63] Office of Administrative Law, *Nomenclature Cross Reference*, effective April 1, 1990.

[64] California Code of Regulations, title 5, sections 51000 and 51100 (Register 83, No. 29) (July 16, 1983).

[65] California Code of Regulations, title 5, sections 51000 and 51100 (Register 96, No. 23) June 7, 1991.

[66] California Code of Regulations, title 5, section 51000 has underwent subsequent amendments, and still provides that the "provisions of this *chapter*."

"Chapter" should be read as "Subchapter," thereby limiting the scope of what constitutes a "minimum condition" established pursuant to Education Code section 70901, subdivision (b)(6), to "Subchapter 1. Minimum Conditions."

Therefore, the Commission finds that the scope of what constitutes a "minimum condition," pursuant to Education Code section 70901, subdivision (b)(6), is limited to title 5, Chapter 2, Subchapter 1, sections 51000 – 51027 (as relevant to this analysis, title 5, sections 51010 and 51026). In addition, the Commission finds that the Education Code sections, and the remaining regulations pled by the claimants are outside of the scope of what constitutes a "minimum condition" pursuant to Education Code section 70901, subdivision (b)(6).

Now that it has been determined, as relevant to this analysis, that only title 5, sections 51010 and 51026, constitute "minimum conditions," it is necessary to determine whether these regulatory sections impose any state-mandated activities. As discussed below, the Commission finds that title 5, sections 51010 and 51026, do not impose any state-mandated activities.

b. California Code of Regulations, title 5, sections 51010, and 51026 do not impose any state-mandated activities

In reference to the regulatory scheme containing sections 51010 and 51026, (Cal. Code Regs., tit. 5, §§ 51000 – 51027), section 51000 provides:

> The provisions of this [Subchapter] [sections 51000 – 51027] 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.[67]

The Chancellor's Office and the claimants both describe the language of section 51000 as providing that most of the regulations pled by the claimants establish minimum conditions *for the receipt of* state aid.[68] Read in this manner, section 51000 conditions the receipt of state aid by community college districts on compliance with the minimum conditions. The resulting implication is that a failure to comply with the minimum conditions results in forgoing the receipt of state aid. However, this is not the case. A district that fails to comply with the minimum conditions may still receive state aid.

Contrary to the plain language of section 51000 and Education Code section 70901, subdivision (b)(6), the Chancellor's Office response to the 02-TC-25/02-TC-31 test claim appears to have interpreted the language of section 51000 as requiring compliance with the minimum conditions in order to *receive* state aid.[69] Although it is generally recognized that an agency's interpretation of its own regulations is given controlling weight by the courts, this weight is not given when the

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[67] California Code of Regulations, title 5, section 51000 (Register 95, No. 15 (April 14, 1995)).

[68] Claimant Comments on Draft Staff Analysis, *supra*, pgs. 7-9. See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on 02-TC-31, dated March 11, 2004;" "Chancellor's Office Comments on 02-TC-25, dated March 16, 2004, p. 8 - 10;" and "Test Claim Filing and Attachments for 02-TC-31."

[69] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on 02-TC-31, dated March 11, 2004."

agency's interpretation is plainly erroneous or inconsistent with the regulation.[70] In addition, an agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language which it aims to implement.[71] Title 5, section 51000 paraphrases Education Code section 70901, subdivision (b)(6), which provides that the Board of Governors are to, "[e]stablish minimum conditions *entitling* districts to receive state aid for support of community colleges."[72]

When interpreting regulations, if the terms of the regulation are unambiguous, the plain meaning of the language governs, and an intent that cannot be found in the words of the regulation cannot be found to exist.[73] Additionally, an interpretation of a regulation should not render any language mere surplusage, and the language must be considered in the context of the regulatory framework as a whole.[74]

The plain language of section 51000 indicates that sections 51010 and 51026 are minimum conditions, "satisfaction of which *entitles*" a community college district to state aid. The language does not provide that a community college district which has not satisfied the minimum conditions, and therefore is not *entitled* to state aid, will not receive state aid. This intent cannot be found to exist absent language indicating such intent. In addition, interpreting section 51000 as providing that sections 51010 and 51026 constitute minimum conditions *for the receipt* of state aid would render the language of section 51000 that provides, "satisfaction of which entitles," unnecessary and mere surplusage. Giving effect to the usual and ordinary import of this language leads to an interpretation of section 51000 as providing that satisfaction of the minimum conditions leads to an *entitlement* to state aid by a community college district.

The plain language interpretation of section 51000 is also consistent with the regulatory scheme regarding minimum conditions. Title 5, section 51102, which addresses enforcement of the minimum conditions by the Chancellor, provides that after the Chancellor has notified a district of the Chancellor's finding of the district's noncompliance with the minimum conditions, and the district has responded or the time for a response has lapsed, the Chancellor shall take one or more of the following actions:

> (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.

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[70] *U.S. v Larionoff* (1977) 431 U.S. 864, 872.

[71] *Gonzales v. Oregon* (2006) 546 U.S. 243, 257.

[72] Emphasis added.

[73] *Riebe v. Budget Financial Corp.* (1968) 264 Cal.App.2d 576, 585.

[74] *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 218.

The Chancellor has discretion on which action or actions to take upon a finding that a community college district is not in compliance with the "minimum conditions." Each of the actions that the Chancellor is authorized to take allows for the possible provision of state aid to a community college district. Accordingly, even if the Chancellor finds a community college district to be in noncompliance with sections 51010 and 51026, a community college district may still receive state aid. Thus, compliance with the minimum conditions (Cal. Code Regs., tit. 5, §§ 51000 – 51027) is a downstream activity of becoming *entitled* to receive state aid. As a result, the underlying issue that must be addressed to determine whether sections 51010 and 51026 mandate any activities is whether community college districts are mandated to become *entitled* to receive state aid, and not whether community college districts are mandated to *receive* state aid as discussed by the Chancellor's Office and the claimants.[75]

Pursuant to *Kern High School Dist*., the Commission must look at the underlying program to determine if a claimant's participation in the underlying program is legally compelled.[76] In addition, the court in *Kern High School Dist*. left open the possibility that a state mandate might be found in circumstances of practical compulsion, where a local entity faced certain and severe penalties as a result of noncompliance with a program that is not legally compelled.[77] The court in *Dept. of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, explained further that a finding of "practical compulsion" requires a concrete showing in the record that a failure to engage in the activities at issue will result in certain and severe penalties.[78]

The claimants argue that a "*Kern* analysis" is unnecessary and not relevant, because districts are legally compelled to comply with the minimum conditions.[79] However, there is nothing in the governing statutes, regulations, or in the record that community college districts are required to become entitled to state aid. As a result, community college districts do not face *legal* compulsion to become entitled to state aid.

In addition, even if the Chancellor finds a community college district to be in noncompliance with the minimum conditions (Cal. Code Regs., tit. 5, §§ 51000-51027), and therefore not entitled to receive state aid, the district may still receive state aid. This was the situation faced by San Mateo County Community College District, an example cited by the claimants.[80] In 2001 and 2002, San Mateo County Community College District appointed the Chancellor-Superintendent of the District without complying with section 51010, which requires as a condition to become entitled to state aid that community college districts substantially comply

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[75] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on 02-TC-31, dated March 11, 2004, p. 2;" "Chancellor's Office Comments on 02-TC-25, dated March 16, 2004, p. 9 – 10;" "Claimant Response to Chancellor's Office Comments on Test Claim, 02-TC-25, dated April 19, 2004, p. 13;" and "Claimant Response to Chancellor's Office Comments on Test Claim, 02-TC-31, dated May 5, 2004, pgs. 3-7.

[76] *Kern High School Dist.* (*supra*) 30 Cal.4th at 743.

[77] *Id*. at p. 731.

[78] *POBRA*, *supra*, 170 Cal.App.4th at pgs. 1366-1369.

[79] Claimant Comments on Draft Staff Analysis, *supra*, p. 8-9.

[80] *Id.* at p. 9.

with the equal employment opportunity regulations (Cal. Code Regs., tit. 5, § 53000 et seq.). The claimants note that "the Chancellor recommended a penalty of $550,513 for the perceived noncompliance in this one instance."[81]

However, in ultimately settling the matter the San Mateo County Community College District and the Chancellor's Office came to an agreement in which San Mateo County Community College District agreed to increased monitoring. The District did not lose *any* state aid.[82] Thus, there is no concrete evidence that a failure to comply with the minimum conditions results in certain and severe consequences. As a result, pursuant to *POBRA* community college districts do not face *practical* compulsion to comply with the minimum conditions.

The claimants argue that the draft staff analysis incorrectly uses one standard of review when discussing federal mandates and another standard when discussing practical compulsion by state laws.[83] The Commission disagrees. Although there is evidence of the possible results of not becoming entitled to state aid, there is no evidence of the certainty or severity of any consequence. The idea of practical compulsion was borrowed by the court in *Kern High School Dist*. from the federal mandates analysis in *City of Sacramento*,[84] and the court *POBRA* clarified the need for a concrete showing of certain and severe penalties.[85]

In *City of Sacramento* if the state failed to conform to federal law the certain result would be either double taxation of businesses within the state or the complete termination of the state's unemployment system, which the court determined to constitute certain and severe penalties.[86] In *Hayes v. Commission on State Mandates*, which is cited to in the federal mandates analyses below, the court found a federal mandate in a situation where districts had been sued in the past and faced future litigation with no real defense as an actual consequence of failing to comply with federal law that codified the equal protection rights of handicapped children, and thus compliance with the federal law would ultimately be compelled.[87] In making this finding the court noted that parents and organized groups representing handicapped children were becoming increasingly litigious in their efforts to secure appropriate education for handicapped children.[88] As an added consequence, districts that failed to comply with the federal law faced the possible loss of federal funds. Here, there is only a possible loss of funding, but no evidence of the certainty of this loss, as exemplified by San Mateo County Community College District. In addition, there is no evidence that districts face any other certain and severe consequence of not becoming entitled to state aid, such as litigation without any defense. Thus, the analysis of

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[81] *Ibid*.

[82] "Agreement" in the Matter between Chancellor of the California Community Colleges and the San Mateo County Community College District.

[83] Claimant Comments on Draft Staff Analysis, *supra*, pgs. 9-10.

[84] *Kern High School Dist*., *supra*. at p. 751, quoting *City of Sacramento*, *supra*, 50 Cal.3d at p. 74.

[85] *POBRA*, *supra*, 170 Cal.App.4th at pgs. 1367.

[86] *City of Sacramento*, *supra*, 50 Cal.3d at p. 74.

[87] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1589-1592 (*Hayes*).

[88] *Id.* at p. 1592.

practical compulsion by federal law is consistent with the analysis of practical compulsion by state law.

As a result, the Commission finds that title 5, sections 51010 and 51026, do not impose any state-mandated activities upon community college districts, and therefore do not mandate a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

(2) Equal Employment Opportunity (Ed. Code, §§ 87101 and 87102; and Cal. Code Regs., tit. 5, §§ 53001, 53002, 53003, 53004, 53005, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, 53033, and 53034)

This section addresses statutes and regulations pertaining to a community college district's equal employment opportunity programs, which seek to promote equal opportunity regardless of gender, ethnicity, or disability. Specifically, this section addresses Education Code sections 87101 and 87102, and title 5, sections 53001-53006, 53020-53027, 53030, and 53033-53034. The following analysis concludes that portions of the test claim statutes and the title 5 regulations constitute state-mandated new programs or higher levels of service.

The discussion immediately below will provide a background on the equal employment opportunity statutes and regulations including the fact that the original version of the statutes were found to be unconstitutional and were subsequently amended. This is important to this discussion because this occurred after the beginning of the reimbursement period (July 1, 2001). As a result, it must be determined whether statutes subsequently held unconstitutional can constitute a reimbursable state-mandated program.

Thus, the following discussion will address: (1) the background of the equal employment opportunity statutes and regulations; (2) whether statutes subsequently held unconstitutional can constitute a reimbursable state-mandated program; (3) whether the test claim statutes and regulations require any activities; (4) whether the requirements constitute federal mandates; (5) whether the test claim statutes impose state-mandated activities; and (6) whether the state-mandated activities constitute a new program or higher level of service.

a. Background

The first incarnation of the title 5 regulations was adopted by the Board of Governors of the California Community Colleges in 1977 and required community college districts to develop an "affirmative action employment program."[89] In 1978, Education Code sections 87100-87106 were enacted as "substantially a codification of [the] regulations adopted by the Board of Governors" that required the development of an affirmative action program.[90] In 1982, the title 5 regulations were repealed and replaced with regulations that more thoroughly set forth the duties regarding a district's affirmative action program, including the adoption of an affirmative action plan to implement the program.[91] In addition, the 1982 regulations listed Education Code

[89] California Code of Regulations, title 5, section 53003 (Register 77, No. 30) (Aug. 18, 1977).

[90] Statutes 1978, chapter 766, section 2.

[91] California Code of Regulations, title 5, section 53000 et seq. (Register 82, No. 6) (Mar. 3, 1982).

sections 87100 and 87105 as the authority and reference citations for the adoption of the regulations.[92]

In 1988, the Legislature added Education Code section 87107 which created the Faculty and Staff Diversity Fund in order to enable the California Community Colleges as a system to address the goal that the system's work force will reflect proportionately the adult population of the state.[93] In 1992 the title 5 regulations were repealed and replaced again, amending the purpose of the regulations to specifically state that the regulations implement and are to be read in conjunction with Education Code section 87100 et seq.[94] In 1996, the purpose of the title 5 regulations was amended to not only implement Education Code sections 87100 et seq., but to also be read in conjunction with other state and federal antidiscrimination laws.[95]

On September 4, 2001, Education Code sections 87100-87107 were held unconstitutional by the court in *Connerly v. State Personnel Bd*.[96] Although the court also notes that the regulations pled by the claimants in this test claim "do not come close to implementing [Education Code sections 87100-87107] in a constitutional manner," this statement and the subsequent discussion regarding the constitutionality of specific regulations does not constitute binding precedent because the regulations were not placed in issue in *Connerly v. State Personnel Bd*., nor were the statements in regard to the regulations necessary to the decision.[97] Thus, while Education Code sections 87100-87107 were held unconstitutional, and therefore void, title 5, section 53000 et seq., as existing prior to the decision, remained in place.

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[92] *Ibid*. Education Code sections 87100 and 87105, as added by Statutes 1978, chapter 767, set forth the Legislature's findings and declarations, and the duty and authority of the Board of Governors of the California Community Colleges to adopt all necessary rules and regulations to carry out the intent of Education Code sections 87100-87106.

[93] Statutes 1988, chapter 973. The Budget Act of 1989 (Stats. 1989, ch. 93) for the 1989-1990 fiscal year (starting July 1, 1989) apportioned $1,000,000 to the Faculty Staff Diversity Fund. The Budget Act of 1989 was the first budget act to appropriate money for the purpose of the Faculty Staff Diversity Fund. See line item 6870-101-001, schedule (h).

[94] California Code of Regulations, title 5, section 53000 (Register 92, No. 17) (April 24, 1992).

[95] California Code of Regulations, title 5, section 53000 (Register 96, No. 23) (June 30, 1996).

[96] *Connerly v. State Personnel Bd.* (2001) 92 Cal.App. 4th 16, 57-61.

[97] *Gogri v. Jack In The Box Inc.* (2008) 166 Cal.App.4th 255, providing, "Only statements necessary to the decision are binding precedents … [t]he doctrine of precedent … extends only to the ratio decidendi[, rule of law on which a court's decision is founded,] of a decision, not to supplementary or explanatory comments which might be included in an opinion. To determine the precedential value of a statement in an opinion, the language of that statement must be compared with the facts of the case and the issues raised." (*Ibid*. at p. 272.) In *Connerly v. State Personnel Bd*., the court's comments regarding the regulations were in response to the community colleges' argument that administrative regulations could save a facially invalid statutory scheme. After finding in the negative, the court proceeded to state that even if the regulations could save the statutory scheme, the regulations themselves do not implement the statutes in a constitutional manner. (*Connerly v. State Personnel Bd., supra*, 92 Cal.App.4th at 60-61.)

In response to the *Connerly v. State Personnel Bd*. decision, the Legislature repealed Education Code sections 87100-87107, as they were written prior to September 4, 2001, and added Education Code sections 87100-87103, and 87105-87108, with the enactment of Statutes 2002, chapter 1169. The post-*Connerly* Education Code sections removed race and gender conscious techniques used in promoting student and faculty diversity found unconstitutional in *Connerly v. State Personnel Bd.* In addition, the post-*Connerly* Education Code sections replaced the Staff and Faculty Diversity Fund with the Equal Employment Opportunity Fund. Also, the activities required by the code sections were made into conditions for receipt of funds from the Equal Employment Opportunity Fund.

On August 11, 2002, as the Legislature was seeking to repeal and replace Education Code sections 87100-87108, the Board of Governors amended its regulations which implemented former sections 87100-87107.[98] The amendments to the title 5 regulations removed all references to affirmative action, focusing more on equal employment opportunity and diversity. Also, these amendments removed language that could be interpreted as providing an improper preference or authorizing discrimination on an impermissible basis. In addition, the amendments removed the requirement of district goals or timetables for the hiring of minorities and women. Further, the amendments to the title 5 regulations removed almost all reference to Education Code sections 87100-87107, both in the stated purpose of the regulations and in the authority and reference citations of the regulations. As a result, pursuant to title 5, section 53000, the stated purpose of the regulations is to implement the other various state and federal antidiscrimination laws cited to in the 1996 amendment of section 53000.[99] Thus, from the language of the post-*Connerly* title 5 regulations, the regulations and Education Code section 87100 et seq. (Stats. 2002, ch. 1169) are separate efforts to address the same issue of equal employment opportunity.

The reimbursement period for the test claim statutes and regulations pled in this section of the analysis begins on July 1, 2001.[100] The claimants have pled Education Code sections 87101 and 87102, as they existed prior to the decision in *Connerly v. State Personnel Bd.* on September 4, 2001, and as repealed and replaced by Statutes 2002, chapter 1169, in response to

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[98] California Code of Regulations, title 5, section 53000 et seq. (Register 2002, No. 35).

[99] California Code of Regulations, title 5, section 53000 (Register 2002, No. 35) (August 11, 2002). Antidiscrimination laws cited to: Government Code sections 11135-11139.5, Education Code sections 66010.2, 66030, and 66250 et seq., Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794); the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.); and the Age Discrimination Act (42 U.S.C. § 6101).

[100] Government Code section 17557, subdivision (e), "A test claim shall be submitted on or before June 30 following the fiscal year in order to establish eligibility for reimbursement for that fiscal year." The claimants filed the *Notice to Students* (02-TC-25), and *Minimum Conditions for State Aid* (02-TC-31) test claims on June 5, 2003, and June 13, 2003. Thus, both test claims were submitted within the 2002-2003 fiscal year. As a result, the reimbursement period for these test claims begins with the 2001-2002 fiscal year which begins on July 1, 2001.

the decision.[101] The changes to Education Code section 87100 et seq. by Statutes 2002, chapter 1169, became operative on January 1, 2003.[102] In addition, the claimants have pled the regulations as "added in 1992 and last amended in 2002."[103, 104] The Commission has interpreted this to include any amendments to the regulations that occurred between 1992 and 2002, including those that occurred in 1996. These years coincide with amendments made to the regulations in Register 92, number 17; Register 96, number 23; and Register 2002, number 35. The operative date of the amendments made in Register 2002, number 35, was August 11, 2002.

Thus, two versions of Education Code sections 87101 and 87102 existed during the reimbursement period. One version existed between July 1, 2001 and September 4, 2001 and the other version existed after January 1, 2003. In addition two versions of the title 5 regulations existed during the reimbursement period. One version existed between July 1, 2001 and August 10, 2002 and the other version became operative on August 11, 2002.

b. Statutes Subsequently Held Unconstitutional Can Constitute a Reimbursable State-Mandated Program

As described above, two versions of Education Code sections 87101 and 87102 exist within the period of reimbursement (beginning July 1, 2001), one of which was held unconstitutional by the court in *Connerly v. State Personnel Bd.* on September 4, 2001. Thus, prior to addressing whether the code sections and regulations pled by the claimants constitute a state-mandated new program or higher level of service, it is necessary to determine whether Education Code sections 87101 and 87102, as they existed in the two-month period beginning at the start of the reimbursement period (July 1, 2001), and ending when they were held unconstitutional (September 4, 2001), can constitute a reimbursable state-mandated program during that limited time period.

The effect of an unconstitutional statute is a complex area of law, and no general rule can be cited with regard to the effectiveness of a statute while it was presumed constitutional. The traditional approach was that an unconstitutional statute is "void ab initio," that is, "[a]n unconstitutional statute is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[105] Under the traditional approach, no reimbursement would be required for activities required by Education Code sections 87101 and 87102 as they existed prior to being held unconstitutional on September 4, 2001. This approach has been criticized in later decisions, however, and the trend nationwide has been toward a more *equity*-oriented view that binding

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[101] Before being held unconstitutional in *Connerly v. State Personnel Bd.*, Education Code section 87101 was last amended by Statutes 1990, chapter 1302, and Education Code section 87102 was last amended by Statutes 1988, chapter 973.

[102] Government Code section 9600, "a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute."

[103] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at pgs. 46-52.

[104] Claimants have pled California Code of Regulations, title 5, section 53006, "as added in 1996 and last amended in 2002." *Id*. at pg. 48.

[105] *Norton v. Shelby County* (1886) 118 U.S. 425.

rights and obligations may be based on a statute that is subsequently declared unconstitutional, and that not every declaration of unconstitutionality is retroactive in its effect.[106]

Under California state mandates law, the determination as to whether a mandate exists is a question of law.[107] As stated in *County of Sonoma*, the Commission must strictly construe article XIII B, section 6 and not apply it as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.[108, 109] Nevertheless, the purpose of article XIII B, section 6, as revealed in the ballot measure adopting it, was to prevent the state from forcing programs on local governments without the state paying for them. In 2004, the California Supreme Court in the *San Diego Unified School Dist.* case reaffirmed the purpose of article XIII B, section 6, as follows:

> The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIII B explained section 6 to the voters: 'Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them.' (Citations omitted) (italics added.)[110]

Applying the court's ruling that the test claim legislation is unconstitutional retroactively to the original effective date of the legislation could have the effect of forcing programs and costs on local governments without the state paying for them, contrary to the purpose of Article XIII B, section 6. As a result, statutes subsequently held unconstitutional can constitute a reimbursable state-mandated program.

Because binding rights or obligations in the form of reimbursable mandates could have been created while the test claim legislation was presumed to be constitutional, an analysis on the merits should proceed in order to determine whether Education Code sections 87101 and 87102, as they existed between July 1, 2001 (the beginning of the reimbursement period) and September 4, 2001 (the date on which the code sections were held unconstitutional), did in fact mandate a new program or higher level of service and impose costs mandated by the state during that period of time.

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[106] *Chicot County Drainage District v. Baxter State Bank* (1940) 308 U.S. 371.

[107] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1279, citing *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[108] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280; see also *City of San Jose v. State of California (City of San Jose)* (1996) 45 Cal.App.4th 1802, 1816-1817, citing *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.

[109] The doctrine of equity in this sense means the "recourse to principles of justice to correct or supplement the law as applied to particular circumstances…" Equity is based on a system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law when the two conflict. (See Black's Law Dict. (7th ed., 1999) p. 561, col. 1.)

[110] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 875.

In the claimants' March 1, 2011 comments, the claimants state:

> Because of [the] 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 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 relevant statutes and regulations.[111]

The Commission must take jurisdiction over, and make findings on, the statutes and regulations pled in the test claim.[112] There is no process under the governing statutes or the Commission's regulations that provides for the abandonment of a portion of a claim. Thus, unless the claimants wish to withdraw portions of their test claim in accordance with the Commission's regulations, the Commission must make a finding on the statutes and regulations pled.[113]

The following discussion will first address whether equal employment opportunity code sections and regulations require any activities. Second, the discussion will analyze whether the activities required by the code sections and title 5 regulations constitute federal mandates. Third, the discussion will analyze whether the activities required by the code sections and regulations constitute state-mandated activities. Finally, the discussion will address whether the code sections and regulations constitute a new program or higher level of service.

c. <u>Education Code sections 87101 and 87102 (Stats. 1988, ch. 973; Stats. 1990, ch. 1302; and Stats. 2002, ch. 1169); and California Code of Regulations, title 5, sections 53001, 53002, 53003, 53004, 53005, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, 53033, and 53034 (Register 96, No. 23; and Register 2002, No. 35) require some activities</u>

The following discussion will analyze whether the language of the Education Code sections and title 5 regulations pled in the "equal employment opportunity" section of this analysis require any activities. Each code section and regulation is introduced with a header that describes the content of the code section or regulation discussed.[114, 115, 116]

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[111] Claimant Comments on Draft Staff Analysis, *supra*, pgs. 1-2.

[112] Government Code section 17550 et seq. and California Code of Regulations, title 5, section 1181 et seq.

[113] California Code of Regulations, title 2, section 1183.08.

[114] Although the claimants have pled the code sections and regulations as they existed before *and* after the 2002 amendments to the code sections and regulations in response to *Connerly v. State Personnel Bd.*, the activities claimed by the claimants paraphrase the language found in the code sections and regulations *after* the 2002 amendments.[114] However, because many of the provisions of the regulations as they existed before the 2002 amendments are substantially

Commitment to Action for Equal Employment Opportunities (Ed. Code, § 87101 (Stats. 2002, ch. 1169))

Education Code section 87101, as repealed and replaced in 2002, sets forth the definitions of terms used in the Education Code sections addressing equal employment opportunity hiring.[117] The definitions, in and of themselves, do not require any activities. However, subdivision (c) of Education Code section 87101, requires community college districts that opt to participate in the post-*Connerly* Education Code sections addressing equal employment opportunity hiring are required to engage in the following activity:

> Commit to sustained action to devise recruiting, training, and advancement opportunities that will result in equal employment opportunities for all qualified applicants and employees. (Ed. Code, § 87101, subd. (c) (Stats. 2002, ch. 1169), beginning January 1, 2003.)

District Plan (Ed. Code, § 87102 (Stats. 1988, ch. 973 and Stats. 2002, ch. 1169; and Cal. Code Regs., tit. 5, § 53003 (Register 96, No. 23 and Register 2002, No. 35))

Between July 1, 2001 and September 4, 2001, Education Code section 87102, dealt with community college district compliance with Education Code sections 87100-87107, which addressed the implementation of a district's affirmative action employment program.[118] During this period, title 5, section 53003, as amended in Register 96, number 23, addressed the development and content of a community college district's faculty and staff diversity plan, which

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similar to the provisions of the regulations after the 2002 amendments, this analysis will address the claimants' arguments as pertaining to both versions of the regulations where appropriate.

[115] Prior to the *Connerly v. State Personnel Bd.* decision the title 5 regulations specifically implemented the affirmative action hiring requirements of the Education Code sections and other state and federal antidiscrimination laws. However, after the *Connerly v. State Personnel Bd.* decision, the Education Code sections and regulations act as separate efforts to address the issue of equal employment opportunity, with the regulations only implementing other state and federal antidiscrimination laws. Thus, although some of the activities required by the post-*Connerly* Education Code sections address similar equal employment opportunity issues as the title 5 regulations, the post-*Connerly* Education Code sections will be identified separately from the title 5 regulations. In contrast, the activities required by the pre-*Connerly* Education Code sections will be combined with the title 5 regulations where appropriate.

[116] Although the title 5 regulations no longer implemented Education Code section 87100 et seq. after the *Connerly v. State Personnel Bd.* decision, the regulations continued to implement other state and federal antidiscrimination laws, and thus, substantial portions of the regulations remained the same. As a result, activities required by the title 5 regulations that did not substantively change after the *Connerly v. State Personnel Bd*. decision, will be identified as continuous activities with a reimbursement period beginning on July 1, 2001 and no date ending the reimbursement period. Activities that ended or began post-*Connerly* will be identified with a date ending the reimbursement period or a start date other than July 1, 2001.

[117] See Education Code section 87100 et seq., as repealed and replaced by Statutes 2002, chapter 1169.

[118] See, Statutes 1988, chapter 973.

implemented the district's affirmative action program.[119] In 2002, title 5, section 53003, was amended in response to the *Connerly v. State Personnel Bd*. decision to address the development and content of a community college district's equal employment opportunity plan, which implements the district's equal employment opportunity program.[120]

The faculty and staff diversity plan required pre-*Connerly* and the equal employment opportunity plan required post-*Connerly* are both written documents in which a district's workforce is analyzed and specific plans and procedures are set for ensuring equal employment opportunity.[121] The equal employment opportunity plan, however, removes the achievement of expected representation of historically underrepresented groups (ethnic minorities, women, and persons with disabilities),[122] and the use of goals and timetables from the plan.

As amended in 2002, Education Code section 87102 addresses the duties regarding community college district equal employment opportunity programs and plans for districts opting to participate in the equal employment opportunity hiring requirements as set forth in Education Code sections 87100-87108.[123]

The plain language of the two versions of Education Code section 87102, and the two versions of title 5, section 53003, requires community college districts to engage in the following activities:[124]

1. Periodically submit to the Board of Governors of the California Community Colleges an affirmation of compliance with the provisions of Education Code sections 87100-87107,

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[119] The term "affirmative action plan" was used in Education Code section 87102 (Stats. 1988, ch. 973) but was not defined in the Education Code. Instead, "affirmative action plan" was defined by California Code of Regulations, title 5, section 53001 (Register 82, No. 6), which preceded and was the basis of the Education Code sections. In 1992, California Code of Regulations, title 5, section 53000 et seq. replaced the term "affirmative action plan" with "faculty and staff diversity plan" by amendments made in Register 92, number 17. The definition of "faculty and staff diversity plan" was substantively the same as "affirmative action plan," and thus, the amendment was in terminology only. No corresponding amendment was made to Education Code section 87102. However, because the Board of Governors is the administrative agency charged with implementation of Education Code section 87100 et seq., and the Education Code sections were largely a codification of the Board of Governor's regulations, for sake of consistency, the term "faculty and staff diversity plan" will be used when discussing the requirements of Education Code section 87102 (Stats. 1988, ch. 973).

[120] California Code of Regulations, title 5, section 53003, as amended in Register 2002, number 35.

[121] California Code of Regulations, title 5, section 53001, as amended in Register 96, number 23, and Register 2002, number 35.

[122] California Code of Regulations, title 5, section 53001, subdivision (h) (Register 96, number 23).

[123] Education Code section 87102, as repealed and replaced by Statutes 2002, chapter 1169.

[124] Statutes 1988, chapter 973; Statutes 2002, chapter 1169; Register 96, number 23; and Register 2002, No. 35.

which address affirmative action hiring (as existing prior to September 4, 2001). (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

2. Have goals in the affirmative action employment program that ensure participation in, and commitment to, the program by district personnel, and timetables, for its implementation. (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

3. Include steps in the faculty and staff diversity plan that the district will take in meeting and improving hiring goals for both full-time faculty and part-time faculty pursuant to Education Code section 87482.6 (Stats. 1988, ch. 973), and the development of the plan shall be a condition for receipt of allowances pursuant to Education Code section 87482.6. (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

4. Make the faculty and staff diversity plan/equal employment opportunity plan a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code). (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973); Cal. Code Regs., tit. 5, § 53003, subd. (d) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (e) (Register 2002, No. 35), beginning July 1, 2001.)

5. Publish and distribute a record of the success rate of the measurable progress, with respect to the district's goals and timetables, in hiring employees through its affirmative action employment program. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

   Make this publication a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code), and include data and information specified by the Board of Governors. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

6. Periodically submit an affirmation of compliance with Education Code sections 87100-87108 (Stats. 2002, ch. 1169), which address equal employment opportunity hiring, to the Board of Governors as a condition of the receipt of funds pursuant to Education Code section 87107 (Stats. 2002, ch. 1169) if the community college district opts to participate under Education Code sections 87100-87108. (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)

7. Ensure participation in, and commitment to, the equal employment opportunity program by district personnel, if the community college district is a participant under Education Code sections 87100-87108 (Stats. 2002, ch. 1169). (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)

8. Include in the equal employment opportunity plan steps that the district will take in eliminating improper discrimination or preferences in its hiring and employment practices if the community college district is a participant in the equal employment opportunity hiring program under Education Code sections 87100-87108 (Stats. 2002,

ch. 1169). (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)

9. Address in the equal employment opportunity plan how the district will make progress in achieving the ratio of full-time to part-time faculty hiring, as indicated in Education Code section 87482.6, while still ensuring equal employment opportunity, if the community college district is a participant under Education Code sections 87100-87108 (Stats. 2002, ch. 1169). (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)

10. Develop and adopt a district-wide written faculty and staff diversity plan/equal employment opportunity plan to implement its affirmative action employment program/equal employment opportunity program. (Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 2002, No. 35) beginning July 1, 2001.)

11. Submit faculty and staff diversity plans/equal employment opportunity plans and revisions to the Chancellor's Office for review and approval. (Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

12. Review the faculty and staff diversity plans/equal employment opportunity plans at least every three years and if necessary revise the plans and submit them to the Chancellor's Office for approval. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

13. Notify the Chancellor at least 30 days prior to adopting any amendments to the faculty and staff diversity plan/equal employment opportunity plan other than those made during the three year review. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

14. Include in the faculty and staff diversity plan/equal employment opportunity plan the following:

    a. Goals and timetables, as appropriate, for hiring and promotion of members of historically underrepresented groups developed pursuant to California Code of Regulations, title 5, section 53006 for each college in the district and for the district as a whole. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. The designation of the district employees who have been delegated responsibility and authority for implementing the faculty and staff diversity plan/equal employment opportunity plan and assuring compliance with the requirements of California Code of Regulations, title 5, section 53000 et seq. (Register 96, No. 23; and Register 2002, No. 35), pursuant to California Code of Regulations, title 5, section 53020. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(1) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (c)(1) (Register 2002, No. 35), beginning July 1, 2001.)

c. The procedure for filing complaints pursuant to California Code of Regulations, title 5, section 53026 (Register 96, No. 23; Register 2002, No. 35) and the person with whom the complaints are to be filed. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(2) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (c)(2) (Register 2002, No. 35.), beginning July 1, 2001.)

d. A process for notifying all district employees of the provisions of the faculty and staff diversity plan/equal employment opportunity plan and the commitment to affirmative action employment/equal employment opportunity policy statement required under California Code of Regulations, title 5, section 53002 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(3) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (c)(3) (Register 2002, No. 35), beginning July 1, 2001.)

e. A process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of California Code of Regulations, title 5, section 53000 et seq., which addresses affirmative action/equal employment opportunity programs (Register 96, No. 23; Register 2002, No. 35) and of state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(4) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subdivision (c)(4) (Register 2002, No. 35), beginning July 1, 2001.)

f. A process for providing annual written notice to appropriate community organizations concerning the district's faculty and staff diversity plan and the need for assistance from the community in identifying qualified members of historically underrepresented groups for openings with the district. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(5) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

g. A process for providing annual written notice to appropriate community-based and professional organizations concerning the district's equal employment opportunity plan and the need for assistance from the community and such organizations in identifying qualified applicants. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(5) (Register 2002, No. 35), beginning August 11, 2002.)

h. An analysis of the number of persons from historically underrepresented groups (ethnic minorities, women, and persons with disabilities) that are employed in the district's work force and those who have applied for employment in each of the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(6) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

i. An analysis of the number of persons from monitored groups (groups based on gender, ethnic group identification, and disability) who are employed in the district's work force and those who have applied for employment in each of the following job categories: (1) executive/administrative/managerial; (2) faculty and

other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) serve and maintenance (listed in Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35)). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(6) (Register 2002, No. 35), beginning August 11, 2002.)

j. An analysis of the degree to which women, ethnic minorities, and persons with disabilities are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

k. An analysis of the degree to which monitored groups (groups based on gender, ethnic group identification, and disability) are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 2002, No. 35), beginning August 11, 2002.)

l. The steps the district will take to achieve diversity in its workforce. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(8) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

m. Goals for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003, subdivision (c)(7) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(9) (Register 96, No. 23). Beginning July 1, 2001 through August 10, 2002.)

n. Methods for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003, subdivision (c)(7). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(8) (Register 2002, No. 35). Beginning August 11, 2002.)

o. Additional steps consistent with California Code of Regulations, title 5, section 53006, to remedy any significant underrepresentation identified in the plan. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(9) (Register 2002, No. 35). Beginning August 11, 2002.)

p. A plan for corrective action consistent with California Code of Regulations, title 5, section 53006 (Register 96, No. 23), including goals and timetables for hiring and promotion, if necessary, to remedy any significant underrepresentation identified in the faculty and staff diversity plan by achieving expected representation for all historically underrepresented groups in all job categories listed in California Code of Regulations, title 5, § 53004, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(10) (Register 96, No. 23). Beginning July 1, 2001 through August 10, 2002.)

q. Any other measures necessary to further equal employment opportunity throughout the district. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(10) (Register 2002, No. 35). Beginning August 11, 2002.)

r. Any goals for hiring persons with disabilities that are required by California Code of Regulations, title 5, section 53025. (Cal. Code Regs., tit. 5, § 53003, subd. (d) (Register 2002, No. 35). Beginning August 11, 2002.)

15. Make a continuous good faith effort to comply with the requirements of the faculty and staff diversity plan/equal employment opportunity plan. (Cal. Code Regs., tit. 5, § 53003, subd. (e) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (f) (Register 2002, No. 35), beginning July 1, 2001.)

Adoption of a Policy Statement (Cal. Code Regs., tit. 5, § 53002 (Register 96, No. 23 and Register 2002, No. 35))

Title 5, section 53002, addresses the adoption of a policy statement regarding a community college district's affirmative action employment program/equal employment opportunity program. As amended in Register 96, number 23, section 53002 requires the one-time activity of adopting a policy statement setting forth the district's commitment to an affirmative action program. In 2002, after the *Connerly v. State Personnel Board* decision, the term "affirmative action employment program" was replaced with "equal employment opportunity program," and as a result, community college districts were required to engage in the one-time activity of adopting a policy statement setting forth the district's commitment to an equal employment opportunity program. "Affirmative action employment program" and "equal employment opportunity program" are both defined as, "all the various methods by which equal employment opportunity is ensured."[125] However, unlike "affirmative action employment programs," the definition for "equal employment opportunity programs" does not include methods to achieve expected representation for historically underrepresented groups.[126] Thus, title 5, section 53002, requires community college districts to engage in the following activity:

> Adopt a policy statement setting forth the district's commitment to an affirmative action program/equal employment opportunity program. (Cal. Code Regs., tit. 5, § 53002 (Register 96, No. 23), one-time activity for the period beginning July 1, 2001 through August 10, 2002; Cal. Code Regs., tit. 5, § 53002 (Register 2002, No. 35) one-time activity beginning August 11, 2002.)

District Evaluation (Cal. Code Regs., tit. 5, § 53004 (Register 96, No. 23 and Register 2002, No. 35))

California Code of Regulations, title 5, section 53004, addresses the efforts of community college districts to evaluate district faculty and staff diversity plans/equal employment opportunity plans and district annual reports to the Chancellor of the results of the evaluations. The plain language of section 53004 requires community college districts to engage in the following activities:

1. Annually survey its employees and monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing its faculty and staff diversity plan/equal employment opportunity plan and to provide data needed for the analyses

[125] California Code of Regulations, title 5, sections 53001, subdivision (a) (Register 96, No. 23), and subdivision (e) (Register 2002, No. 35).

[126] California Code of Regulations, title 5, section 53001, subdivision (e) (Register 2002, No. 35).

required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

2. Annually report to the Chancellor, in a manner described by the Chancellor, the results of its annual survey of employees at each college in the district. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

   Report each employee 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. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

3. Afford each applicant or employee the opportunity to identify his or her gender, ethnicity and, if applicable, his or her disability for purposes of the survey and report required by California Code of Regulations, title 5, section 53004, subdivision (a) (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

   a. Count a person in only one ethnic group for reporting purposes if that person designates multiple ethnic groups with which he or she identifies. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

   b. Count and report Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians as part of the Asian/Pacific Islander group as well as in separate subcategories. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

<u>Advisory Committee (Cal. Code Regs., tit. 5, § 53005 (Register 96, No. 23 and Register 2002, No. 35))</u>

Title 5, section 53005, addresses the activity of creating a committee to assist in developing and implementing a district's faculty and staff diversity plan/equal employment opportunity plan. Specifically, title 5, section 53005 requires community college districts to engage in the following activity:

> Establish a Faculty and Staff Diversity Advisory Committee/Equal Employment Opportunity Advisory Committee to assist the district in developing and implementing the faculty and staff diversity plan/equal employment opportunity plan required under section 53003 (Register 96, No. 23; Register 2002, No. 35) which includes members of all historically underrepresented groups/diverse membership whenever possible. (Cal. Code Regs., tit. 5, § 53005 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53005 (Register 2002, No. 35), beginning July 1, 2001.)

Corrective Action (Cal. Code Regs., tit. 5, § 53006 (Register 96, No. 23 and Register 2002, No. 35))

Title 5, section 53006, addresses the corrective action or steps districts must take to ensure equal employment opportunity if significant underrepresentation of a gender, an ethnic group, or disabled individuals persists after the implementation of district affirmative action employment programs/equal employment opportunity programs. Many changes to title 5, section 53006, were made after the *Connerly v. State Personnel Bd.* decision, including the removal of the use of goals and timelines to achieve expected representation. Because of these changes the activities required by the pre-*Connerly* version of title 5, section 53006, will be identified separately from the activities required by the post-*Connerly* version.

The pre-*Connerly* title 5, section 53006, requires community college districts to engage in the following activities:

1. If a community college district has existing goals:
    a. Update goals established prior to June 30, 1996 and set a new target date for achieving expected representation for a group in a job category if significant underrepresentation still exists. (Cal. Code Regs., tit. 5, § 53006, subd. (a) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)
    b. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)
    c. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)
    d. Comply with California Code of Regulations, title 5, section 53006, subdivision (c) (Register 96, No. 23) while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)
2. If a community college district has no existing goals:
    a. Take corrective action if, pursuant to California Code of Regulations, title 5, section 53003, subdivision (c)(7), the district determines that a particular group is significantly underrepresented with respect to one or more job categories and no goal has previously been set. (Cal. Code Regs., tit. 5, § 53006, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

b. The district shall take, at a minimum, the following corrective action:

i. Review district recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

ii. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

iii. Determine whether the group is still significantly underrepresented in the job categories in question after the measures described in California Code of Regulations, title 5, section 53006, subdivision (b)(1) and (2) (Register 96, No. 23) have been in place a reasonable period of time. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

iv. Set a goal with a target date for achieving expected representation for the significantly underrepresented group in each job category where significant underrepresentation persists, if it persists. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

v. Monitor on an ongoing basis the staffing rate for the significantly underrepresented groups in the specified job categories. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

vi. Discontinue the use of goals when expected representation has been achieved for that group in the job categories in question. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

3. Additional measures to be taken if a goal has been set and after a reasonable period of time significant underrepresentation persists:

a. Establish a specific timetable to project the levels of annual hiring of persons from the significantly underrepresented group which will be necessary to meet the existing goal by the target date. (Cal. Code Regs., tit. 5, § 53006, subd. (c) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

b. Implement one or more of the following additional corrective measures until expected representation has been achieved for that group in the job category in question:

i. Include in the applicant pool applicants from significantly underrepresented groups who were initially screened out because they failed to meet locally established “desirable or preferred” qualifications

beyond state minimum qualifications, where such applicants can be expected to meet the additional qualifications through appropriate training or experience within one year. (Cal. Code Regs., tit. 5, § 53006, subd. (c)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

ii. Consider, as one factor in the final selection process, the fact that a candidate is a member of a significantly underrepresented group, provided that the qualifications of the candidates under consideration are reasonably considered to be equivalent. (Cal. Code Regs., tit. 5, § 53006, subd. (c)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

4. If a community college district has no existing goals for women or persons with disabilities implement the measures required in California Code of Regulations, title 5, section 53006, subdivision (b)(1) and (2) (Register 96, No. 23) concurrently with setting a goal with a target date for achieving expected representation for women or persons with disabilities in each job category in which they are found to be significantly underrepresented. (Cal. Code Regs., tit. 5, § 53006, subd. (d) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    a. Goals shall remain in effect only until expected representation has been achieved for the group in the job category or categories in which significant underrepresentation is found. (Cal. Code Regs., tit. 5, § 53006, subd. (d) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. An aggregate labor force availability rate shall be utilized for setting goals for hiring persons with disabilities with respect to the total district work force until the Chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, § 53006, subd. (d), beginning July 1, 2001 through August 10, 2002.)

The post-*Connerly* title 5, section 53006, requires community college districts to engage in the following activities:

1. Take additional steps if a district determines that a particular monitored group is significantly underrepresented with respect to one or more categories, including at minimum:

    a. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(1) (Register 2002, No. 35), beginning August 11, 2002.)

    b. 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. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(2) (Register 2002, No. 35), beginning August 11, 2002.)

    c. Determine whether the group is still significantly underrepresented in the categories in question after the measures described in subdivisions (a)(1) and (2) of California Code of Regulations, title 5, section 53006, have been in place a

reasonable period of time (three years or longer). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(3) (Register 2002, No. 35), beginning August 11, 2002.)

d. Monitor the staffing rate for the significantly underrepresented group in the specified job categories in question on an ongoing basis until the projected representation has been achieved for that group if significant underrepresentation persists. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)

2. 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, if significant underrepresentation persists for a particular group in the job category in question and a reasonable period of time has passed. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(1) (Register 2002, No. 35), beginning August 11, 2002.)

3. Discontinue the use of any locally established qualification that has not been found to satisfy the requirements set forth in California Code of Regulations, title 5, section 53006, subdivision (b)(1), if significant underrepresentation persists for a particular group in the job category in question and a reasonable period of time has passed. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(2) (Register 2002, No. 35), beginning August 11, 2002.)

4. Continue using qualification standards meeting the requirements of California Code of Regulations, title 5, section 53006, subdivision (b)(1) only where no alternative qualification standard is reasonably available which would select for the same characteristics, meet the requirements of subdivision (b)(1) and be expected to have a less exclusionary effect, if a significant underrepresentation persists for a particular group in the job categories in question and a reasonable period of time has passed. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(3) (Register 2002, No. 35), beginning August 11, 2002.)

<u>Delegation of Authority (Cal. Code Regs., tit. 5, § 53020 (Register 96, No. 23 and Register 2002, No. 35))</u>

Title 5, section 53020, provides that community college districts are ultimately responsible for the implementation of equal employment opportunity, and addresses the delegation of authority within community college districts. Section 53020 requires community college districts to engage in the following activities:

1. Be ultimately responsible for proper implementation of California Code of Regulations, title 5, section 53000 et seq., at all levels of district and college operation and for making measurable progress toward the goals established in the district's faculty and staff diversity plan or measurable progress toward equal employment opportunity by methods described in the district's equal employment opportunity plan. (Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

2. Ensure that an affirmative action officer/equal employment opportunity officer is designated to oversee the day-to-day implementation of the requirements of the equal

employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.), upon the recommendation of the chief executive officer. (Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subdivision (a) (Register 2002, No. 35), beginning July 1, 2001.)

3. Describe in the district's faculty and staff diversity plan/equal employment opportunity plan the administrative structure created by any delegation of authority to the affirmative action officer/equal employment opportunity officer or others. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)
4. Design the administrative structure created by any delegation of authority to the affirmative action officer/equal employment officer or others in such a manner so as to ensure prompt and effective implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23), beginning July 1, 2001.)
5. Designate in the faculty and staff diversity plan/equal employment opportunity plan a single officer, who may be the affirmative action officer/equal employment opportunity officer, who shall be given authority and responsibility for receiving complaints filed pursuant to California Code of Regulations, title 5, 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 California Code of Regulations, title 5, sections 53023 and 53024. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23), beginning July 1, 2001.)

<u>Recruitment (Cal Code Regs., tit. 5, § 53021 (Register 96, No. 23 and Register 2002, No. 35))</u>

Title 5, section 53021, addresses recruitment of applicants for employment by community college districts. The claimants allege that section 53021, subdivision (b), requires community college districts to:

> Ensure that "in-house or promotional only" recruitment is not 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, pursuant to Title 5, California Code of Regulation, Section 53021(b).[127]

However, the plain language of section 53021, subdivision (b) provides, "'In-house or promotional only' recruitment *shall not* be used to fill any new opening *except* when ... ."[128] As shown by the plain language of subdivision (b), community college districts are prohibited from

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[127] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 219.

[128] California Code of Regulations, title 5, section 53021, Register 96, number 23, and Register 2002, number 35.

engaging in an activity but are provided exceptions to this prohibition. Thus, subdivision (b) does not impose any requirement on community college districts.

Title 5, section 53021, requires community college districts to engage in the following activities:

1. Actively recruit from both within and outside the district work force to attract qualified applicants for all new openings except as provided by California Code of Regulations, title 5, section 53021, subdivision (b). (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)
    a. Active recruitment shall include focused outreach to historically underrepresented groups. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)
    b. Active recruitment shall include outreach to ensure all persons, including persons from monitored groups, are provided the opportunity to seek employment with the district. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning August 11, 2002.)
    c. Open recruitment applies 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. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)
2. Recruit at least statewide for full-time faculty and educational administrator positions, and at a minimum, seek qualified applicants listed in the California Community Colleges Faculty and Staff Diversity Registry/Equal Employment Opportunity Registry. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)
3. Recruit part-time faculty positions separately for each new opening or by annually establishing a pool of eligible candidates. In either case, full and open recruitment is required consistent with California Code of Regulations, title 5, section 53021. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)
4. Notify the Faculty and Staff Diversity Advisory Committee/Equal Employment Opportunity Advisory Committee established pursuant to California Code of Regulations, title 5, section 53005 and the Chancellor, at least ten working days prior to offering the position to a candidate, if the district believes justification exists for use of any of the exceptions listed in section 53021, subdivision(b). (Cal. Code Regs., tit. 5, § 53021, subd. (c) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)
5. Comply with the district's established hiring procedures and afford all qualified district employees the opportunity to apply even where in-house or promotional only recruitment is permitted under California Code of Regulations, title 5, section 53005, subdivision (b). (Cal. Code Regs., tit. 5, § 53021, subd. (d) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (d) (Register 2002, No. 35), beginning July 1, 2001.)

Job Announcements (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23 and Register 2002, No. 35))

Title 5, section 53022, addresses the content of job announcements of community college districts. Section 53022 requires community college districts to engage in the following activities:

1. State clearly job specifications setting forth the knowledge, skills, and abilities necessary to job performance in job announcements. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)
2. Include sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students in job requirements for faculty and administrative positions. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)
3. Review job specifications, including any "required," "desired," or "preferred" qualifications beyond the state minimum qualifications (set forth in Subchapter 4 of Cal. Code Regs., tit. 5, commencing with § 53400) which the district wishes to utilize, before the position is announced to ensure conformity with the requirements of California Code of Regulations, title 5, section 53000 et seq., and state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

Applicant Pool (Cal. Code Regs., tit. 5, § 53023 (Register 96, No. 23, and Register 2002, No. 35))

Title 5, section 53023, addresses the make-up of the applicant pool for employment with community colleges. The claimants allege that the following language of subdivision (a) of section 53023 imposes an activity on community college districts:

> [An applicant's gender, ethnic group identification, or disability] 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 [Cal. Code Regs., tit. 5, § 53000 et seq.] or by any applicable statute or regulation.[129]

However, the above quoted language prohibits community college districts from engaging in an activity and provides exceptions to this prohibition.[130] Thus, the above language of subdivision (a) does not require any activity of community college districts.

The claimants also assert that subdivision (c) of the Register 96 version of section 53023 and subdivision (d) of the Register 2002 version of section 53023 require that if an adverse impact

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[129] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 221.

[130] California Code of Regulations, title 5, section 53023, subdivision (a) as amended in Register 96, number 23, is substantively the same as subdivision (a) of section 53023 as amended in Register 2002, number 35.

persists after steps are taken to address adverse impacts in the applicant pool, that a community college district is required to ensure that the selection process for a community college position proceeds only if the job qualification has one of three characteristics.[131] However, the language of those subdivisions provides, "If adverse impact persists after taking steps required under subdivision (b) [Cal. Code Regs., tit. 5, § 53023], the selection process *may only proceed if* [the qualifications required in the job announcement have one of three characteristics]." As shown by the above quoted language, subdivision (c) of the Register 96 version of section 53023 and subdivision (d) of the Register 2002 version of section 53023 do not require community college districts to engage in any activity. Instead, the subdivisions prohibit community college districts from engaging in an activity and provide an exception to this prohibition.

In addition, the claimants assert that title 5, section 53023, subdivision (e), as added in Register 2002, number 35, requires community college districts to:

> [E]nsure that the district does not advertise or utilize in future hiring processes for the same position or a substantially similar position any locally established qualifications beyond state minimum qualifications that the district was unable to verify … .[132]

However, the plain language of subdivision (e) does not require a community college district to ensure that it does not advertise or utilize in future hiring processes for the same position or a substantially similar position any locally established qualifications beyond state minimum qualifications that the district was unable to verify. Subdivision (e) specifically provides:

> The district *may not* advertise or utilize in future hiring processes for the same position or substantially similar position any locally established qualifications beyond state minimum qualifications that the district was unable to verify … . (Italics added.)

Thus, while subdivision (e) prohibits activities, it does not require that a community college district ensure that it does not engage in the prohibited activities.

Although the above described subdivisions of section 53023 do not impose any activities on community college districts, section 53023 does require community college districts to engage in the following activities:

1. Afford each applicant an opportunity to voluntarily identify his or her gender, ethnicity and, if applicable, his or her disability, in the district's application for employment. (Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)
2. Keep information regarding an applicant's gender, ethnicity, and/or disability provided in an application for employment confidential. (Cal. Code Regs., tit. 5, § 53023, subd. (a)

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[131] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 223. The claimants' assertion paraphrases language found in California Code of Regulations, title 5, section 53023, subdivision (d) (Register 2002, No. 35). This language is substantially the same as the language of California Code of Regulations, title 5, section 53023, subdivision (c) (Register 96, No. 23).

[132] *Id.* at p. 224.

(Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

3. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that expected representation has been achieved for historically underrepresented groups. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

4. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that any failure to obtain projected representation for any monitored group is not due to discriminatory recruitment procedures. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

5. Extend the application deadline and conduct additional focused recruitment for historically underrepresented groups for which expected representation has not been achieved, if necessary. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

6. Extend the application deadline and conduct additional recruitment, which eliminates discriminatory recruitment procedures and ensures that recruitment efforts provide a full and fair opportunity for participation to a wide diversity of potential applicants, if necessary. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

7. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when the expected representation of historically underrepresented groups is achieved, or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

8. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when recruitment efforts have offered an opportunity for participation to a wide diversity of potential applicants or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

9. Analyze the composition of the qualified applicant pool to ensure that no group defined in terms of ethnicity, gender, or disability is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (m) (Register 96, No. 23).

   This analysis occurs after the analysis to ensure that expected representation has been achieved for historically underrepresented groups (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

10. Analyze the composition of the qualified applicant pool to ensure that no monitored group is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (a) (Register 2002, No. 35).

    This analysis occurs after the analysis done to ensure that any failure to obtain projected representation for any monitored group is not due to discriminatory recruitment

procedures (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

11. Take effective steps to address adverse impact found in the district's applicant pool before the selection process is continued. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)

Selection Procedures (Cal. Code Regs., tit. 5, § 53024 (Register 96, No. 23 and Register 2002, No. 35))

Title 5, section 53024, addresses the employment screening or selection procedures of community college districts. The claimants assert that subdivision (b) of section 53024 requires community college districts to:

> [E]nsure that confidential information is not disclosed if the equal employment opportunity officer, or other official charged with responsibility for monitoring selection procedures, assists the screening committee by discussing the overall composition of the applicant pool and the screening criteria or procedures which have produced an adverse impact … .[133]

Section 53024, subdivision (b) provides in relevant part:

> The affirmative action officer, or other official charged with the 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. (Emphasis added.)

The above language of section 53024 does not require community college districts to engage in any activity. Rather, the language authorizes the affirmative action officer to assist the screening committee, and conditions this authorization on the non-disclosure of confidential information.

In addition, the claimants argue that subdivisions (c) of section 53024 requires a community college district to implement policies and procedures to ensure that the district does not engage in specific activities in the employment process.[134] However, subdivision (c) of section 53024, as amended in Register 96, number 23, provides:

> 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. (Emphasis added.)

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[133] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at pgs. 225-226.

[134] *Id*. at p. 226.

As shown by the language above, subdivision (c) prohibits a community college district from engaging in specific activities. It does not require community college districts to engage in any activities, including the implementation of policies and procedures to ensure that the district does not engage in prohibited activities.[135]

The claimants also assert that subdivision (d) of section 53024 requires community college districts to "ensure that seniority or length of service is taken into consideration only to the extent … it is job related … it is not the sole criterion … it is included in the job announcement consistent with the requirements of [Cal. Code Regs., tit. 5, § 53022]." However, subdivision provides in relevant part that, "Seniority or length of service *may* be taken into consideration *only to the extent* … ." As shown by the quoted language, subdivision (d) sets limits on the ability to take seniority or length of service into consideration, but it does not require community college districts to engage in any activity.

The claimants also argue that subdivision (g) of section 53024 requires community college districts to implement policies and procedures for the governing board or its designee to have specified authority.[136] However, the plain language of subdivision (g) does not require community college districts to engage in any activity, including implementing policies and procedures so that the governing board of the district or its designee has the authority specified in subdivision (g). Subdivision (g) merely sets forth the authority that a district's governing board has in regard to hiring decisions.

The remaining parts of section 53024 require community college districts to engage in the following activities:

1. Provide all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to the Chancellor upon request. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 2002, No. 35), beginning July 1, 2001.)
2. Design all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole, 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. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 2002, No. 35), beginning July 1, 2001.)
3. Base all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole solely on job-related criteria, except as authorized by California Code of Regulations, title 5, section 53006 (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53024, subd. (a)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

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[135] Although the language of subdivision (c) of section 53024 was amended in Register 2002, number 35, as relevant to this analysis, the language continued to prohibit community college districts from engaging in specific activities.

[136] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at pgs. 227-228.

4. Base all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole solely on job-related criteria. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(3) (Register 2002, No. 35), beginning August 11, 2002.)
5. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to ensure that they do not have an adverse impact, as defined by California Code of Regulations, title 5, section 53001, subdivision (m), on any group defined in terms of ethnicity, gender, or disability. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)
6. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to avoid an adverse impact as defined in California Code of Regulations, title 5, section 53001, subdivision (a), and to detect and address any adverse impact which does occur. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)
7. Suspend the selection process and take timely and effective steps to remedy adverse impact on any group before the selection process resumes if monitoring under California Code of Regulations, title 5, section 53024, subdivision (a)(4) reveals that any selection technique or procedure has adversely impacted such group. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)
8. Immediately discontinue the use of any locally established qualifications beyond state minimum qualifications that have not been verified as described in California Code of Regulations, title 5, section 53023, subdivision (c)(2) or replaced with suitable alternatives having a lesser adverse impact if adverse impact results from the locally established qualifications. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)
9. Continue in the hiring process any applicant eliminated on the basis of the locally established qualification discontinued under California Code of Regulations, title 5, section 53024, subdivision (b). (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)
10. Follow procedures as outlined in the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures" for selection testing for employees. (Cal. Code Regs., tit. 5, § 53024, subd. (e) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (e) (Register 2002, No. 35), beginning July 1, 2001.)
11. Include members of historically underrepresented groups in screening committees whenever possible. (Cal. Code Regs., tit. 5, § 53024, subd. (f) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)
12. Include, whenever possible, a diverse membership in screening committees which will bring a variety of perspectives to the assessment of applicant qualifications. (Cal. Code Regs., tit. 5, § 53024, subd. (f) (Register 2002, No. 35), beginning August 11, 2002.)

Persons with Disabilities: (Cal. Code Regs., tit. 5, § 53025 (Register 96, No. 23 and Register 2002, No. 35))

Title 5, section 53025, addresses reasonable accommodations provided to applicants or employees with disabilities. Section 53025 requires community college districts to engage in the following activities:

1. Ensure that applicants and employees with disabilities receive reasonable accommodations consistent with the requirements of Government Code section 11135 et seq. and 12940 (m), Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act. (Cal. Code Regs., tit. 5, § 53025 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53025, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)
2. Update a goal established prior to July 12, 2002 for persons with disabilities, set a new target date for achieving projected representation in a job category or categories, and concurrently comply with California Code of Regulations, title 5, section 53006, subdivisions (a)(1), (a)(2), and (b) with respect to persons with disability, if significant underrepresentation still exists in the job category or categories. (Cal. Code Regs., tit. 5, § 53025, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)
3. Implement California Code of Regulations, title 5, section 53006, subdivisions (a)(1) and (a)(2) concurrently with setting a goal with a target date for achieving projected representation for persons with a disability in each job category where underrepresentation was found to exist. Goals are to remain in effect only until projected representation has been achieved for that group in the category or categories in question. (Cal. Code Regs., tit. 5, § 53025, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)
4. Utilize an aggregate labor force availability rate for setting goals for hiring persons with disabilities with respect to the total district work force, until the chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, § 53025, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

Complaints (Cal. Code Regs., tit. 5, § 53026 (Register 96, No.23 and Register 2002, No. 35))

Title 5, section 53026, addresses the complaint process for alleged violations of the affirmative action/equal employment opportunity program regulations set forth in title 5, section 53000 et seq., such as a failure to comply with the recruiting, screening, and selection procedure requirements. Section 53026 requires community college districts to engage in the following activities:

1. Establish a process permitting any person to file a complaint alleging that the requirements of the affirmative action/equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) have been violated. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)
2. Forward immediately to the Chancellor a copy of the complaint. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

3. Provide a written investigative report within 90 days if required by the Chancellor. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)
4. Process complaints which also allege discrimination prohibited by Government Code Section 11135 et seq. according to the procedures set forth in California Code of Regulations, title 5, section 59300 et seq. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

Reporting Employee Statistics and District Use of Funds (Cal. Code Regs., tit. 5, §§ 53033 and 53034 (Register 96, No. 23 and Register 2002, No. 35))

Title 5, sections 53033 and 53034, address community college district reporting on employee statistics and the use of Faculty and Staff Diversity funds/Equal Employment Opportunity funds. In 1988, after the Legislature and the Board of Governors had established requirements associated with the development and implementation of affirmative action plans and programs in the late 1970s and early 1980s, the Faculty and Staff Diversity Fund was established by the enactment of Education Code section 87107 (Stats. 1988, ch. 973) for the purpose of reimbursing and funding costs associated these requirements.

Title 5, section 53030, as amended in Register 96, number 23, which was not pled by the claimants, sets forth how the Faculty and Staff Diversity Fund is to be allocated to districts by the Board of Governors. Title 5, section 53033, as amended in Register 96, number 23, prohibits the granting of most of the Faculty and Staff Diversity funds to districts that fail to provide employee data to the Chancellor as required by California Code of Regulations, title 5, section 53004. Specifically, section 53033 provides:

> Any district failing to provide the data required under Section 53004 is not in compliance with [Cal. Code Regs., tit. 5, § 53000 et seq.] 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 or receives an extension of the deadline from the Chancellor.

The claimants argue that section 53033 requires districts to provide data required under section 53004, as a condition for receipt of any funds from the Faculty and Staff Diversity Fund.[137] The language of section 53033, however, does not support this interpretation of the regulation. Rather, section 53033 sets forth a consequence of failing to provide to the Chancellor employee data required to be reported title 5, section 53004. Section 53033 does not, itself, require any activities and instead prohibits the Board of Governors from engaging in the activity of granting funds in specified instances.

Title 5, section 53034, as amended in Register 96, number 23, requires community college districts to submit a report on district use of funds received from the Faculty and Staff Diversity Fund. In addition, section 53034 directs community college districts to report the staffing rate

[137] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," p. 231.

for persons with disabilities in a separate survey until a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by title 5, section 53004.

As discussed above, in 2002 the Education Code sections and title 5 regulations were amended in response to the *Connerly v. State Personnel Bd.* decision. After the amendments the title 5 regulations no longer implemented the Education Code sections. Instead, the Education Code sections and the title 5 regulations act as separate efforts to address the issue of equal employment opportunity. Some of the requirements of the title 5 regulations, however, remained tied to funding through the Equal Employment Opportunity Fund, which functionally replaced the Faculty and Staff Diversity Fund. Specifically, title 5, sections 53033 and 53034, as amended by Register 2002, number 35, tie the reporting requirements under title 5, section 53004 to the receipt of Equal Employment Opportunity funds. Although the language of the Education Code sections was substantially amended, the language of title 5, sections 53033 and 53034, remained largely the same. Thus, for the same reasons discussed above for the Register 96, number 23 version of section 53033, the Register 2002, number 35 version of section 53033 does not require community college districts to engage in any activities.

After the 2002 amendments, the plain language of title 5, section 53034, continued to require community college districts to engage in the following activities:

1. Submit a report on the use of Faculty and Staff Diversity funds/Equal Employment Opportunity funds to the Chancellor's Office no later than September 30 of the fiscal year following the use of the funds. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53034 (Register 2002, No. 35), beginning July 1, 2001.)
2. Report the staffing rate of persons with disabilities by a separate survey as directed by the Chancellor's Office, until a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by California Code of Regulations, title 5, section 53004. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53034 (Register 2002, No. 35), beginning July 1, 2001.)

(i) <u>Summary of Required Activities</u>

1. Commit to sustained action to devise recruiting, training, and advancement opportunities that will result in equal employment opportunities for all qualified applicants and employees. (Ed. Code, § 87101, subd. (c) (Stats. 2002, ch. 1169), beginning January 1, 2003.)
2. Periodically submit to the Board of Governors of the California Community Colleges an affirmation of compliance with the provisions of Education Code sections 87100-87107, which address affirmative action hiring (as existing prior to September 4, 2001). (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)
3. Have goals in the affirmative action employment program that ensure participation in, and commitment to, the program by district personnel, and timetables, for its implementation. (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)
4. Include steps in the faculty and staff diversity plan that the district will take in meeting and improving hiring goals for both full-time faculty and part-time faculty pursuant to

Education Code section 87482.6 (Stats. 1988, ch. 973), and the development of the plan shall be a condition for receipt of allowances pursuant to Education Code section 87482.6. (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

5. Make the faculty and staff diversity plan/equal employment opportunity plan a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code). (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973); Cal. Code Regs., tit. 5, § 53003, subd. (d) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (e) (Register 2002, No. 35), beginning July 1, 2001.)

6. Publish and distribute a record of the success rate of the measurable progress, with respect to the district's goals and timetables, in hiring employees through its affirmative action employment program. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

   Make this publication a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code), and include data and information specified by the Board of Governors. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

7. Periodically submit an affirmation of compliance with Education Code sections 87100-87108 (Stats. 2002, ch. 1169), which address equal employment opportunity hiring, to the Board of Governors as a condition for the receipt of funds pursuant to Education Code section 87107 (Stats. 2002, ch. 1169) if the community college district opts to participate under Education Code sections 87100-87108. (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)

8. Ensure participation in, and commitment to, the equal employment opportunity program by district personnel, if the community college district is a participant under Education Code sections 87100-87108 (Stats. 2002, ch. 1169). (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)

9. Include in the equal employment opportunity plan steps that the district will take in eliminating improper discrimination or preferences in its hiring and employment practices if the community college district is a participant in the equal employment opportunity hiring program under Education Code sections 87100-87108 (Stats. 2002, ch. 1169). (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)

10. Address in the equal employment opportunity plan how the district will make progress in achieving the ratio of full-time to part-time faculty hiring, as indicated in Education Code section 87482.6, while still ensuring equal employment opportunity, if the community college district is a participant under Education Code sections 87100-87108 (Stats. 2002, ch. 1169). (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)

11. Develop and adopt a district-wide written faculty and staff diversity plan/equal employment opportunity plan to implement its affirmative action employment

program/equal employment opportunity program. (Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 2002, No. 35) beginning July 1, 2001.)

12. Submit faculty and staff diversity plans/equal employment opportunity plans and revisions to the Chancellor's Office for review and approval. (Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

13. Review the faculty and staff diversity plan/equal employment opportunity plans at least every three years and if necessary revise the plan and submit it to the Chancellor's Office for approval. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

14. Notify the Chancellor at least 30 days prior to adopting any amendments to the faculty and staff diversity plan/equal employment opportunity plan other than those made during the three year review. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

15. Include in the faculty and staff diversity plan/equal employment opportunity plan the following:

    a. Goals and timetables, as appropriate, for hiring and promotion of members of historically underrepresented groups developed pursuant to California Code of Regulations, title 5, section 53006 for each college in the district and for the district as a whole. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. The designation of the district employee or employees who have been delegated responsibility and authority for implementing the faculty and staff diversity plan/equal employment opportunity plan and assuring compliance with the requirements of California Code of Regulations, title 5, section 53000 et seq. (Register 96, No. 23; and Register 2002, No. 35), pursuant to California Code of Regulations, title 5, section 53020. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(1) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (c)(1) (Register 2002, No. 35), beginning July 1, 2001.)

    c. The procedure for filing complaints pursuant to California Code of Regulations, title 5, section 53026 (Register 96, No. 23; Register 2002, No. 35) and the person with whom the complaints are to be filed. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(2) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (c)(2) (Register 2002, No. 35.), beginning July 1, 2001.)

    d. A process for notifying all district employees of the provisions of the faculty and staff diversity plan/equal employment opportunity plan and the commitment to affirmative action employment/equal employment opportunity policy statement required under California Code of Regulations, title 5, section 53002 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(3) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (c)(3) (Register 2002, No. 35), beginning July 1, 2001.)

e. A process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of California Code of Regulations, title 5, section 53000 et seq., which addresses affirmative action/equal employment opportunity programs (Register 96, No. 23; Register 2002, No. 35) and of state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(4) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subdivision (c)(4) (Register 2002, No. 35), beginning July 1, 2001.)

f. A process for providing annual written notice to appropriate community organizations concerning the district's faculty and staff diversity plan and the need for assistance from the community in identifying qualified members of historically underrepresented groups for openings with the district. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(5) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

g. A process for providing annual written notice to appropriate community-based and professional organizations concerning the district's equal employment opportunity plan and the need for assistance from the community and such organizations in identifying qualified applicants. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(5) (Register 2002, No. 35), beginning August 11, 2002.)

h. An analysis of the number of persons from historically underrepresented groups (ethnic minorities, women, and persons with disabilities) that are employed in the district's work force and those who have applied for employment in each of the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(6) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

i. An analysis of the number of persons from monitored groups (groups based on gender, ethnic group identification, and disability) who are employed in the district's work force and those who have applied for employment in each of the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) serve and maintenance (listed in Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35)). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(6) (Register 2002, No. 35), beginning August 11, 2002.)

j. An analysis of the degree to which women, ethnic minorities, and persons with disabilities are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

k. An analysis of the degree to which monitored groups (groups based on gender, ethnic group identification, and disability) are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 2002, No. 35), beginning August 11, 2002.)

l. The steps the district will take to achieve diversity in its workforce. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(8) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

m. Goals for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003, subdivision (c)(7) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(9) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

n. Methods for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003, subdivision (c)(7). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(8) (Register 2002, No. 35), beginning August 11, 2002.)

o. Additional steps consistent with California Code of Regulations, title 5, section 53006, to remedy any significant underrepresentation identified in the plan. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(9) (Register 2002, No. 35), beginning August 11, 2002.)

p. A plan for corrective action consistent with California Code of Regulations, title 5, section 53006 (Register 96, No. 23), including goals and timetables for hiring and promotion, if necessary, to remedy any significant underrepresentation identified in the faculty and staff diversity plan by achieving expected representation for all historically underrepresented groups in all job categories listed in California Code of Regulations, title 5, § 53004, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(10) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

q. Any other measures necessary to further equal employment opportunity throughout the district. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(10) (Register 2002, No. 35), beginning August 11, 2002.)

r. Any goals for hiring persons with disabilities that are required by California Code of Regulations, title 5, section 53025. (Cal. Code Regs., tit. 5, § 53003, subd. (d) (Register 2002, No. 35), beginning August 11, 2002.)

16. Make a continuous good faith effort to comply with the requirements of the faculty and staff diversity plan/equal employment opportunity plan. (Cal. Code Regs., tit. 5, § 53003, subd. (e) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (f) (Register 2002, No. 35), beginning July 1, 2001.)

17. Adopt a policy statement setting forth the district's commitment to an affirmative action program/equal employment opportunity program. (Cal. Code Regs., tit. 5, § 53002 (Register 96, No. 23), one-time activity for the period beginning July 1, 2001 through

August 10, 2002; Cal. Code Regs., tit. 5, § 53002 (Register 2002, No. 35) one-time activity beginning August 11, 2002.)

18. Annually survey its employees and monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing its faculty and staff diversity plan/equal employment opportunity plan and to provide data needed for the analyses required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

19. Annually report to the Chancellor, in a manner described by the Chancellor, the results of its annual survey of employees at each college in the district. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

    Report each employee 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. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

20. Afford each applicant or employee the opportunity to identify his or her gender, ethnicity and, if applicable, his or her disability for purposes of the survey and report required by California Code of Regulations, title 5, section 53004, subdivision (a) (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

    a. Count a person in only one ethnic group for reporting purposes if that person designates multiple ethnic groups with which he or she identifies. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

    b. Count and report Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians as part of the Asian/Pacific Islander group as well as in separate subcategories. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

21. Establish a Faculty and Staff Diversity Advisory Committee/Equal Employment Opportunity Advisory Committee to assist the district in developing and implementing the faculty and staff diversity plan/equal employment opportunity plan required under section 53003 (Register 96, No. 23; Register 2002, No. 35) which includes members of all historically underrepresented groups/diverse membership whenever possible. (Cal. Code Regs., tit. 5, § 53005 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53005 (Register 2002, No. 35), beginning July 1, 2001.)

22. If a community college district has existing goals:

    a. Update goals established prior to June 30, 1996 and set a new target date for achieving expected representation for a group in a job category if significant underrepresentation still exists. (Cal. Code Regs., tit. 5, § 53006, subd. (a) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    c. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    d. Comply with California Code of Regulations, title 5, section 53006, subdivision (c) (Register 96, No. 23) while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

23. If a community college district has no existing goals:

    a. Take corrective action if, pursuant to California Code of Regulations, title 5, section 53003, subdivision (c)(7), the district determines that a particular group is significantly underrepresented with respect to one or more job categories and no goal has previously been set. (Cal. Code Regs., tit. 5, § 53006, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. The district shall take, at a minimum, the following corrective action:

        i. Review district recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

        ii. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

iii. Determine whether the group is still significantly underrepresented in the job categories in question after the measures described in California Code of Regulations, title 5, section 53006, subdivision (b)(1) and (2) (Register 96, No. 23) have been in place a reasonable period of time. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

iv. Set a goal with a target date for achieving expected representation for the significantly underrepresented group in each job category where significant underrepresentation persists, if it persists. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

v. Monitor on an ongoing basis the staffing rate for the significantly underrepresented groups in the specified job categories. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

vi. Discontinue the use of goals when expected representation has been achieved for that group in the job categories in question. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

24. Additional measures to be taken if a goal has been set and after a reasonable period of time significant underrepresentation persists:

a. Establish a specific timetable to project the levels of annual hiring of persons from the significantly underrepresented group which will be necessary to meet the existing goal by the target date. (Cal. Code Regs., tit. 5, § 53006, subd. (c) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

b. Implement one or more of the following additional corrective measures until expected representation has been achieved for that group in the job category in question:

i. Include in the applicant pool applicants from significantly underrepresented groups who were initially screened out because they failed to meet locally established “desirable or preferred” qualifications beyond state minimum qualifications, where such applicants can be expected to meet the additional qualifications through appropriate training or experience within one year. (Cal. Code Regs., tit. 5, § 53006, subd. (c)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

ii. Consider, as one factor in the final selection process, the fact that a candidate is a member of a significantly underrepresented group, provided that the qualifications of the candidates under consideration are reasonably considered to be equivalent. (Cal. Code Regs., tit. 5, § 53006, subd. (c)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

25. If a community college district has no existing goals for women or persons with disabilities implement the measures required in California Code of Regulations, title 5,

section 53006, subdivision (b)(1) and (2) (Register 96, No. 23) concurrently with setting a goal with a target date for achieving expected representation for women or persons with disabilities in each job category in which they are found to be significantly underrepresented. (Cal. Code Regs., tit. 5, § 53006, subd. (d) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

a. Goals shall remain in effect only until expected representation has been achieved for the group in the job category or categories in which significant underrepresentation is found. (Cal. Code Regs., tit. 5, § 53006, subd. (d) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

b. An aggregate labor force availability rate shall be utilized for setting goals for hiring persons with disabilities with respect to the total district work force until the Chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, § 53006, subd. (d), beginning July 1, 2001 through August 10, 2002.)

26. Take additional steps if a district determines that a particular monitored group is significantly underrepresented with respect to one or more categories, including at minimum:

a. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(1) (Register 2002, No. 35), beginning August 11, 2002.)

b. 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. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(2) (Register 2002, No. 35), beginning August 11, 2002.)

c. Determine whether the group is still significantly underrepresented in the categories in question after the measures described in subdivisions (a)(1) and (2) of California Code of Regulations, title 5, section 53006, have been in place a reasonable period of time (three years or longer). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(3) (Register 2002, No. 35), beginning August 11, 2002.)

d. Monitor the staffing rate for the significantly underrepresented group in the specified job categories on an ongoing basis until the projected representation has been achieved for that group in the category or categories in question if significant underrepresentation persists. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)

27. 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, if significant underrepresentation persists for a particular group in the job

category in question and a reasonable period of time has passed. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(1) (Register 2002, No. 35), beginning August 11, 2002.)

28. Discontinue the use of any locally established qualification that has not been found to satisfy the requirements set forth in California Code of Regulations, title 5, section 53006, subdivision (b)(1), if significant underrepresentation persists for a particular group in the job category in question and a reasonable period of time has passed. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(2) (Register 2002, No. 35), beginning August 11, 2002.)

29. Continue using qualification standards meeting the requirements of California Code of Regulations, title 5, section 53006, subdivision (b)(1) only where no alternative qualification standard is reasonably available which would select for the same characteristics, meet the requirements of subdivision (b)(1) and be expected to have a less exclusionary effect, if a significant underrepresentation persists for a particular group in the job categories in question and a reasonable period of time has passed. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(3) (Register 2002, No. 35), beginning August 11, 2002.)

30. Be ultimately responsible for proper implementation of California Code of Regulations, title 5, section 53000 et seq., at all levels of district and college operation and for making measurable progress toward the goals established in the district's faculty and staff diversity plan or measurable progress toward equal employment opportunity by methods described in the district's equal employment opportunity plan. (Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

31. Ensure that an affirmative action officer/equal employment opportunity officer is designated to oversee the day-to-day implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.), upon the recommendation of the chief executive officer. (Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subdivision (a) (Register 2002, No. 35), beginning July 1, 2001.)

32. Describe in the district's faculty and staff diversity plan/equal employment opportunity plan the administrative structure created by any delegation of authority to the affirmative action officer/equal employment opportunity officer or others. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

33. Design the administrative structure created by any delegation of authority to the affirmative action officer/equal employment officer or others in such a manner so as to ensure prompt and effective implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23) beginning July 1, 2001.)

34. Designate in the faculty and staff diversity plan/equal employment opportunity plan a single officer, who may be the affirmative action officer/equal employment opportunity officer, who shall be given authority and responsibility for receiving complaints filed pursuant to California Code of Regulations, title 5, 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 California Code of Regulations, title 5, sections 53023 and 53024. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23), beginning July 1, 2001.)

35. Actively recruit from both within and outside the district work force to attract qualified applicants for all new openings except as provided by California Code of Regulations, title 5, section 53021, subdivision (b). (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

    a. Active recruitment shall include focused outreach to historically underrepresented groups. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. Active recruitment shall include outreach to ensure all persons, including persons from monitored groups, are provided the opportunity to seek employment with the district. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning August 11, 2002.)

    c. Open recruitment applies 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. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

36. Recruit at least statewide for full-time faculty and educational administrator positions, and at a minimum, seek qualified applicants listed in the California Community Colleges Faculty and Staff Diversity Registry/Equal Employment Opportunity Registry. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

37. Recruit part-time faculty positions separately for each new opening or by annually establishing a pool of eligible candidates. In either case, full and open recruitment is required consistent with California Code of Regulations, title 5, section 53021. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

38. Notify the Faculty and Staff Diversity Advisory Committee/Equal Employment Opportunity Advisory Committee established pursuant to California Code of Regulations, title 5, section 53005 and the Chancellor, at least ten working days prior to offering the position to a candidate, if the district believes justification exists for use of any of the exceptions listed in section 53021, subdivision(b). (Cal. Code Regs., tit. 5, § 53021, subd. (c) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)

39. Comply with the district's established hiring procedures and afford all qualified district employees the opportunity to apply even where in-house or promotional only recruitment is permitted under California Code of Regulations, title 5, section 53005, subdivision (b).

(Cal. Code Regs., tit. 5, § 53021, subd. (d) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (d) (Register 2002, No. 35), beginning July 1, 2001.)

40. State clearly job specifications setting forth the knowledge, skills, and abilities necessary to job performance in job announcements. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

41. Include sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students in job requirements for faculty and administrative positions. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

42. Review job specifications, including any "required," "desired," or "preferred" qualifications beyond the state minimum qualifications (set forth in Subchapter 4 of Cal. Code Regs., tit. 5, commencing with § 53400) which the district wishes to utilize, before the position is announced to ensure conformity with the requirements of California Code of Regulations, title 5, section 53000 et seq., and state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

43. Afford each applicant an opportunity to voluntarily identify his or her gender, ethnicity and, if applicable, his or her disability, in the district's application for employment. (Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

44. Keep information regarding an applicant's gender, ethnicity, and/or disability provided in an application for employment confidential. (Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

45. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that expected representation has been achieved for historically underrepresented groups. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

46. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that any failure to obtain projected representation for any monitored group is not due to discriminatory recruitment procedures. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

47. Extend the application deadline and conduct additional focused recruitment for historically underrepresented groups for which expected representation has not been achieved, if necessary. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

48. Extend the application deadline and conduct additional recruitment, which eliminates discriminatory recruitment procedures and ensures that recruitment efforts provide a full and fair opportunity for participation to a wide diversity of potential applicants, if necessary. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

49. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when the expected representation of historically underrepresented groups is achieved, or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

50. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when recruitment efforts have offered an opportunity for participation to a wide diversity of potential applicants or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

51. Analyze the composition of the qualified applicant pool to ensure that no group defined in terms of ethnicity, gender, or disability is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (m) (Register 96, No. 23).

    This analysis occurs after the analysis to ensure that expected representation has been achieved for historically underrepresented groups (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

52. Analyze the composition of the qualified applicant pool to ensure that no monitored group is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (a) (Register 2002, No. 35).

    This analysis occurs after the analysis done to ensure that any failure to obtain projected representation for any monitored group is not due to discriminatory recruitment procedures (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

53. Take effective steps to address adverse impact found in the district's applicant pool before the selection process is continued. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)

54. Provide all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to the Chancellor upon request. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 2002, No. 35), beginning July 1, 2001.)

55. Design all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole, 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. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 2002, No. 35), beginning July 1, 2001.)

56. Base all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole solely on job-related criteria,

except as authorized by California Code of Regulations, title 5, section 53006 (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53024, subd. (a)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

57. Base all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole solely on job-related criteria. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(3) (Register 2002, No. 35), beginning August 11, 2002.)

58. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to ensure that they do not have an adverse impact, as defined by California Code of Regulations, title 5, section 53001, subdivision (m), on any group defined in terms of ethnicity, gender, or disability. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

59. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to avoid an adverse impact as defined in California Code of Regulations, title 5, section 53001, subdivision (a), and to detect and address any adverse impact which does occur. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)

60. Suspend the selection process and take timely and effective steps to remedy adverse impact on any group before the selection process resumes if monitoring under California Code of Regulations, title 5, section 53024, subdivision (a)(4) reveals that any selection technique or procedure has adversely impacted such group. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

61. Immediately discontinue the use of any locally established qualifications beyond state minimum qualifications that have not been verified as described in California Code of Regulations, title 5, section 53023, subdivision (c)(2) or replaced with suitable alternatives having a lesser adverse impact if adverse impact results from the locally established qualifications. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

62. Continue in the hiring process any applicant eliminated on the basis of the locally established qualification discontinued under California Code of Regulations, title 5, section 53024, subdivision (b). (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

63. Follow procedures as outlined in the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures" for selection testing for employees. (Cal. Code Regs., tit. 5, § 53024, subd. (e) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (e) (Register 2002, No. 35), beginning July 1, 2001.)

64. Include members of historically underrepresented groups in screening committees whenever possible. (Cal. Code Regs., tit. 5, § 53024, subd. (f) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

65. Include, whenever possible, a diverse membership in screening committees which will bring a variety of perspectives to the assessment of applicant qualifications. (Cal. Code Regs., tit. 5, § 53024, subd. (f) (Register 2002, No. 35), beginning August 11, 2002.)

66. Ensure that applicants and employees with disabilities receive reasonable accommodations consistent with the requirements of Government Code section 11135 et seq. and 12940 (m), Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act. (Cal. Code Regs., tit. 5, § 53025 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53025, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

67. Update a goal established prior to July 12, 2002 for persons with disabilities, set a new target date for achieving projected representation in a job category or categories, and concurrently comply with California Code of Regulations, title 5, section 53006, subdivisions (a)(1), (a)(2), and (b) with respect to persons with disability, if significant underrepresentation still exists in the job category or categories. (Cal. Code Regs., tit. 5, § 53025, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

68. Implement California Code of Regulations, title 5, section 53006, subdivisions (a)(1) and (a)(2) concurrently with setting a goal with a target date for achieving projected representation for persons with a disability in each job category where underrepresentation was found to exist. Goals are to remain in effect only until projected representation has been achieved for that group in the category or categories in question. (Cal. Code Regs., tit. 5, § 53025, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

69. Utilize an aggregate labor force availability rate for setting goals for hiring persons with disabilities with respect to the total district work force, until the chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, § 53025, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

70. Establish a process permitting any person to file a complaint alleging that the requirements of the affirmative action/equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) have been violated. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

71. Forward immediately to the Chancellor a copy of the complaint. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

72. Provide a written investigative report within 90 days if required by the Chancellor. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

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

74. Submit a report on the use of Faculty and Staff Diversity funds/Equal Employment Opportunity funds to the Chancellor's Office no later than September 30 of the fiscal year following the use of the funds. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53034 (Register 2002, No. 35), beginning July 1, 2001.)

75. Report the staffing rate of persons with disabilities by a separate survey as directed by the Chancellor's Office, until a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by California Code of Regulations, title 5, section 53004. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53034 (Register 2002, No. 35), beginning July 1, 2001.)

d. Some of the requirements of California Code of Regulations, title 5, sections 53001 – 53006, 53020 – 53026, 53033, and 53034 constitute federal mandates not subject to article XIII B, section 6 of the California Constitution

Article XIII B places spending limits on both the state and local governments; however, costs mandated by courts or federal law are expressly excluded from these spending limits. Article XIII B, section 9, subdivision (b), of the California Constitution excludes from either the state or local spending limit any "[a]ppropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly."

When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[138] Also, the court in *San Diego Unified School Dist*. found that "for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the underlying federal mandate."[139] However, the court in *Hayes* also found when federal law imposes a mandate on the state, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[140]

Section 53000 of title 5 of the California Code of Regulations provides that sections 53001 – 53006, 53020 – 53026, 53033, and 53034 implement and should be read in conjunction with various laws, both state and federal.[141] The following discussion will address whether the

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[138] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593 citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; see also, Government Code section 17513.

[139] *San Diego Unified School Dist*., *supra*, 33 Cal.4th 859, 890.

[140] *Hayes*, *supra*, 11 Cal.App.4th at p. 1594.

[141] California Code of Regulations, title 5, section 53000 cites to the following federal laws: (1) Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d); (2) Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681); (3) Section 504 of the Rehabilitation Act of 1973

activities required by the test claim statutes and regulations are mandated by the federal laws that were cited to by the Chancellor's Office or section 53000. This will be done first by analyzing what federal law requires as relevant to the "equal employment opportunity" section of this analysis. Then the discussion will analyze whether the activities required by the test claim statutes and regulations are required by or exceed federal law.

(i) Federal Requirements

The following federal laws will be analyzed in the below discussion: (1) Equal Protection Clause of the Fourteenth Amendment (U.S. Const., 14th Amend., § 1); (2) Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.); (3) the Americans with Disabilities Act (42 U.S.C. § 12111 et seq.); (4) section 504 of the Rehabilitation Act (29 U.S.C. § 794); (5) Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.); (6) Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.); and (7) the Age Discrimination Act (42 U.S.C. § 6101).

Equal Protection Clause of the Fourteenth Amendment (U.S. Const., 14th Amend., § 1)

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall … deny to any person within its jurisdiction the equal protection of the laws." The Chancellor's Office asserts:

> The federal Equal Protection Clause is a general constitutional guarantee that requires to [*sic*] Claimant afford equal treatment to all employees. Discrimination on the basis of race, ethnicity and national origin is particularly suspect, but other bases for discriminatory treatment, such as gender, may also be challenged.[142]

The Chancellor's Office appears to argue that the Equal Protection Clause requires many of the pled activities to ensure equal employment opportunity without discrimination, and as a result, Government Code section 17556, subdivision (c), precludes the finding of a reimbursable state mandate. However, on its own, the Equal Protection Clause of the United States Constitution does not require a community college district to engage in any of the specific administrative activities regarding seeking, hiring, or promoting persons who are underrepresented in job categories in the district. In fact, the Equal Protection Clause was part of the basis for which test claim statutes, Education Code section 87101, as amended by Statutes 1990, chapter 1302, and section 87102, as amended by Statutes 1988, chapter 973, were found invalid.[143]

Thus, as relevant to the activities required by the test claim statutes and title 5 regulations regarding a community college district's affirmative action/equal employment opportunity program, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution does not constitute a federal mandate.

(29 U.S.C. § 794); (4) the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.); and (5) the Age Discrimination Act (42 U.S.C. §61010).

[142] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on 02-TC-31, dated March 11, 2004," p. 11.

[143] *Connerly v. State Personnel Bd.* (App. 3 Dist. 2001) 92 Cal.App.4th 16, 57-61.

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

The Chancellor's Office states that the regulations claimed by the claimants frequently reflect the federal provisions of Title VII of the Civil Rights Act of 1964 (Title VII) (codified at 42 U.S.C. § 2000e et seq.) and its implementing regulations, specifically 29 Code of Federal Regulations part 1607 et seq.[144] To the extent that claimed activities are required by federal law, the Chancellor's Office argues that the claimants are precluded from reimbursement.[145]

Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin by employers of 15 or more employees.[146] Title VII prohibits both intentional discrimination (known as "disparate treatment") as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as "disparate impact").[147] This prohibition is applicable independent of the receipt of any federal funds.

In developing Title VII's statutory scheme, Congress chose cooperation and voluntary compliance as the preferred means of eliminating discriminatory employment practices. This decision resulted in enforcement provisions which involve investigations by the Equal Employment Opportunity Commission (EEOC), efforts by the EEOC at conciliation in instances in which the EEOC finds that reasonable cause exists that employment discrimination has existed, and finally by litigation brought by individuals alleging discrimination or the Attorney General in the federal courts if conciliation by the EEOC fails.[148]

As shown by Title VII's enforcement scheme, the EEOC was created as the agency with initial enforcement responsibility of Title VII.[149] In order to carry out its duties, the EEOC is given the authority to adopt, issue, amend, or rescind suitable procedural regulations.[150] Under this authority, the EEOC adopted 29 Code of Federal Regulations part 1602. Part 1602 addresses recordkeeping and reporting requirements under Title VII. In regard to recordkeeping and reporting, since 1972 Title VII, specifically Title 42 United States Code section 2000e-8 (c), provides in relevant part:

> Every employer ... subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have

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[144] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on 02-TC-31, dated March 11, 2004," p. 11.

[145] *Ibid*.

[146] Title 42 United States Code section 2000e and 2000e-2 (Pub.L.No.102-166 (Nov.21, 1991).

[147] Title 42 United States Code section 2000e-2(a)(1) and (k)(1)(A)(i) (Pub.L.No. 102-166 (Nov. 21, 1991)).

[148] Title 42 United States Code section 2000e-5(f) (Pub.L.No. 102-166 (Nov. 21, 1991)). See also, *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 44; *Equal Employment Opportunity Commission v. Contour Chair Lounge Company, Inc.* (8th Cir. 1979) 596 F.2d 809, 813.

[149] Title 42 United States Code sections 2000e-4 and 5 (Pub.L.No. 104-66 (Dec. 21, 1995) and Pub.L.No. 102-166 (Nov. 21, 1991)).

[150] Title 42 United States Code section 2000e-12(a) (Pub.L.No. 88-352 (July 2, 1964)).

> been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder.[151]

Title VII defines an "employer" subject to its provisions as, "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year … ."[152] Included in the definition of "person" are "governments, governmental agencies, [and] political subdivisions."[153] "Industry affecting commerce" is defined to include, "any governmental industry, business, or activity."[154] Thus, the provisions of Title VII are applicable to community college districts as employers.

Under the plain language of Title VII, community college districts are required to engage in the following activities as the EEOC prescribes by regulation: (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed; (2) preserve such records for such periods as prescribed by the EEOC; and (3) make such reports from the records as prescribed by the EEOC.

As noted above, the regulations which set forth the EEOC's recordkeeping and reporting requirements are set forth in 29 Code of Federal Regulations part 1602. As relevant to this discussion, part 1602.48 requires community college districts beginning on August 1, 1975 to "make or keep all records, and information therefrom, which are or would be necessary for the completion of Higher Education Staff Information Report EEO-6 whether or not it is required to file such a report under part 1602.50."[155] In 1993, the EEOC, as the agency charged with enforcing Title VII, replaced the use of the EEO-6 with the National Center for Education Statistics' (NCES) Integrated Postsecondary Education Data System (IPEDS) Fall Staff questionnaire.[156] As a result, community college districts employing 15 or more employees are

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[151] Title 42 United States Code section 2000e-8(c) (Pub.L.No.92-261 (Mar. 24, 1972)).

[152] Title 42 United States Code section 2000e(b) (Pub.L.No. 102-166 (Nov. 21, 1991)).

[153] Title 42 United States Code section 2000e(a) (Pub.L.No.102-166 (Nov. 21, 1991)).

[154] Title 42 United States Code section 2000e(h) (Pub.L.No. 102-166 (Nov. 21, 1991)). "[A]ny governmental industry, business, or activity" language added by 1972 amendment. See also, *Faulkner v. Federation of Preschool & Community Education Centers, Inc.* (9th Cir. 1977) 564 F.2d 327, 328, noting that the 1972 amendments eliminated the educational institution exemption to Title VII coverage.

[155] 29 Code of Federal Regulations part 1062.48 (Dec. 31, 1981). 29 Code of Federal Regulations part 1602.50 requires a community college district to file with the EEOC copies of its EEO-6 biennially.

[156] National Center for Education Statistics, "Fall Staff in Postsecondary Institutions," (1993) Introduction, at <http://nces.ed.gov/pubs96/web/96323in.asp> [as of November 3, 2009]. See also, EEOC's "Regional Attorneys' Manual" at <http://www.eeoc.gov/eeoc/litigation/manual/4-1-c_services_orip.html> [as of April 29, 2010]. Note that 29 Code of Federal Regulations part 1602 was never amended to reflect the change in report used.

required to make or keep all records necessary for the completion of IPEDS Fall Staff questionnaire.[157]

As relevant to this discussion, the 2009 IPEDS Fall Staff questionnaire requires the following information for all employees:

1. Assigned positions separated by the following job categories: (a) faculty and other instructional staff; (b) executive/administrative/managerial; (c) other professionals (support/service); (d) technical and paraprofessional; (e) clerical and secretarial; (f) skilled crafts; and (g) service/maintenance.[158]
2. Gender.[159]
3. Race/ethnicity separated in the following categories: (a) Hispanic/Latino; (b) American Indian or Alaska Native; (c) Asian; (d) Black or African American; (e) Native Hawaiian or Other Pacific Islander; (f) White; (g) two are more races; (h) nonresident alien; and (i) race and ethnicity unknown.[160]

As relevant to this analysis, the information required for the IPEDS Fall Staff questionnaire did not substantively change between 2001 and 2009, thus the above information was required since the start of the reimbursement period.[161]

Part 1602.50 requires the submission of this information, as it exists on a specified date, to be submitted once every other year.[162] Because part 1602.48 requires community college districts to make or keep all records necessary to complete the IPEDS Fall Staff questionnaire, and completion of the questionnaire occurs every other year, districts are only required to make or keep this information every other year as necessary for the IPEDS questionnaire. Districts are required to preserve this information for a period of two years from the date of the making of the record.[163] Thus, read together the language of Title 42 United States Code section 2000e-8,

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[157] National Center for Education Statistics, "Statutory Requirements for Reporting IPEDS Data," at <https://surveys.nces.ed.gov/ipeds/> [as of November 3, 2009].

[158] IPEDS Survey Material for 2-year degree-granting public institutions and related administrative offices that have 15 or more full-time staff (2009-10), p. 2 Part A, at <https://surveys.nces.ed.gov/ipeds/VisForms.aspx?survey=1&form=61&index=0&ri=3&show=part> [as of October 28, 2009].

[159] *Id*. at p. 3-25, Parts D, E, G-L.

[160] *Id*. at p. 7-25, Parts G-L.

[161] IPEDS "Fall Staff Survey, 2001" for degree-granting institutions at <https://nces.ed.gov/ipeds/surveys/2001/pdf/S1_form.pdf> [as of March 3, 2011]. Because the information required is the same, the document cited to throughout the rest of the document will be the 2009 Fall Staff questionnaire.

[162] 29 Code of Federal Regulations part 1602.50 (June 12, 1975). The NCES website specifies that this reporting is to occur in odd years (e.g. 2007-2008, 2009-2010, etc.). <https://surveys.nces.ed.gov/ipeds/> [as of February 23, 2010].

[163] 29 Code of Federal Regulations part 1602.49 (July 26, 1991).

29 Code of Federal Regulations parts 1602.48 and 1602.50, and the IPEDS Fall Staff questionnaire imposes a federal mandate which occurs every other year.

The Chancellor's Office argues that 29 Code of Federal Regulations part 1607 et seq., which makes up the EEOC's "Uniform Guidelines on Employee Selection Procedures" (Uniform Guidelines), also constitutes a federal mandate.[164] The Uniform Guidelines were adopted to assist employers with complying with federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin.[165] The Uniform Guidelines address employment selection procedures that result in disparate/adverse impact, and as a result, are possibly in violation of Title VII. Title VII provides:

> An unlawful employment practice based on disparate impact is established under this subchapter only if--
>
> [A] complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> [T]he complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.[166]

The Uniform Guidelines guide the investigations and findings of the EEOC, setting forth the EEOC's interpretation of what constitutes disparate/adverse impact and EEOC's interpretation of how to "validate" or show that a procedure is job related and consistent with business necessity so as to be consistent with Title VII. Staff, however, finds that the Uniform Guidelines do not constitute a federal mandate because there is no legal requirement to comply with the Uniform Guidelines, nor are there any certain penalties assessed for failing to comply with the Uniform Guidelines.[167]

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[164] The Uniform Guidelines were also adopted by other federal enforcement agencies that enforce Title VII and other federal nondiscrimination laws, including those possibly applicable to community college districts based on receipt of federal funds. These agencies include the Department of Labor, the Civil Service Commission, the Department of Justice, and the Office of Revenue Sharing of the Department of the Treasury. However, because the Chancellor's Office is arguing that the Uniform Guidelines constitute a federal mandate as used to enforce Title VII and because there is no evidence in the record that community college districts have received any federal funding from the above listed agencies, this discussion will focus on the use of the Uniform Guidelines by the EEOC and the applicability of the Uniform Guidelines to community college districts as employers of 15 or more employees. See 29 Code of Federal Regulations part 1607.2(A) (Aug. 25, 1978).

[165] 29 Code of Federal Regulations part 1607.1(B) (Aug. 25, 1978).

[166] Title 42 United States Code section 2000e-2(k)(1)(A) (Pub.L.No. 102-166 (Nov. 21, 1991)).

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

As indicated by the title of 29 Code of Federal Regulations part 1607 et seq., the "Uniform Guidelines" are *guidelines*. As such, the provisions of the guidelines contain language such as, "the [employer] *should* include, as a part of the validity study, an investigation of the suitable alternative selection procedures …;"[168] "Where cutoff scores are used, they *should* normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency …;"[169] "When an informal or unscored selection procedure which has an adverse impact is utilized, the [employer] *should* eliminate the adverse impact … ."[170] Thus, the plain language of the Uniform Guidelines does not require community college districts to engage in any activities. Instead, the guidelines set forth suggestions on how to comply with Title VII requirements.

In addition, as noted above, the EEOC has *initial* enforcement responsibility for Title VII. This enforcement responsibility includes investigating employers for violations of Title VII, making findings regarding whether reasonable cause exists for employment discrimination, and efforts at conciliation if a "reasonable cause" finding is made. Absent from the EEOC's Title VII enforcement authority, however, is the ability to adjudicate claims of discrimination or impose administrative sanctions. Congress left this authority and ultimate enforcement responsibility with the federal courts.[171] In the event that a civil action is brought to federal court by an aggrieved individual or the Attorney General, the findings made by the EEOC are not binding on the federal courts, nor are they entitled to the benefit of the "substantial evidence" or "clearly erroneous" standard of review.[172] Instead, a federal court would determine the issue of whether Title VII has been violated by an employer using a de novo standard of review, in which the court decides the matter anew.[173] Although courts have acknowledged that EEOC guidelines, as the administrative interpretation of an enforcing agency of Title VII, are entitled to great deference, courts have consistently found that they do not have the force of law.[174] In addition,

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[168] 29 Code of Federal Regulations part 1607.3(B) (Aug. 25, 1978).

[169] 29 Code of Federal Regulations part 1607.5(H) (Aug. 25, 1978).

[170] 29 Code of Federal Regulations part 1607.6(B)(1) (Aug. 25, 1978).

[171] *Alexander v. Gardner-Denver Co.* (1874) 415 U.S. 36, 44; *McDonnell Douglas Corporation v. Green* (1973) 411 U.S. 792, 799; and *Associated Dry Goods Corporation v. Equal Employment Opportunity Commission* (4th Cir. 1983) 720 F.2d 804, 809-810.

[172] *Equal Employment Opportunity Commission v. Contour Chair Lounge Company, Inc.* (8th Cir. 1979) 596 F.2d at 813.

[173] *Associated Dry Goods Corporation v. Equal Employment Opportunity Commission, supra,* 720 F.2d 804, 809-810.

[174] *Albemarle Paper Co. v. Moody, et al.* (1975) 422 U.S. 405, 430-431, in which the court noted that the EEOC Guidelines are not administrative regulations' promulgated pursuant to formal procedures established by Congress, but were entitled to great deference as the administrative interpretation of Title VII by the enforcing agency. See also, *Guardians Assoc. of the New York Police Dept., Inc. v. Civil Service Commission of the City of New York, et al.* (2nd Cir 1980) 630 F.2d 79, 90-91, noting that although the Supreme Court has relied on some of the Uniform Guidelines, it has not ruled that every deviation from the Guidelines results in a violation of Title VII. The court in *Guardians Assoc*. continues that it appears that the Supreme Court has applied

deviation from EEOC guidelines has occurred in some instances.[175] Thus, even if a community college district does not comply with the Uniform Guidelines, the district would not be subject to any sanctions by the EEOC, nor would the community college district face certain penalties imposed by a federal court. As a result, the Commission finds that the Uniform Guidelines (29 C.F.R. § 1607) do not impose a federal mandate on community college districts.

The Commission finds that the language of Title VII, its implementing regulations, and the IPEDS questionnaire constitute a federal mandate on community college districts for the following activities:

> Make or keep records necessary to provide the following information relevant to the determinations of whether unlawful employment practices have been or are being committed once every other year (beginning August 1, 1975):
>
> a. Assigned positions of employees separated by the following job categories: (a) faculty and other instructional staff; (b) executive/administrative/managerial; (c) other professionals (support/service); (d) technical and paraprofessional; (e) clerical and secretarial; (f) skilled crafts; and (g) service/maintenance. (42 U.S.C. § 2000e-8 (Pub.L.No.92-261 (Mar. 24, 1972)); 29 C.F.R. § 1602.48 (Dec. 31, 1981); IPEDS Survey Material for 2-year degree-granting public institutions and related administrative offices that have 15 or more full-time staff (2009-10), p. 2, Part A.)
>
> b. Gender of employees. (42 U.S.C. § 2000e-8 (Pub.L.No.92-261 (Mar. 24, 1972)); 29 C.F.R. § 1602.48 (Dec. 31, 1981); IPEDS Survey Material for 2-year degree-granting public institutions and related administrative offices that have 15 or more full-time staff (2009-10), p. 3-25, Parts D, E, G-L.)
>
> c. Race/ethnicity of employees separated in the following categories: (a) Hispanic/Latino; (b) American Indian or Alaska Native; (c) Asian; (d) Black or African American; (e) Native Hawaiian or Other Pacific Islander; (f) White; (g) two are more races; (h) nonresident alien; and (i) race and ethnicity unknown. (42 U.S.C. § 2000e-8 (Pub.L.No.92-261 (Mar. 24, 1972)); 29 C.F.R. § 1602.48 (Dec. 31, 1981); IPEDS Survey Material for 2-year degree-granting public institutions and related administrative offices that have 15 or more full-time staff (2009-10), p. 7-25, Parts G-L.)

<u>The Americans with Disabilities Act (42 U.S.C. § 12111-12117)</u>

The Chancellor's Office also cites generally to the Americans with Disabilities Act (ADA) as federal law that may require activities to ensure equal employment opportunity which would

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the Uniform Guidelines only to the extent that they are useful, in the particular setting of the case under consideration, for advancing the basic purposes of Title VII.

[175] *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480, 1489, in which the court rejected the EEOC guidelines that an employee meets the prima facie case in a disparate impact cause of action by proving the existence of an "English-only" policy; *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1428, in which the court noted that the Uniform Guidelines are not legally binding when discussing the varying applications/views of the Uniform Guidelines' "80 percent" rule when determining adverse impact.

constitute a federal mandate.[176] The ADA encompasses Title 42 United States Code sections 12101-12213, however, there is currently a split between federal circuit courts on the issue of whether only Title I of the ADA (42 U.S.C. §§ 12111-12117) applies to employment discrimination claims or if Title II of the ADA (42 U.S.C. §§ 12131-12134) also applies. Title I of the ADA expressly applies to employment discrimination based on disability. In contrast, Title II and its implementing regulations generally prohibit the exclusion of individuals from participation in or the denial of benefits to individuals of the services, programs, or activities of a public entity due to disability, or for the entity to subject an individual to discrimination based on disability. The majority of circuits in the United States Courts of Appeal agree with the United States Department of Justice and its implementing regulations that Title II applies to employment discrimination.[177] In contrast, the 9th Circuit, which is the controlling circuit in California, has declined to follow this view (*Zimmerman v Oregon Dept. of Justice* (9th Cir. 1999) 170 F.3d 1169).[178, 179] As a result, any discussion regarding the ADA in this section, which specifically addresses employment issues, excludes Title II and refers only to Title I of the ADA and its implementing regulations (42 U.S.C. § 12111-12117; 29 C.F.R. § 1630 et seq.).

In 1990, Congress enacted the ADA to ensure that qualified individuals with disabilities are protected from employment discrimination on the basis of disability. Congress directed the EEOC to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII of the Civil Rights Act for discrimination based on race, color, religion, sex and national origin when enforcing the ADA.[180] In addition, like Title VII, the ADA's prohibition applies to employers of 15 or more employees.[181] As a result, the ADA is applicable to community college districts independent of the receipt of any federal funds and the plain language of the ADA imposes a federal mandate upon community college districts.

As relevant to this discussion, the ADA (42 U.S.C. § 12111-12117) and its implementing regulations (29 C.F.R. § 1630 et seq.) impose the following federal mandates on community college districts:

1. Make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue

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[176] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on 02-TC-31, March 11, 2004," p. 11.

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

[178] *Hart v. Massanari* (9th Cir. 2001) 266 F.3d 1155, 1171. Stating, "Circuit law … binds all courts within a particular circuit, including the court of appeals itself."

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

[180] Title 42 United States Code section 12117 (Pub.L.No. 101-336 (July 26, 1990)).

[181] Title 42 United States Code section 12111 (Pub.L.No. 102-166 (Nov. 21, 1991)).

hardship on the operation of the business of such covered entity. (42 U.S.C.A. § 12112, subd. (b)(5)(A) (Pub.L.No. 102-166 (Nov. 21, 1991)); 29 C.F.R § 1630.9 (July 26, 1991).)

2. Post notices in an accessible format to applicants, employees, and members describing the applicable provisions of the ADA (42 U.S.C. § 12101 et seq.) in the manner prescribed by Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-10). (42 U.S.C. § 12115 (Pub.L.No. 101-336 (July 26, 1990).)

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

In 1973, Congress enacted the Rehabilitation Act of 1973, section 504 (Section 504) (29 U.S.C. § 794) to extend the protections of the Civil Rights Act of 1964 to the handicapped.[182] Section 504 prohibits discrimination on the basis of physical or mental disability with respect to "any program or activity receiving federal financial assistance." It states the following:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity.[183]

The U.S. Department of Education, Office of Civil Rights, the agency responsible for enforcing Section 504 in public colleges and universities, adopted 34 Code of Federal Regulations part 104 et seq. to implement Section 504. Section 504 and its implementing regulations apply to all recipients of federal financial assistance, including colleges, universities, other postsecondary institutions, and public systems of higher education. The federal law extends to all of the operations of a college, including employment, any part of which is extended federal financial assistance.[184] As applicable to community college district employment practices, Section 504's implementing regulations prohibit discrimination on the basis of disability in community college district recruitment, advertising, and processing of applications for employment.[185] In addition, subject to some exceptions, the implementing regulations of Section 504 prohibit the use of employment criteria that have an adverse impact on persons with disabilities.[186]

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[182] *Lloyd v. Regional Transp. Authority* (1977) 548 F.2d 1277, 1285.

[183] Title 29 United States Code section 794(a) (Pub.L.No. 105-220 (Aug. 7, 1998)).

[184] *Consolidated Rail Corp. v. Darrone* (1984) 465 U.S. 624, finding that federal assistance did not need to have a primary purpose to promote employment in order for section 504 to apply to employment practices. *Leake v. Long Island Jewish Medical Center* (E.D.N.Y. 1988) 695 F.Supp. 1414, finding that section 504 applied to all operations of an entity receiving federal financial assistance, not just the specific program receiving assistance.

[185] 34 Code of Federal Regulations part 104.11 (b)(1).

[186] 34 Code of Federal Regulations parts 104.11 (a)(3) and 104.13 (a), which specifically prohibit employment criteria which screen out or tend to screen out persons with disabilities, or in other words has a disparate impact on persons with disabilities, unless: (1) the test score or other selection criteria, as used by the recipient, is shown to be job-related for the position in question; and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many

Compliance with Section 504 and its implementing regulations is a condition on the receipt of federal financial assistance.

> In this regard, section 504 [of the Rehabilitation Act] is similar to other statutes placing conditions on the receipt of federal funding…Congress may attach reasonable conditions to federal financial assistance. The recipients of federal funding are not thereby obligated to accept the conditions, however, because they "may terminate their participation in the program and thus avoid" the conditions imposed by the statute. [Citation omitted.][187]

Thus, community college districts are not legally compelled to comply with the Section 504.

The courts, however, have acknowledged that federal financial assistance to education is pervasive.[188] In addition, violations of Section 504 can result, and has resulted, in the termination of federal funding to the program in which noncompliance was found.[189] Along with the termination of federal financial assistance, community college districts face litigation by the Attorney General for violations of Section 504 and its implementing regulations.[190] Litigation by an aggrieved employee or applicant for employment is available for violations of Section 504 and possibly for violations of its implementing regulations.[191] Further, as noted by the United

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handicapped persons are not shown by the Director of the United States Department of Education to be available. The "tends to screen out" language indicates that a statistical showing of disparate impact is not necessary as it is with claims of disparate impact based on gender and ethnicity. See Appendix A to 34 Code of Federal Regulations part 104.

[187] *Greater Los Angeles Council on Deafness, Inc,* (9th Cir. 1987) 812 F.2d 1103, 1111, fn. 11.

[188] *Hayes, supra,* 11 Cal.App.4th 1564, 1584.

[189] Title 29 United States Code section 794a incorporates Title 42 U.S.C 2000d-1, which authorizes the termination of federal financial assistance to the program in which noncompliance is found. 34 Code of Federal Regulations part 104.61 incorporates the procedures to effect compliance found in 34 Code of Federal Regulations part 100.6-100.10, which authorize the termination of federal financial assistance for failure to comply with regulations promulgated under section 504. See, *Freeman v. Cavazos* (11th Cir. 1991) 939 F.2d 1527, 1531, in which the court found that federal funding of a school district was properly discontinued, noting that compliance with any regulation promulgated under section 504 may be obtained by the termination of or refusal to grant or to continue assistance to a recipient of federal assistance. See also, *Fells v. Brooks* (D.D.C. 1981) 522 F.Supp. 30, 34, in finding that resort to administrative remedies by individual complainants is not required nor intended under section 504 and its implementing regulations, the court noted that federal assistance had been withdrawn from a school district.

[190] Title 29 United States Code section 794a, subdivision (a)(2), incorporating by reference Title 42 United States Code section 2000d et seq. and Title 42 United States Code section 2000e-5, which authorize litigation for violations of section 504 of the Rehabilitation Act.

[191] Although Title 42 United States Code section 2000e-5 authorizes litigation by aggrieved individuals for violations of section 504 of the Rehabilitation Act, district courts in the 9th Circuit have split on whether a private cause of action arises from noncompliance with the regulations

States Supreme Court in *Consolidated Rail Corporation v. Darrone* (1984) 465 U.S. 624, "[E]nhancing employment of the handicapped was so much the focus of the 1973 legislation that Congress the next year felt it necessary to amend the statute to clarify whether § 504 [of the Rehabilitation Act] was intended to prohibit other types of discrimination as well."[192] Thus, a main purpose of Section 504 is to enhance employment of disabled individuals.

In light of the penalties and legal consequences for failing to comply with Section 504, and the purpose of Section 504, the Commission finds that community colleges are practically compelled to comply with the requirements of Section 504 and its implementing regulations.[193, 194, 195]

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implementing section 504. see *Huezo v. Los Angeles Community College Dist*. (C.D. Cal. 2008) 672 F.Supp.2d 1045, 1054, in which a 9th Circuit district court, after noting a split between federal circuits and between district courts within the 9th Circuit, found that there is no private cause of action to enforce self-evaluation regulations implementing the ADA and Section 504 of the Rehabilitation Act. Citing to the Supreme Court's decision in *Alexander v. Sandoval* (2001) 532 U.S. 275, the court found that a regulation by regulation analysis, as opposed to an analysis of the regulations as a whole, is required in order to determine if a regulation exhibits a Congressional intent to create a private right of action.

[192] *Consolidated Rail Corporation v. Darrone, supra*, 465 U.S. at p. 632. See also, Title 29 United States Code section 701.

[193] *City of Sacramento v. State of California*, supra, 50 Cal.3d at p. 76, setting forth the factors to determine whether a federal mandate exists.

[194] Note the court's analysis of section 504 of the Rehabilitation Act in *Hayes, supra*, 11 Cal.App. 4th 1564. While the issue in *Hayes* primarily involved the Education of the Handicapped Act, legislation enacted after the Rehabilitation Act as it applied to the state with regard to elementary and secondary education, the court also discussed the Rehabilitation Act of 1973 since it was the first federal legislation to codify the equal protection rights of citizens with disabilities. Pointing to the facts that federal financial assistance to education is pervasive, failure to comply with the Act has resulted in equal protection lawsuits, and the Rehabilitation Act was essentially a codification of the equal protection rights of citizens with disabilities, the court stated that it "was satisfied that section 504 [the Rehabilitation Act] does impose an obligation upon local school districts to accommodate the needs of handicapped children." 11 Cal.App. 4th at 1586.

[195] In claimants' March 1, 2011 comments, the claimants note their continued disagreement with the Commission's standard of review of federal mandates stating, "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 pervious arguments are not productive at this junction as a matter of administrative futility." Claimant Comments on Draft Staff Analysis, *supra*, p. 4.

As relevant to this section ("equal employment opportunity"), under Section 504 and its implementing regulations community college districts are required to engage in the following activities:

1. Designate at least one person to coordinate efforts to comply with 34 Code of Federal Regulations part 104 (which implements section 504 of the Rehabilitation Act), if employing 15 people or more. (34 C.F.R. § 104.7(a) (May 9, 1980)).
2. Adopt grievance procedures for employees that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by 34 Code of Federal Regulations part 104 (which implements section 504 of the Rehabilitation Act), if employing 15 people or more. (34 C.F.R. § 104.7(b) (May 9, 1980)).
3. Make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the district can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity. (34 C.F.R. § 104.12 (Nov. 13, 2000)).

It is important to note that, unlike Title VII and title I of the ADA, the provisions of Section 504 address compliance with Section 504 initially through an internal process within the district. In contrast, compliance with Title VII and title I of the ADA is ensured and enforced externally with a combination of efforts by the EEOC and federal courts.

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

Title IX of Education Amendments of 1972 (Title IX) (codified at 20 U.S.C. § 1681 et seq.) and its implementing regulations (34 C.F.R. § 106 et seq.) prohibit discrimination on the basis of sex under any education program or activity receiving federal financial assistance, including employment.[196] Title IX applies to community college districts as recipients of federal financial assistance.[197] Under the implementing regulations of Title IX, the prohibition against discrimination on the basis of gender applies to community college district recruitment, advertising, and processing of applications for employment.[198] In addition, subject to some exceptions, Title IX's implementing regulations prohibit the use of tests or criteria in screen or selection procedures for employment that have an adverse impact on persons on the basis of gender.[199]

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[196] Title 20 United States Code sections 1681 and 1687; 34 Code of Federal Regulations part 106.51; *North Haven Bd. of Ed. v. Bell* (1982) 456 U.S. 512, 530-535. See also, *Sharif by Salahuddin v. New York State Educ. Dept.* (S.D.N.Y. 1989) 709 F.Supp. 345, 360 fn. 34, noting that Congress broadened the scope of title 20 United States Code section 1687 with the 1988 adoption of the Civil Rights Restoration Act, such that receipt of federal financial assistance results in institution-wide application of Title IX.

[197] *Hayes, supra,* 11 Cal.App.4th 1564, 1584, noting the pervasiveness of federal financial assistance in education.

[198] 34 Code of Federal Regulations part 106.51 (b)(1) (Nov. 13, 2000).

[199] 34 Code of Federal Regulations part 106.52 (May 9, 1980). The use of test or criteria that have a disproportionate adverse effect on individuals based on sex is prohibited unless: (1) use

Like Section 504, compliance with Title IX is a condition of receipt of all federal financial assistance, and as a result, community college districts are not *legally* required to comply with the provisions of Title IX. However, also like Section 504, community college districts face practical compulsion to comply with Title IX and its implementing regulations. A failure to comply with Title IX and its implementing regulations can result in the termination of federal financial assistance to the program in which noncompliance is found.[200] In addition, community college districts face litigation by aggrieved employees or applicants for employment for intentional violations of Title IX.[201] Further, the principal objectives of Title IX are to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those discriminatory practices.[202]

Thus, for reasons similar to those discussed for Section 504, the Commission finds that community colleges are practically compelled to comply with the requirements and prohibitions of Title IX and its implementing regulations. As relevant to this discussion, Title IX and its implementing regulations require community college districts to engage in the following activities:

1. Designate at least one employee to coordinate efforts to comply with and carry out the responsibilities under 34 Code of Federal Regulations part 106, which implement Title IX, including the investigation of any complaint communicated to the community college district alleging its noncompliance with part 106 or alleging any action that would be prohibited by part 106. (34 C.F.R. § 106.8(a) (May 9, 1980).)
2. Adopt and publish grievance procedures providing for prompt and equitable resolution of employee complaints alleging any action which would be prohibited by this part. (34 C.F.R. § 106.8(b) (May 9, 1980).)

Like Section 504, it is important to note that efforts to ensure compliance with Title IX are required to be initially handled internally by the community college district.

<u>Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.)</u>

Title VI of the Civil Rights Act of 1964 (Title VI) (codified at 42 U.S.C. § 2000d et seq.) and its implementing regulations (34 C.F.R. § 100) prohibit discrimination on the basis of race, color, or national origin with respect to "any program or activity receiving Federal financial assistance."[203] Like Section 504, compliance with Title VI and its implementing regulations is a

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of such test or other criterion is shown to predict validly successful performance in the position in question; and (2) alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

[200] Title 20 United States Code section 1682 (Pub.L.No. 92-318 (June 23, 1972). See *Dougherty County School System v. Bell* (5th Cir. 1982) 694 F.2d 78, 81, finding that deferring school's federal funding must be done on a program by program basis.

[201] *Cannon v. University of Chicago* (1979) 441 U.S. 677, 717, in which the court found an implied private right of action under Title IX. *Davis v. Monroe County Bd. of Educ.* (1999) 526 U.S. 629, 639-640, finding that liability for damages extends only to recipients of federal funds.

[202] *Id*. at p. 704.

[203] Title 42 United States Code section 2000d (Pub.L.No. 88-352 (July 2, 1964)).

condition for the receipt of federal financial assistance, and thus, community college districts are not *legally* required to comply with Title VI and its implementing regulations.

Unlike Section 504, however, the provisions of Title VI apply to employment practices only where a primary objective of the federal financial assistance is to provide employment.[204] Title 42 United States Code section 2000d-3 prohibits enforcement actions by the federal government against recipients of federal financial assistance unless the primary objective of that assistance is to provide employment. The 9th Circuit extends this prohibition to civil suits by private individuals.[205] In this instance, although courts have acknowledged that federal financial assistance to education is pervasive, there is no evidence in the record that the primary objective of any of the federal financial assistance is to provide employment.[206] Thus, for the purposes of this section (the "equal employment opportunity" section of this analysis) Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.) does not constitute a federal mandate.

The Age Discrimination Act of 1975 (42 U.S.C. § 6101 et seq.)

The Age Discrimination Act of 1975 (codified at 42 U.S.C. § 6101 et seq.) and its implementing regulations (34 C.F.R. 110) prohibit discrimination on the basis of age in programs or activities receiving federal financial assistance. However, the Age Discrimination Act of 1975 explicitly excludes employment discrimination from its scope.[207] Thus, for purposes of the discussion in this section (the "Equal Employment Opportunity" section of this analysis) the Age Discrimination Act of 1975 (42 U.S.C. § 6101 et seq.) does not constitute a federal mandate.

(ii) The activities required by the Equal Employment Opportunity regulations that are also mandated by federal law are not subject to reimbursement under Article XIII B, section 6 of the California Constitution

The following will discuss whether activities required by the state are mandated by the federal laws described above. If the activities required by the title 5 regulations pled in the "equal employment opportunity" section of this analysis are required by federal law they do not constitute state-mandated activities.

District Evaluation (Cal. Code Regs., tit. 5, § 53004 (Register 96, No. 23 and Register 2002, No. 35))

Title 5, section 53004, as amended by Register 96, number 23, and Register 2002, number 35, require community college districts to engage in the following activities:

1. Annually survey its employees and monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing the faculty and staff diversity plan/equal employment opportunity plan and to provide data needed for the analyses

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[204] Title 42 United States Code section 2000d-3 (Pub.L.No. 88-352 (July 2, 1964)).

[205] *Grimes v. Superior Home Health Care of Middle Tennessee, Inc.* (M.D. Tenn. 1996) 929 F.Supp. 1088, 1092-1093, noting that many circuits, including the 9th Circuit, in the United States Courts of Appeal extends the limitation of 42 U.S.C. section 2000d-3 to the private right of action alleging violations of Title VI.

[206] *Hayes, supra,* 11 Cal.App.4th 1564, 1584.

[207] Title 42 United States Code section 6103, subdivision (c)(1).

required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

2. Annually report to the Chancellor, in a manner described by the Chancellor, the results of its annual survey of employees at each college in the district. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

   Report each employee 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. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

3. Afford each applicant or employee the opportunity to identify his or her gender, ethnicity and, if applicable, his or her disability for purposes of the survey and report required by California Code of Regulations, title 5, section 53004, subdivision (a) (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

   a. Count a person in only one ethnic group for reporting purposes if that person designates multiple ethnic groups with which he or she identifies. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

   b. Count and report Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians as part of the Asian/Pacific Islander group as well as in separate subcategories. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

Thus, under California law community college districts are required to annually create a record describing, out of seven job categories, which category each employee falls within. In addition, the record is to include each employee's gender, ethnic group identification, and, if applicable, disability.

Similarly, Title VII (42 U.S.C. § 2000e et seq.) and its implementing regulations (29 C.F.R. § 1602) mandate community college districts to engage in the following activity:

> Make or keep records necessary to provide the following information relevant to the determinations of whether unlawful employment practices have been or are being committed once every other year (beginning August 1, 1975):
>
> a. Assigned positions of employees separated by the following job categories: (a) faculty and other instructional staff; (b) executive/administrative/managerial; (c) other professionals (support/service); (d) technical and paraprofessional; (e) clerical and secretarial; (f) skilled crafts; and (g) service/maintenance.

(42 U.S.C. § 2000e-8 (Pub.L.No.92-261 (Mar. 24, 1972)); 29 C.F.R. § 1602.48 (Dec. 31, 1981); IPEDS Survey Material for 2-year degree-granting public institutions and related administrative offices that have 15 or more full-time staff (2009-10), p. 2, Part A.)

b. Gender of employees. (42 U.S.C. § 2000e-8 (Pub.L.No.92-261 (Mar. 24, 1972)); 29 C.F.R. § 1602.48 (Dec. 31, 1981); IPEDS Survey Material for 2-year degree-granting public institutions and related administrative offices that have 15 or more full-time staff (2009-10), p. 3-25, Parts D, E, G-L.)

c. Race/ethnicity of employees separated in the following categories: (a) Hispanic/Latino; (b) American Indian or Alaska Native; (c) Asian; (d) Black or African American; (e) Native Hawaiian or Other Pacific Islander; (f) White; (g) two are more races; (h) nonresident alien; and (i) race and ethnicity unknown. (42 U.S.C. § 2000e-8 (Pub.L.No.92-261 (Mar. 24, 1972)); 29 C.F.R. § 1602.48 (Dec. 31, 1981); IPEDS Survey Material for 2-year degree-granting public institutions and related administrative offices that have 15 or more full-time staff (2009-10), p. 7-25, Parts G-L.)

Although California law mirrors Title VII and its implementing regulations in many ways, it also diverges from the requirements of Title VII in a few aspects. California law requires the creation of a record of employee information annually. Under Title VII, however, community college districts are only required to make a record once every other year (every odd year, e.g. 2007-2008, 2009-2010, etc.). In addition, California law requires the collection of information regarding employee disabilities, while Title VII does not.

Thus, the following activity required by title 5, section 53004, constitutes a federal mandate and is not subject to reimbursement under article XIII B, section 6 of the California Constitution:

> Survey district employees every odd year in order to evaluate the progress in implementing its faculty and staff diversity plan/equal employment opportunity plan and to provide data needed for the analyses required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

The following activity required by title 5, section 53004, exceeds the requirements of Title VII, and does not constitute a federal mandate under *Hayes*:

> Survey district employees every even year (except for information regarding disability, which shall occur annually) and monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing its faculty and staff diversity plan/equal employment opportunity plan and to provide data needed for the analyses required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

Delegation of Authority (Cal. Code Regs., tit. 5, § 53020 (Register 96, No. 23 and Register 2002, No. 35))

Title 5, section 53020, subdivisions (a) and (b) require community college districts to:

1. Ensure that an affirmative action officer/equal employment opportunity officer is designated to oversee the day-to-day implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.), upon the recommendation of the chief executive officer. (Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subdivision (a) (Register 2002, No. 35), beginning July 1, 2001.)
2. Designate in the faculty and staff diversity plan/equal employment opportunity plan a single officer, who may be the affirmative action officer/equal employment opportunity officer, who shall be given authority and responsibility for receiving complaints filed pursuant to California Code of Regulations, title 5, 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 California Code of Regulations, title 5, sections 53023 and 53024. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23), beginning July 1, 2001.)

The equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) that must be overseen by the affirmative action officer/equal employment opportunity officer include, but are not limited to, requirements regarding the provision of reasonable accommodations to persons with disabilities (Cal. Code Regs., tit. 5, § 53025); job announcements and qualifications (Cal. Code Regs., tit. 5, § 53022); the applicant pool (Cal. Code Regs., tit. 5, § 53023); and the screening or selection procedures for employment (Cal. Code Regs., tit. 5, § 53024); all of which must be designed to avoid discrimination or adverse impact on groups based on ethnic group identification, gender, or disability; and the creation of a grievance procedure for violations of the regulations.[208] In addition, the requirements of the equal employment opportunity program regulations are meant to implement and be read in conjunction with various state and federal antidiscrimination laws including, but not limited to, Section 504 and Title IX.[209]

As relevant to this discussion, the implementing regulations of Section 504, which prohibits employment discrimination on the basis of disability, require community college districts to:

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[208] California Code of Regulations, title 5, sections 53024 and 53026.

[209] California Code of Regulations, title 5, section 53000, as amended in Register 96, number 23, and Register 2002, number 35, provides that the equal employment opportunity program regulations are to meant to implement and be read in conjunction with Government Code sections 11135-11139.5, Education Code sections 66010.2, 66030, and 66250 et seq., Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794); the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.); and the Age Discrimination Act (42 U.S.C. § 6101). The Register 96 version of section 53000 also provided that the regulations are meant to implement Education Code section 87100 et seq.

1. Designate at least one person to coordinate efforts to comply with 34 Code of Federal Regulations part 104 (which implements section 504 of the Rehabilitation Act), if employing 15 people or more. (34 C.F.R. § 104.7 (a) (May 9, 1980)).
2. Adopt grievance procedures for employees that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by 34 Code of Federal Regulations part 104 (which implements section 504 of the Rehabilitation Act), if employing 15 people or more. (34 C.F.R. § 104.7 (b) (May 9, 1980)).

Similarly, the implementing regulations of Title IX, which prohibits employment discrimination on the basis of gender, require community college districts to:

> Designate at least one employee to coordinate efforts to comply with and carry out the responsibilities under 34 Code of Federal Regulations part 106, including the investigation of any complaint communicated to the community college district alleging its noncompliance with part 106 or alleging any action that would be prohibited by part 106. (34 C.F.R. § 106.8, subd. (a) (May 9, 1980).)

As discussed above, Section 504 and Title IX's implementing regulations prohibit discrimination on the basis of disability and gender in employment; prohibit, with exceptions, the use of employment practices that have an adverse impact on individuals with disabilities or a specific gender; and require a grievance procedure for complaints alleging violations of the prohibitions and requirements of Section 504 and Title IX.[210] Thus, like the affirmative action/equal employment opportunity program regulations, Section 504 and Title IX require the designation of an employee to oversee employment screening and selection procedures, which must be designed to avoid adverse impact on groups based on gender, and disability; and the creation of a grievance procedure for violations of the Section 504 and Title IX regulations, which the district employee must oversee. As a result, the following activities constitute federal mandates not subject to reimbursement under article XIII B, section 6 of the California Constitution:

1. Ensure, upon the recommendation of the chief executive officer, that an affirmative action officer/equal employment opportunity officer is designated to oversee the day-to-day implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.), the portion of which require the provision of reasonable accommodations to disabled individuals (Cal. Code Regs., tit. 5, § 53025), and the portion of which require the job announcements and qualifications (Cal. Code Regs., tit. 5, § 53022), the applicant pool (Cal. Code Regs., tit. 5, § 53023), and the screening and selection procedures for employment (Cal. Code Regs., tit. 5, § 53024), to avoid adverse impact on groups based on disability or gender. (Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subdivision (a) (Register 2002, No. 35), beginning July 1, 2001.)
2. Designate in the faculty and staff diversity plan/equal employment opportunity plan a single officer, who may be the affirmative action officer/equal employment opportunity officer, who shall be given authority and responsibility for receiving complaints of violations of the equal employment opportunity program regulations based on disability

[210] 34 Code of Federal Regulations parts 104.7 and 106.8 (May 9, 1980).

or gender filed pursuant to California Code of Regulations, title 5, section 53026, for ensuring that such complaints are promptly and impartially investigated, and ensuring that selection procedures and the applicant pool are properly monitored for adverse impact on groups based on disability or gender, as required by California Code of Regulations, title 5, sections 53023 and 53024. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23), beginning July 1, 2001.)

However, in addition to avoiding adverse impact on groups based on gender and disability, the equal employment opportunity program regulations also require that the employment screening and selection procedures are designed to avoid adverse impact on groups based on ethnic group identification and to receive complaints of violations of the equal employment opportunity regulations based on ethnic group identification. Further, as summarized below under "Summary of Required Activities that Exceed the Requirements of Federal Law," the equal employment opportunity program regulations impose many other requirements that are not imposed by federal law, the implementation of which must be overseen by the affirmative action employment officer. As a result, the following activities do not constitute federal mandates:

1. Ensure, upon the recommendation of the chief executive officer, that an affirmative action officer/equal employment opportunity officer is designated to oversee the day-to-day implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.), excluding overseeing the portion of the equal employment opportunity program regulations which require the provision of reasonable accommodations to disabled individuals (Cal. Code Regs., tit. 5, § 53025), and the portion of which require the job announcements and qualifications (Cal. Code Regs., tit. 5, § 53022), the applicant pool (Cal. Code Regs., tit. 5, § 53023), and the screening and selection procedures for employment (Cal. Code Regs., tit. 5, § 53024), to avoid adverse impact on groups based on disability or gender. (Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subdivision (a) (Register 2002, No. 35), beginning July 1, 2001.)
2. Designate in the faculty and staff diversity plan/equal employment opportunity plan a single officer, who may be the affirmative action officer/equal employment opportunity officer, who shall be given authority and responsibility for receiving complaints of violations of the equal employment opportunity program regulations, filed pursuant to California Code of Regulations, title 5, section 53026, excluding those based on disability or gender, for ensuring that such complaints are promptly and impartially investigated, and ensuring that selection procedures and the applicant pool are properly monitored for adverse impact, as required by California Code of Regulations, title 5, sections 53023 and 53024, excluding adverse impact on groups based on disability or gender. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23), beginning July 1, 2001.)

<u>Job Announcements and Qualifications (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23 and Register 2002, No. 35))</u>

Title 5, section 53022, requires community college districts to engage in the following activity:

> Review job specifications, including any "required," "desired," or "preferred" qualifications beyond the state minimum qualifications (set forth in Subchapter 4

> of Cal. Code Regs., tit. 5, commencing with § 53400) which the district wishes to utilize, before the position is announced to ensure conformity with the requirements of California Code of Regulations, title 5, section 53000 et seq., and state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

Thus, community college districts are required to review for compliance with state and federal nondiscrimination laws, not simply comply with state and federal nondiscrimination laws. As noted above, Section 504 and Title IX require community college districts to designate an employee to oversee compliance with Section 504 and Title IX.[211] As a result, reviewing job specifications which the district wishes to utilize for conformity with the requirements of Section 504 and Title IX constitute a federal mandate not subject to reimbursement under article XIII B, section 6 of the California Constitution.

However, the following activity does not constitute a federal mandate:

> Review job specifications, including any "required," "desired," or "preferred" qualifications beyond the state minimum qualifications (set forth in Subchapter 4 of Cal. Code Regs., tit. 5, commencing with § 53400) which the district wishes to utilize, before the position is announced to ensure conformity with the requirements of California Code of Regulations, title 5, section 53000 et seq., and state and federal nondiscrimination laws, excluding section 504 of the Rehabilitation Act, and Title IX of Education Amendments of 1972. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

<u>Applicant Pool, and Screening or Selection Procedures (Cal. Code Regs., tit. 5, §§ 53023 and 53024 (Register 96, No. 23 and Register 2002, No. 35))</u>

As relevant to this discussion, title 5, sections 53023 and 53024, require community college districts to engage in the following activities:

1. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that any failure to obtain projected representation for any monitored group is not due to discriminatory recruitment procedures. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)
2. Analyze the composition of the qualified applicant pool to ensure that no group defined in terms of ethnicity, gender, or disability is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (m) (Register 96, No. 23).

   This analysis occurs after the analysis to ensure that expected representation has been achieved for historically underrepresented groups (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

[211] 34 Code of Federal Regulations parts 104.7(a) and 106.8(a) (May 9, 1980).

3. Analyze the composition of the qualified applicant pool to ensure that no monitored group is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (a) (Register 2002, No. 35).

   This analysis occurs after the analysis done to ensure that any failure to obtain projected representation for any monitored group is not due to discriminatory recruitment procedures (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

4. Take effective steps to address adverse impact found in the district's applicant pool before the selection process is continued. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)

5. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to ensure that they do not have an adverse impact, as defined by California Code of Regulations, title 5, section 53001, subdivision (m), on any group defined in terms of ethnicity, gender, or disability. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

6. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to avoid an adverse impact as defined in California Code of Regulations, title 5, section 53001, subdivision (a), and to detect and address any adverse impact which does occur. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)

7. Suspend the selection process and take timely and effective steps to remedy adverse impact on any group before the selection process resumes if monitoring under California Code of Regulations, title 5, section 53024, subdivision (a)(4) reveals that any selection technique or procedure has adversely impacted such group. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

8. Immediately discontinue the use of any locally established qualifications beyond state minimum qualifications that have not been verified as described in California Code of Regulations, title 5, section 53023, subdivision (c)(2) or replaced with suitable alternatives having a lesser adverse impact if adverse impact results from the locally established qualifications. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

The above activities all seek to prevent or end the use of discriminatory recruitment procedures, and application, screening, and selection procedures that result in adverse impact. "Adverse impact" is defined by the title 5 regulations as a statistical measure, such as those outlined in the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures,"[212] applied to the effects of a selection procedure and demonstrates a

[212] The Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures," sets forth a "four-fifths rule" in which a selection rate for any race, sex or

disproportionate negative impact on any group defined in terms of ethnic group identification, gender, or disability.[213]

Generally stated, Section 504 and Title IX prohibit employment discrimination on the basis of disability or gender. The implementing regulations of Section 504 and Title IX prohibit community college districts from administering or operating any test or other criterion for any employment opportunity which have an adverse impact on persons on the basis of disability or gender, unless the test or other criterion meets certain requirements.[214] This prohibition is applicable to recruitment, advertising, processing of applications for employment, and employment related decisions.[215] In addition, community college districts are required to oversee compliance with these prohibitions.[216] Thus, community college districts are required to oversee that district recruitment, advertising, processing of applications for employment, and employment related decisions are not discriminatory and do not have an adverse impact on individuals based on disability or gender.

Under *San Diego Unified School Dist*., state rules or procedures intended to implement an applicable federal law, whose costs are de minimis in context with the federal law, should be treated as part and parcel of the underlying federal mandate.[217] In this instance, the affirmative action/equal employment opportunity regulations specifically implement various state and federal antidiscrimination laws including Section 504 and Title IX.[218] As discussed above, Section 504 and Title IX require community college districts oversee that district recruitment, advertising, processing of applications for employment, and employment related decisions are not discriminatory and do not have an adverse impact on individuals based on disability or gender. In this context, the cost of activities listed above, which seek to prevent or end the use of

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ethnic group which is less than four-fifths of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact. See 29 Code of Federal Regulations part 1607.4(D) (Dec. 31, 1981).

[213] California Code of Regulations, title 5, section 53001, subdivision (m) (Register 96, No. 23); and section 53001, subdivision (a) (Register 2002, No. 35).

[214] 34 Code of Federal Regulations parts 104.13 and 106.52 (May 9, 1980). Tests or selection criteria which tend to screen out handicapped persons or any class of handicapped persons may be used if: (1) the test score or other selection criteria, as used by the recipient, is shown to be job-related for the position in question; and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director of the United States Department of Education to be available. Tests or selection criteria which have an adverse impact on persons based on gender may be used if: (1) use of such test or other criterion is shown to predict validly successful performance in the position in question; and (2) alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

[215] 34 Code of Federal Regulations parts 104.11 and 106.51(Nov. 13, 2000 and May 9, 1980).

[216] 34 Code of Federal Regulations parts 104.7 and 106.8 (May 9, 1980).

[217] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 890.

[218] California Code of Regulations, title 5, section 53000 (Register 96, No. 23; and Register 2002, No. 35)

discriminatory recruitment procedures, and application, screening, and selection procedures that result in an adverse impact, is de minimis.

Thus, the above activities should be treated as part and parcel of the underlying federal mandate to the extent that the activities above prevent or end the use of employment procedures that discriminate or result in an adverse impact on individuals based on disability or gender. As a result, these activities as they relate to a disparate impact or discrimination on the basis of disability and gender are not subject to reimbursement under article XIII B, section 6 of the California Constitution.

However, because the above activities also seek to prevent or end the use of recruitment procedures that discriminate on the basis of ethnicity, and the use of application, screening, and selection procedures that result in adverse impact on the basis of ethnicity, the following activities do not constitute a federal mandate:

1. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that any failure to obtain projected representation for any group defined in terms of ethnicity is not due to discriminatory recruitment procedures. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

2. Analyze the composition of the qualified applicant pool to ensure that no group defined in terms of ethnicity is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (m) (Register 96, No. 23).

   This analysis occurs after the analysis to ensure that expected representation has been achieved for groups defined in terms of ethnicity (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

3. Analyze the composition of the qualified applicant pool to ensure that no ethnic group is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (a) (Register 2002, No. 35).

   This analysis occurs after the analysis done to ensure that any failure to obtain projected representation for any group defined in terms of ethnicity is not due to discriminatory recruitment procedures (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

4. Take effective steps to address adverse impact on any group defined in terms of ethnicity found in the district's applicant pool before the selection process is continued. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)

5. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to ensure that they do not have an adverse impact, as defined by California Code of Regulations, title 5, section 53001, subdivision (m), on any group defined in terms of ethnicity. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

6. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to avoid an adverse impact as defined in California Code of Regulations, title 5, section 53001, subdivision (a) on any group defined in terms of ethnicity, and to detect and address any adverse impact on any group defined in terms of ethnicity which does occur. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)
7. Suspend the selection process and take timely and effective steps to remedy adverse impact on any group defined in terms of ethnicity before the selection process resumes if monitoring under California Code of Regulations, title 5, section 53024, subdivision (a)(4) reveals that any selection technique or procedure has adversely impacted such ethnic group. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)
8. Immediately discontinue the use of any locally established qualifications beyond state minimum qualifications that have not been verified as described in California Code of Regulations, title 5, section 53023, subdivision (c)(2) or replaced with suitable alternatives having a lesser adverse impact on any group defined in terms of ethnicity if adverse impact results from the locally established qualifications. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

<u>Persons with Disabilities (Cal. Code Regs., tit. 5, § 53025 (Register 96, No. 23 and Register 2002, No. 35))</u>

Title 5, section 53025, requires community college districts to:

> Ensure that applicants and employees with disabilities receive reasonable accommodations consistent with the requirements of Government Code section 11135 et seq. and 12940 (m), Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act. (Cal. Code Regs., tit. 5, § 53025 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53025 (Register 2002, No. 35), beginning July 1, 2001.)

Section 504 of the Rehabilitation Act requires community college districts to engage in the following activity:

> Make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the district can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity. (34 C.F.R. § 104.12 (Nov. 13, 2000).)

Similarly the ADA and its implementing regulations require community college districts to engage in the following activity:

> Make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. (42 U.S.C. § 12112(b)(5)(A) (Pub.L.No. 102-166 (Nov. 21, 1991); 29 C.F.R § 1630.9 (July 26, 1991).)

The "reasonable accommodations" that are to be provided under Government Code sections 11135 and 12940, subdivision (m), are the same type of "reasonable accommodations" that are required under Section 504 and the ADA.[219, 220] Thus, for the purposes of this discussion, Government Code sections 11135 and 12940, subdivision (m), do not require any reasonable accommodations in excess of those required by section 504 of the Rehabilitation Act or the ADA. According to the plain language of California Code of Regulations, title 5, section 53025, community college districts are required to provide reasonable accommodations "consistent" with section 504 of the Rehabilitation Act, the ADA, and Government Code sections 11135 and 12940, subdivision (m), but does not require anything in excess of those laws. As a result, the requirement of the 1996 version of section 53025 and the 2002 version of section 53025, subdivision (a), to ensure that applicants and employees with disabilities receive reasonable accommodations consistent with the requirements of Government Code section 11135 et seq. and 12940 (m), Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act is mandated by federal law, and as a result, is not subject to reimbursement under article XIII B, section 6 of the California Constitution.

Complaints (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23 and Register 2002, No. 35))

Title 5, section 53026, requires community college districts to engage in the following activity:

> Establish a process permitting any person to file a complaint alleging that the requirements of the affirmative action/equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) have been violated. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

Section 504 of the Rehabilitation Act's implementing regulations requires the establishment of a complaint process for allegations of discrimination based on disability. Specifically, 34 Code of Federal Regulations part 104.7 provides:

> Adopt grievance procedures for employees that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by 34 Code of Federal Regulations part 104 (which implements section 504 of the Rehabilitation Act), if employing 15 people or more. (34 C.F.R. § 104.7 (b) (May 9, 1980).)

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[219] Government Code section 11135 et seq. incorporates the "accessibility requirement" for state funded programs found in Title II of the ADA. Courts have found that to assure meaningful access, *reasonable accommodations* in an entity's program or benefit may have to be made. *Alexander v. Choate* (1985) 469 U.S. 287, 301; *Fry v. Saenz* (2002) 98 Cal.App.4th 256, 268. In addition, courts have often used case law construing the Rehabilitation Act, which requires and defines "reasonable accommodations" to provide guidance in construing the ADA. *Fry v. Saenz*, *supra*, 98 Cal.App.4th at 263.

[220] *Humphrey v. Memorial Hospitals Assn.* (2001) 239 F.3d 1128, 1133, fn. 6., in which the court notes that Government Code section 12940, subdivision (m), which is part of California's fair Employment and Housing Act (FEHA), is based on the ADA, and as a result, courts have used the ADA in interpreting FEHA's provisions.

The implementing regulations of Title IX of the Education Amendments of 1972 require community college districts to establish a complaint process for allegations of discrimination based on gender. 34 Code of Federal Regulations part 106.8 provides:

> Adopt and publish grievance procedures providing for prompt and equitable resolution of employee complaints alleging any action which would be prohibited by this part. (34 C.F.R. § 106.8, subd. (b) (Nov. 13, 2000).)

Thus, the establishment of a process permitting *employees* to allege that the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.), to the extent that the requirements coincide with the requirements of Section 504 and Title IX (i.e. failure to designate a person to coordinate efforts to comply Section 504 and Title IX (see Cal. Code Regs., tit. 5, § 53020); failure to provide reasonable accommodations (see Cal. Code Regs., tit. 5, § 53020); and employment discrimination on the basis of gender and disability in the employee selection procedures), have been violated is mandated by federal law, and therefore, is not subject to reimbursement under article XIII B, section 6 of the California Constitution.

However, the following activity required by title 5, section 53026, *does not* constitute a federal mandate:

> Establish a process permitting any person to file a complaint alleging that the requirements of the affirmative action/equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) have been violated. This excludes the establishment of a process permitting an employee to file a complaint alleging a violation of the equal employment opportunity program regulations on the basis of disability or gender (i.e. failure to designate a person to coordinate efforts to comply Section 504 and Title IX (see Cal. Code Regs., tit. 5, § 53020); failure to provide reasonable accommodations (see Cal. Code Regs., tit. 5, § 53020); and employment discrimination on the basis of disability and gender in district employee selection procedures). (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

To the extent that the test claim regulation requirements discussed above constitute federal mandates, the requirements are not subject to Article XIII B, section 6 of the California Constitution. However, if the requirements of a test claim statute or regulation go beyond or exceed the requirements of federal law, those activities are *not* federal mandates and *may* be subject to article XIII B, section 6. For example, in *Long Beach Unified School Dist. v. State of California*, federal law required school districts to take reasonable steps to alleviate racial and ethnic segregation, and the federal courts suggested certain approaches to comply. State law was enacted to require specific action of school districts to alleviate segregation. The court found that the state law requirements went beyond federal constitutional and case law requirements or suggestions and mandated a higher level of service.[221] In addition, Government Code section 17556, subdivision (c), requires the Commission to not find costs mandated by the state if "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and imposes costs mandated by the federal government, *unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation*." (Emphasis added.)

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[221] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 173.

In this case, there are several administrative, accounting, and reporting activities that exceed the requirements of federal law and are, thus, not mandated by federal law.

(iii) Summary of Required Activities that Exceed the Requirements of Federal Law

1. Commit to sustained action to devise recruiting, training, and advancement opportunities that will result in equal employment opportunities for all qualified applicants and employees. (Ed. Code, § 87101, subd. (c) (Stats. 2002, ch. 1169), beginning January 1, 2003.)
2. Periodically submit to the Board of Governors of the California Community Colleges an affirmation of compliance with the provisions of Education Code sections 87100-87107, which address affirmative action hiring (as existing prior to September 4, 2001). (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)
3. Have goals in the affirmative action employment program that ensure participation in, and commitment to, the program by district personnel, and timetables, for its implementation. (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)
4. Include steps in the faculty and staff diversity plan that the district will take in meeting and improving hiring goals for both full-time faculty and part-time faculty pursuant to Education Code section 87482.6 (Stats. 1988, ch. 973), and the development of the plan shall be a condition for receipt of allowances pursuant to Education Code section 87482.6. (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)
5. Make the faculty and staff diversity plan/equal employment opportunity plan a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code). (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973); Cal. Code Regs., tit. 5, § 53003, subd. (d) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (e) (Register 2002, No. 35), beginning July 1, 2001.)
6. Publish and distribute a record of the success rate of the measurable progress, with respect to the district's goals and timetables, in hiring employees through its affirmative action employment program. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

   Make this publication a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code), and include data and information specified by the Board of Governors. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)
7. Periodically submit an affirmation of compliance with Education Code sections 87100-87108 (Stats. 2002, ch. 1169), which address equal employment opportunity hiring, to the Board of Governors as a condition of the receipt of funds pursuant to Education Code section 87107 (Stats. 2002, ch. 1169) if the community college district opts to participate

under Education Code sections 87100-87108. (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)

8. Ensure participation in, and commitment to, the equal employment opportunity program by district personnel, if the community college district is a participant under Education Code sections 87100-87108 (Stats. 2002, ch. 1169). (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)
9. Include in the equal employment opportunity plan steps that the district will take in eliminating improper discrimination or preferences in its hiring and employment practices if the community college district is a participant in the equal employment opportunity hiring program under Education Code sections 87100-87108 (Stats. 2002, ch. 1169). (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)
10. Address in the equal employment opportunity plan how the district will make progress in achieving the ratio of full-time to part-time faculty hiring, as indicated in Education Code section 87482.6, while still ensuring equal employment opportunity, if the community college district is a participant under Education Code sections 87100-87108 (Stats. 2002, ch. 1169). (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)
11. Develop and adopt a district-wide written faculty and staff diversity plan/equal employment opportunity plan to implement its affirmative action employment program/equal employment opportunity program. (Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 2002, No. 35) beginning July 1, 2001.)
12. Submit faculty and staff diversity plans/equal employment opportunity plans and revisions to the Chancellor's Office for review and approval. (Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)
13. Review the faculty and staff diversity plans/equal employment opportunity plans at least every three years and if necessary revise the plans and submit them to the Chancellor's Office for approval. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)
14. Notify the Chancellor at least 30 days prior to adopting any amendments to the faculty and staff diversity plan/equal employment opportunity plan other than those made during the three year review. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)
15. Include in the faculty and staff diversity plan/equal employment opportunity plan the following:
    a. Goals and timetables, as appropriate, for hiring and promotion of members of historically underrepresented groups developed pursuant to California Code of Regulations, title 5, section 53006 for each college in the district and for the

district as a whole. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

b. The designation of the district employees who have been delegated responsibility and authority for implementing the faculty and staff diversity plan/equal employment opportunity plan and assuring compliance with the requirements of California Code of Regulations, title 5, section 53000 et seq. (Register 96, No. 23; and Register 2002, No. 35), pursuant to California Code of Regulations, title 5, section 53020. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(1) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (c)(1) (Register 2002, No. 35), beginning July 1, 2001.)

c. The procedure for filing complaints pursuant to California Code of Regulations, title 5, section 53026 (Register 96, No. 23; Register 2002, No. 35) and the person with whom the complaints are to be filed. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(2) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (c)(2) (Register 2002, No. 35.), beginning July 1, 2001.)

d. A process for notifying all district employees of the provisions of the faculty and staff diversity plan/equal employment opportunity plan and the commitment to affirmative action employment/equal employment opportunity policy statement required under California Code of Regulations, title 5, section 53002 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(3) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (c)(3) (Register 2002, No. 35), beginning July 1, 2001.)

e. A process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of California Code of Regulations, title 5, section 53000 et seq., which addresses affirmative action/equal employment opportunity programs (Register 96, No. 23; Register 2002, No. 35) and of state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(4) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subdivision (c)(4) (Register 2002, No. 35), beginning July 1, 2001.)

f. A process for providing annual written notice to appropriate community organizations concerning the district's faculty and staff diversity plan and the need for assistance from the community in identifying qualified members of historically underrepresented groups for openings with the district. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(5) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

g. A process for providing annual written notice to appropriate community-based and professional organizations concerning the district's equal employment opportunity plan and the need for assistance from the community and such organizations in identifying qualified applicants. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(5) (Register 2002, No. 35), beginning August 11, 2002.)

h. An analysis of the number of persons from historically underrepresented groups (ethnic minorities, women, and persons with disabilities) are employed in the

district's work force and those who have applied for employment in each of the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(6) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

i. An analysis of the number of persons from monitored groups (groups based on gender, ethnic group identification, and disability) who are employed in the district's work force and those who have applied for employment in each of the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) serve and maintenance (listed in Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35)). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(6) (Register 2002, No. 35), beginning August 11, 2002.)

j. An analysis of the degree to which women, ethnic minorities, and persons with disabilities are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

k. An analysis of the degree to which monitored groups (groups based on gender, ethnic group identification, and disability) are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 2002, No. 35), beginning August 11, 2002.)

l. The steps the district will take to achieve diversity in its workforce. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(8) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

m. Goals for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003, subdivision (c)(7) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(9) (Register 96, No. 23). Beginning July 1, 2001 through August 10, 2002.)

n. Methods for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003, subdivision (c)(7). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(8) (Register 2002, No. 35). Beginning August 11, 2002.)

o. Additional steps consistent with California Code of Regulations, title 5, section 53006, to remedy any significant underrepresentation identified in the plan. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(9) (Register 2002, No. 35), beginning August 11, 2002.)

p. A plan for corrective action consistent with California Code of Regulations, title 5, section 53006 (Register 96, No. 23), including goals and timetables for hiring and promotion, if necessary, to remedy any significant underrepresentation identified in the faculty and staff diversity plan by achieving expected representation for all historically underrepresented groups in all job categories listed in California Code of Regulations, title 5, § 53004, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(10) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

q. Any other measures necessary to further equal employment opportunity throughout the district. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(10) (Register 2002, No. 35), beginning August 11, 2002.)

r. Any goals for hiring persons with disabilities that are required by California Code of Regulations, title 5, section 53025. (Cal. Code Regs., tit. 5, § 53003, subd. (d) (Register 2002, No. 35), beginning August 11, 2002.)

16. Make a continuous good faith effort to comply with the requirements of the faculty and staff diversity plan/equal employment opportunity plan. (Cal. Code Regs., tit. 5, § 53003, subd. (e) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (f) (Register 2002, No. 35), beginning July 1, 2001.)

17. Adopt a policy statement setting forth the district's commitment to an affirmative action program/equal employment opportunity program. (Cal. Code Regs., tit. 5, § 53002 (Register 96, No. 23), one-time activity for the period beginning July 1, 2001 through August 10, 2002; Cal. Code Regs., tit. 5, § 53002 (Register 2002, No. 35) one-time activity beginning August 11, 2002.)

18. Survey district employees every even year (except for information regarding disability, which shall occur annually) and monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing the faculty and staff diversity plan/equal employment opportunity plan and to provide data needed for the analyses required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

19. Annually report to the Chancellor, in a manner described by the Chancellor, the results of its annual survey of employees at each college in the district. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

    Report employees 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. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

20. Afford each applicant or employee the opportunity to identify his or her gender, ethnicity and, if applicable, his or her disability for purposes of the survey and report required by

California Code of Regulations, title 5, section 53004, subdivision (a) (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

a. Count a person in only one ethnic group for reporting purposes if that person designates multiple ethnic groups with which he or she identifies. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

b. Count and report Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians as part of the Asian/Pacific Islander group as well as in separate subcategories. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

21. Establish a Faculty and Staff Diversity Advisory Committee/Equal Employment Opportunity Advisory Committee to assist the district in developing and implementing the faculty and staff diversity plan/equal employment opportunity plan required under section 53003 (Register 96, No. 23; Register 2002, No. 35) which includes members of all historically underrepresented groups/diverse membership whenever possible. (Cal. Code Regs., tit. 5, § 53005 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53005 (Register 2002, No. 35), beginning July 1, 2001.)

22. If a community college district has existing goals:

a. Update goals established prior to June 30, 1996 and set a new target date for achieving expected representation for a group in a job category if significant underrepresentation still exists. (Cal. Code Regs., tit. 5, § 53006, subd. (a) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

b. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

c. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

d. Comply with California Code of Regulations, title 5, section 53006, subdivision (c) (Register 96, No. 23) while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006,

subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

23. If a community college district has no existing goals:

    a. Take corrective action if, pursuant to California Code of Regulations, title 5, section 53003, subdivision (c)(7), the district determines that a particular group is significantly underrepresented with respect to one or more job categories and no goal has previously been set. (Cal. Code Regs., tit. 5, § 53006, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. The district shall take, at a minimum, the following corrective action:

        i. Review district recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

        ii. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

        iii. Determine whether the group is still significantly underrepresented in the job categories in question after the measures described in California Code of Regulations, title 5, section 53006, subdivision (b)(1) and (2) (Register 96, No. 23) have been in place a reasonable period of time. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

        iv. Set a goal with a target date for achieving expected representation for the significantly underrepresented group in each job category where significant underrepresentation persists, if it persists. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

        v. Monitor on an ongoing basis the staffing rate for the significantly underrepresented groups in the specified job categories. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

        vi. Discontinue the use of goals when expected representation has been achieved for that group in the job categories in question. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

24. Additional measures to be taken if a goal has been set and after a reasonable period of time significant underrepresentation persists:

a. Establish a specific timetable to project the levels of annual hiring of persons from the significantly underrepresented group which will be necessary to meet the existing goal by the target date. (Cal. Code Regs., tit. 5, § 53006, subd. (c) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

b. Implement one or more of the following additional corrective measures until expected representation has been achieved for that group in the job category in question:

   i. Include in the applicant pool applicants from significantly underrepresented groups who were initially screened out because they failed to meet locally established "desirable or preferred" qualifications beyond state minimum qualifications, where such applicants can be expected to meet the additional qualifications through appropriate training or experience within one year. (Cal. Code Regs., tit. 5, § 53006, subd. (c)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

   ii. Consider, as one factor in the final selection process, the fact that a candidate is a member of a significantly underrepresented group, provided that the qualifications of the candidates under consideration are reasonably considered to be equivalent. (Cal. Code Regs., tit. 5, § 53006, subd. (c)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

25. If a community college district has no existing goals for women or persons with disabilities implement the measures required in California Code of Regulations, title 5, section 53006, subdivision (b)(1) and (2) (Register 96, No. 23) concurrently with setting a goal with a target date for achieving expected representation for women or persons with disabilities in each job category in which they are found to be significantly underrepresented. (Cal. Code Regs., tit. 5, § 53006, subd. (d) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    a. Goals shall remain in effect only until expected representation has been achieved for the group in the job category or categories in which significant underrepresentation is found. (Cal. Code Regs., tit. 5, § 53006, subd. (d) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. An aggregate labor force availability rate shall be utilized for setting goals for hiring persons with disabilities with respect to the total district work force until the Chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, § 53006, subd. (d), beginning July 1, 2001 through August 10, 2002.)

26. Take additional steps if a district determines that a particular monitored group is significantly underrepresented with respect to one or more categories, including at minimum:

    a. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(1) (Register 2002, No. 35), beginning August 11, 2002.)

b. 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. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(2) (Register 2002, No. 35), beginning August 11, 2002.)

c. Determine whether the group is still significantly underrepresented in the categories in question after the measures described in subdivisions (a)(1) and (2) of California Code of Regulations, title 5, section 53006, have been in place a reasonable period of time (three years or longer). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(3) (Register 2002, No. 35), beginning August 11, 2002.)

d. Monitor the staffing rate for the significantly underrepresented group in the specified job categories in question on an ongoing basis until the projected representation has been achieved for that group if significant underrepresentation persists. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)

27. 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, if significant underrepresentation persists for a particular group in the job category in question and a reasonable period of time has passed. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(1) (Register 2002, No. 35), beginning August 11, 2002.)

28. Discontinue the use of any locally established qualification that has not been found to satisfy the requirements set forth in California Code of Regulations, title 5, section 53006, subdivision (b)(1), if significant underrepresentation persists for a particular group in the job category in question and a reasonable period of time has passed. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(2) (Register 2002, No. 35), beginning August 11, 2002.)

29. Continue using qualification standards meeting the requirements of California Code of Regulations, title 5, section 53006, subdivision (b)(1) only where no alternative qualification standard is reasonably available which would select for the same characteristics, meet the requirements of subdivision (b)(1) and be expected to have a less exclusionary effect, if a significant underrepresentation persists for a particular group in the job categories in question and a reasonable period of time has passed. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(3) (Register 2002, No. 35), beginning August 11, 2002.)

30. Be ultimately responsible for proper implementation of California Code of Regulations, title 5, section 53000 et seq., at all levels of district and college operation and for making measurable progress toward the goals established in the district's faculty and staff diversity plan or measurable progress toward equal employment opportunity by methods described in the district's equal employment opportunity plan. (Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

31. Ensure, upon the recommendation of the chief executive officer, that an affirmative action officer/equal employment opportunity officer is designated to oversee the day-to-day implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.), excluding overseeing the portion of the equal employment opportunity program regulations which require the provision of reasonable accommodations to disabled individuals (Cal. Code Regs., tit. 5, § 53025), and the portion of which require the job announcements and qualifications (Cal. Code Regs., tit. 5, § 53022), the applicant pool (Cal. Code Regs., tit. 5, § 53023), and the screening and selection procedures for employment (Cal. Code Regs., tit. 5, § 53024), to avoid adverse impact on groups based on disability or gender. (Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subdivision (a) (Register 2002, No. 35), beginning July 1, 2001.)

32. Describe in the district's faculty and staff diversity plan/equal employment opportunity plan the administrative structure created by any delegation of authority to the affirmative action officer/equal employment opportunity officer or others. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

33. Design the administrative structure created by any delegation of authority to the affirmative action officer/equal employment officer or others in such a manner so as to ensure prompt and effective implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23) beginning July 1, 2001.)

34. Designate in the faculty and staff diversity plan/equal employment opportunity plan a single officer, who may be the affirmative action officer/equal employment opportunity officer, who shall be given authority and responsibility for receiving complaints of violations of the equal employment opportunity program regulations, filed pursuant to California Code of Regulations, title 5, section 53026, excluding those based on disability or gender, for ensuring that such complaints are promptly and impartially investigated, and ensuring that selection procedures and the applicant pool are properly monitored for adverse impact, as required by California Code of Regulations, title 5, sections 53023 and 53024, excluding adverse impact on groups based on disability or gender. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23), beginning July 1, 2001.)

35. Actively recruit from both within and outside the district work force to attract qualified applicants for all new openings except as provided by California Code of Regulations, title 5, section 53021, subdivision (b). (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

    a. Active recruitment shall include focused outreach to historically underrepresented groups. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. Active recruitment shall include outreach to ensure all persons, including persons from monitored groups, are provided the opportunity to seek employment with the

district. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning August 11, 2002.)

c. Open recruitment applies 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. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

36. Recruit at least statewide for full-time faculty and educational administrator positions, and at a minimum, seek qualified applicants listed in the California Community Colleges Faculty and Staff Diversity Registry/Equal Employment Opportunity Registry. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

37. Recruit part-time faculty positions separately for each new opening or by annually establishing a pool of eligible candidates. In either case, full and open recruitment is required consistent with California Code of Regulations, title 5, section 53021. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

38. Notify the Faculty and Staff Diversity Advisory Committee/Equal Employment Opportunity Advisory Committee established pursuant to California Code of Regulations, title 5, section 53005 and the Chancellor, at least ten working days prior to offering the position to a candidate, if the district believes justification exists for use of any of the exceptions listed in section 53021, subdivision(b). (Cal. Code Regs., tit. 5, § 53021, subd. (c) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)

39. Comply with the district's established hiring procedures and afford all qualified district employees the opportunity to apply even where in-house or promotional only recruitment is permitted under California Code of Regulations, title 5, section 53005, subdivision (b). (Cal. Code Regs., tit. 5, § 53021, subd. (d) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (d) (Register 2002, No. 35), beginning July 1, 2001.)

40. State clearly job specifications setting forth the knowledge, skills, and abilities necessary to job performance in job announcements. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

41. Include sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students in job requirements for faculty and administrative positions. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

42. Review job specifications, including any "required," "desired," or "preferred" qualifications beyond the state minimum qualifications (set forth in Subchapter 4 of Cal. Code Regs., tit. 5, commencing with § 53400) which the district wishes to utilize, before the position is announced to ensure conformity with the requirements of California Code

of Regulations, title 5, section 53000 et seq., and state and federal nondiscrimination laws, excluding section 504 of the Rehabilitation Act, and Title IX of Education Amendments of 1972. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

43. Afford each applicant an opportunity to voluntarily identify his or her gender, ethnicity and, if applicable, his or her disability, in the district's application for employment. (Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

44. Keep information regarding an applicant's gender, ethnicity, and/or disability provided in an application for employment confidential. (Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

45. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that expected representation has been achieved for historically underrepresented groups. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

46. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that any failure to obtain projected representation for any group defined in terms of ethnicity is not due to discriminatory recruitment procedures. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

47. Extend the application deadline and conduct additional focused recruitment for historically underrepresented groups for which expected representation has not been achieved, if necessary. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

48. Extend the application deadline and conduct additional recruitment, which eliminates discriminatory recruitment procedures and ensures that recruitment efforts provide a full and fair opportunity for participation to a wide diversity of potential applicants, if necessary. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

49. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when the expected representation of historically underrepresented groups is achieved, or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

50. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when recruitment efforts have offered an opportunity for participation to a wide diversity of potential applicants or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

51. Analyze the composition of the qualified applicant pool to ensure that no group defined in terms of ethnicity is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (m) (Register 96, No. 23).

This analysis occurs after the analysis to ensure that expected representation has been achieved for groups defined in terms of ethnicity (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

52. Analyze the composition of the qualified applicant pool to ensure that no ethnic group is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (a) (Register 2002, No. 35).

    This analysis occurs after the analysis done to ensure that any failure to obtain projected representation for any group defined in terms of ethnicity is not due to discriminatory recruitment procedures (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

53. Take effective steps to address adverse impact on any group defined in terms of ethnicity found in the district's applicant pool before the selection process is continued. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)

54. Provide all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to the Chancellor upon request. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 2002, No. 35), beginning July 1, 2001.)

55. Design all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole, 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. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 2002, No. 35), beginning July 1, 2001.)

56. Base all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole solely on job-related criteria, except as authorized by California Code of Regulations, title 5, section 53006 (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53024, subd. (a)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

57. Base all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole solely on job-related criteria. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(3) (Register 2002, No. 35), beginning August 11, 2002.)

58. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to ensure that they do not have an adverse impact, as defined by California Code of Regulations, title 5, section 53001, subdivision (m), on any group defined in terms of ethnicity. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

59. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to avoid an adverse impact as defined in California Code of Regulations, title 5, section 53001, subdivision (a) on any group defined in terms of ethnicity, and to detect and address any adverse impact on any group defined in terms of ethnicity which does occur. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)

60. Suspend the selection process and take timely and effective steps to remedy adverse impact on any group defined in terms of ethnicity before the selection process resumes if monitoring under California Code of Regulations, title 5, section 53024, subdivision (a)(4) reveals that any selection technique or procedure has adversely impacted such ethnic group. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

61. Immediately discontinue the use of any locally established qualifications beyond state minimum qualifications that have not been verified as described in California Code of Regulations, title 5, section 53023, subdivision (c)(2) or replaced with suitable alternatives having a lesser adverse impact on any group defined in terms of ethnicity if adverse impact results from the locally established qualifications. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

62. Continue in the hiring process any applicant eliminated on the basis of the locally established qualification discontinued under California Code of Regulations, title 5, section 53024, subdivision (b). (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

63. Follow procedures as outlined in the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures" for selection testing for employees. (Cal. Code Regs., tit. 5, § 53024, subd. (e) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (e) (Register 2002, No. 35), beginning July 1, 2001.)

64. Include members of historically underrepresented groups in screening committees whenever possible. (Cal. Code Regs., tit. 5, § 53024, subd. (f) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

65. Include, whenever possible, a diverse membership in screening committees which will bring a variety of perspectives to the assessment of applicant qualifications. (Cal. Code Regs., tit. 5, § 53024, subd. (f) (Register 2002, No. 35), beginning August 11, 2002.)

66. Update a goal established prior to July 12, 2002 for persons with disabilities, set a new target date for achieving projected representation in a job category or categories, and concurrently comply with California Code of Regulations, title 5, section 53006, subdivisions (a)(1), (a)(2), and (b) with respect to persons with disability, if significant underrepresentation still exists in the job category or categories. (Cal. Code Regs., tit. 5, § 53025, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

67. Implement California Code of Regulations, title 5, section 53006, subdivisions (a)(1) and (a)(2) concurrently with setting a goal with a target date for achieving projected representation for persons with a disability in each job category where underrepresentation was found to exist. Goals are to remain in effect only until projected representation has been achieved for that group in the category or categories in question.

(Cal. Code Regs., tit. 5, § 53025, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

68. Utilize an aggregate labor force availability rate for setting goals for hiring persons with disabilities with respect to the total district work force, until the chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, § 53025, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

69. Establish a process permitting any person to file a complaint alleging that the requirements of the affirmative action/equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) have been violated. This excludes the establishment of a process permitting an employee to file a complaint alleging a violation of the equal employment opportunity program regulations on the basis of disability or gender (i.e. failure to designate a person to coordinate efforts to comply Section 504 and Title IX (see Cal. Code Regs., tit. 5, § 53020); failure to provide reasonable accommodations (see Cal. Code Regs., tit. 5, § 53020); and employment discrimination on the basis of disability and gender in district employee selection procedures). (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

70. Forward immediately to the Chancellor a copy of the complaint. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

71. Provide a written investigative report within 90 days if required by the Chancellor. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

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

73. Submit a report on the use of Faculty and Staff Diversity funds/Equal Employment Opportunity funds to the Chancellor's Office no later than September 30 of the fiscal year following the use of the funds. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53034 (Register 2002, No. 35), beginning July 1, 2001.)

74. Report the staffing rate of persons with disabilities by a separate survey as directed by the Chancellor's Office, until a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by California Code of Regulations, title 5, section 53004. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53034 (Register 2002, No. 35), beginning July 1, 2001.)

While these activities go beyond the requirements of federal law, the Commission finds that some of these activities are not mandated by the state because the activities are required only as a condition of receiving funding.

e. Some of the activities required by Education Code sections 87101 and 87102, and California Code of Regulations, title 5, sections 53001 – 53006, 53020 – 53026, 53033, and 53034 do not constitute state-mandated activities

In 2003, the California Supreme Court decided the *Kern High School Dist.* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution.[222] The court held that when analyzing state mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[223] In addition, the court in *Kern High School Dist*. left open the possibility that a state mandate might be found in circumstances of practical compulsion, where a local entity faced certain and severe penalties as a result of noncompliance with a program that is not legally compelled.[224] The court in *Dept. of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, explained further that a finding of "practical compulsion" requires a concrete showing in the record that a failure to engage in the activities at issue will result in certain and severe penalties.[225]

District Plan (Ed. Code, §§ 87101 and 87102 (Statutes 2002, ch. 1169))

The 2002 version of Education Code sections 87101 and 87102,[226] requires community college districts to engage in the following activities:

1. Commit to sustained action to devise recruiting, training, and advancement opportunities that will result in equal employment opportunities for all qualified applicants and employees. (Ed. Code, § 87101, subd. (c) (Stats. 2002, ch. 1169), beginning January 1, 2003.)
2. Periodically submit an affirmation of compliance with Education Code sections 87100-87108 (Stats. 2002, ch. 1169), which address equal employment opportunity hiring, to the Board of Governors as a condition of the receipt of funds pursuant to Education Code section 87107 (Stats. 2002, ch. 1169) if the community college district opts to participate under Education Code sections 87100-87108. (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)
3. Ensure participation in, and commitment to, the equal employment opportunity program by district personnel, if the community college district is a participant under Education Code sections 87100-87108 (Stats. 2002, ch. 1169). (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)
4. Include in the equal employment opportunity plan steps that the district will take in eliminating improper discrimination or preferences in its hiring and employment practices if the community college district is a participant in the equal employment opportunity hiring program under Education Code sections 87100-87108 (Stats. 2002,

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

[223] *Id.* at p. 743.

[224] *Id.* at pg. 731.

[225] *POBRA*, *supra*, 170 Cal.App.4th at pgs. 1366-1369.

[226] Statutes 2002, chapter 1169.

ch. 1169). (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)

5. Address in the equal employment opportunity plan how the district will make progress in achieving the ratio of full-time to part-time faculty hiring, as indicated in Education Code section 87482.6, while still ensuring equal employment opportunity, if the community college district is a participant under Education Code sections 87100-87108 (Stats. 2002, ch. 1169). (Ed. Code, § 87102, subd. (a) (Stats. 2002, ch. 1169), beginning January 1, 2003.)

However, the requirements of Education Code sections 87101 and 87102 must be read in context of the whole statutory scheme rather than individual parts or words standing alone.[227] Education Code section 87102 provides in relevant part:

> As a condition for the receipt of funds pursuant to Education Code section 87107 [creating the Equal Employment Opportunity Fund][228], the governing board of community college district [*sic*] that *opts to participate* under the article [87100-87108] … . (Italics added.)

The above language indicates that community college districts opt into participating under Education Code sections 87100-87108 in order to receive funding from the Equal Employment Opportunity Fund. The Commission has not found any statute or regulation, nor is there evidence in the record, that districts are legally or practically required to receive Equal Employment Opportunity funds. Read in this context, compliance with the activities required by the 2002 version of Education Code sections 87101 and 87102 is within the discretion of community college districts, and thus, not mandated by the state under *Kern High School Dist*.

The claimants point out that the full language of Education Code section 87102 provides "[a]s a condition for receipt of funds pursuant to Section 87107, the governing board of community college district [*sic*] that opts to participate under the article shall periodically submit to the board of governors an affirmation of compliance with this article."[229] The claimants argue that this language indicates that the only activity that is a condition of receiving funds is the activity to periodically submit to the board of governors an affirmation of compliance with Education

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[227] *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, p. 218.

[228] Education Code section 87107 (Stats. 2002, ch. 1169) refers to an "Employment Opportunity Fund." However, California Code of Regulations, title 5, sections 53030, 53033, and 53034 refer to an "Equal Employment Opportunity Fund." Viewing these two together it is not clear whether the Education Code refers to the same fund as the regulations. Under the rules of statutory construction, courts correct inadvertent errors in a statute where necessary to give a statute reasonable meaning or where it manifestly appears that the legislature has erroneously used one word for another. *Pepper v. Board of Directors of Bolinas Public Utility Dist.* (1st Dist. 1985) 162 Cal.App.2d 1. Nowhere in the 2003-2004 Budget Act (Assem. Bill No. 1765 (Stats. 2003, ch. 157)) does the legislature create an "Employment Opportunity." However the legislature does provide $1,747,000 for "*Equal* Employment Opportunity pursuant to Ch. 1169, Statutes 2002." Thus, this discussion will refer to the "*Equal* Employment Opportunity Fund" where necessary.

[229] Claimant Comments to Draft Staff Analysis, *supra*, p. 11.

Code sections 87100-87108. However, even if this language is read in such a manner, the plain language of Education Code section 87102 indicates that a community college district "opts to participate" in the entire program. Thus, program participation is discretionary and not mandated under *Kern High School Dist*.

Corrective Action (Cal. Code Regs., tit. 5, § 53006, subd. (c)(1) (Register 96, no. 23))

The 1996 version of title 5, section 53006, subdivision (c),[230] sets forth additional measures that a community college district must take if a goal has been set, a reasonable time has passed, and significant underrepresentation persists for a particular group in a job category. Subdivision (c) provides in relevant part:

> [A] district shall implement one or more of the following additional corrective measures until expected representation has been achieved for that group in the category in question.
>
> (1) include in the applicant pool applicants from significantly underrepresented groups who were initially screened out because they failed to meet locally established "desirable or preferred" qualifications beyond minimum qualifications, where such applicants can be expected to meet the additional qualifications through appropriate training or experience within one year.
>
> (2) consider, as one factor in the final selection process, the fact that a candidate is a member of a significantly underrepresented group, provided that the qualifications of the candidates under consideration are reasonably considered to be substantially equivalent.

Subdivision (c) of section 53006 requires community college districts to take one of the above activities in specified circumstances. However, subdivision (c)(1) of section 53006, is a downstream activity resulting from a community college district's decision to establish "desirable or preferred" qualifications *beyond state* minimum qualifications. As alluded to in title 5, section 53022, which will be addressed below, community college districts are authorized to use "desired" or "required" qualifications beyond the state minimum qualifications set forth in California Code of Regulations, title 5, section 53400 et seq.[231] Thus, under *Kern High School Dist*. the requirement of the 1996 version of title 5, section 53006, subdivision (c)(1),[232] is not a state-mandated activity.

The claimants argue, "The *Kern* issue is not relevant because program activities are not a program 'downstream' to a request for funds."[233] In addition, the claimants argue that the

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[230] Register 96, number 23.

[231] California Code of Regulations, title 5, section 53022, provides, "Job specifications, including any "required," desired" or "preferred" qualifications beyond the state minimum qualifications … which the district *wishes* to utilize, shall be reviewed before the position is announced … ." (Italics added.)

[232] Register 96, number 23.

[233] Claimant Comments to Draft Staff Analysis, *supra*, p. 12. The claimants make this argument for the activities required by California Code of Regulations, title 5, section 53006, subdivisions (b)(1), (2), and (3) (Register 2002, No. 35); section 53022 (Register 96, No. 23 and Register

activity required by section 53006, subdivision (c)(1), is mitigating the historic underrepresentation, not the scope of the local qualification statements. The claimants misinterpret the analysis above, as it was not based on the request for funds. Instead, the discretionary activity is the establishment of "desirable or preferred" qualifications beyond state and minimum qualifications. Absent locally established qualifications there would be no need to mitigate historic underrepresentation caused by the locally established qualifications. Thus, absent the local discretionary decision to establish "desirable or preferred" qualifications beyond the minimum qualifications, the downstream activity required by section 53006, subdivision (c)(1), would not be required. Thus, under *Kern High School Dist*. the activity in section 53006, subdivision (c)(1), to include in the applicant pool applicants screened out by locally established "desirable or preferred" qualifications, is not a state-mandated activity.

Additional Steps to Ensure Equal Employment Opportunity (Cal. Code Regs., tit. 5, § 53006, subds. (b)(1), (2), and (3) (Register 2002, No. 35))

The 2002 version of title 5, section 53006,[234] requires community college districts to engage in the following activities:

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, if significant underrepresentation persists for a particular group in the job category in question and a reasonable period of time has passed. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(1) (Register 2002, No. 35), beginning August 11, 2002.)
2. Discontinue the use of any locally established qualification that has not been found to satisfy the requirements set forth in California Code of Regulations, title 5, section 53006, subdivision (b)(1), if significant underrepresentation persists for a particular group in the job category in question and a reasonable period of time has passed. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(2) (Register 2002, No. 35), beginning August 11, 2002.)
3. Continue using qualification standards meeting the requirements of California Code of Regulations, title 5, section 53006, subdivision (b)(1), only where no alternative qualification standard is reasonably available which would select for the same characteristics, meet the requirements of subdivision (b)(1) and be expected to have a less exclusionary effect, if a significant underrepresentation persists for a particular group in the job categories in question and a reasonable period of time has passed. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(3) (Register 2002, No. 35), beginning August 11, 2002.)

The above activities, however, are downstream activities resulting from a community college district's decision to establish "required," "desired," or "preferred" qualifications *beyond* the

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2002, No. 35); and 53024, subdivision (b) (Register 2002, No. 35). For the same reasons discussed here, the analysis refutes the claimants' argument as it applies to title 5, sections 53006, subdivisions (b)(1), (2), and (3) (Register 2002, No. 35); section 53022 (Register 96, No. 23 and Register 2002, No. 35); and 53024, subdivision (b) (Register 2002, No. 35).

[234] Register 2002, number 35.

minimum qualifications established by the Board of Governors. As discussed above, community college districts are authorized but not required to use locally established qualifications beyond state minimum qualifications. Thus, the requirements of the 2002 version of title 5, section 53006, subdivision (b)(1), (2), and (3),[235] are not state-mandated activities under *Kern High School Dist*.

Job Announcements (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23 and Register 2002, No. 35))

The 1996 version of title 5, section 53022,[236] requires community college districts to engage in the following:

> Review 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, before the position is announced to ensure conformity with the requirements of California Code of Regulations, title 5, section 53000 et seq., and state and federal nondiscrimination laws, excluding section 504 of the Rehabilitation Act, and Title IX of Education Amendments of 1972.

The 2002 version of title 5, section 53022,[237] adds "preferred" qualifications beyond the state minimum qualifications that must be reviewed.

Based on the plain language of section 53022, a district is not required to use any "required," "desired," or "preferred" qualifications beyond the state minimum qualifications. Thus, the review of any locally established "required," "desired," or "preferred" qualifications beyond the state minimum qualification to ensure conformity with California Code of Regulations, title 5, section 53000 et seq. is a downstream activity resulting from a community college district's decision to use the locally established qualifications, and therefore is not state-mandated. However, community college districts are required to review job specifications that do not exceed state minimum qualifications to ensure conformity with the requirements of California Code of Regulations, title 5, section 53000 et seq. and state and federal nondiscrimination laws (excluding section 504 of the Rehabilitation Act, and Title IX of Education Amendments of 1972).

Selection Procedures (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35))

The 2002 version of title 5, section 53024, subdivision (b),[238] which addresses what community college districts are required to do if a selection technique or procedure has an adverse impact on a monitored group, requires community college districts to engage in the following activities:

1. Immediately discontinue the use of any locally established qualifications beyond state minimum qualifications that have not been verified as described in California Code of Regulations, title 5, section 53023, subdivision (c)(2) or replaced with suitable

[235] Register 2002, number 35.

[236] Register 96, number 23.

[237] Register 2002, number 35.

[238] Register 2002, number 35.

alternatives having a lesser adverse impact if adverse impact results from the locally established qualifications. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

2. Continue in the hiring process any applicant eliminated on the basis of the locally established qualification discontinued under California Code of Regulations, title 5, section 53024, subdivision (b). (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

As discussed above, community college districts are not required to utilize locally established qualifications beyond state minimum qualifications. Without a community college's decision to utilize locally established qualifications, there would be no need to discontinue the use of locally established qualifications, nor would there be a need to continue applicants eliminated on the basis of locally established qualifications in the hiring process. As a result, these activities required by the 2002 version of title 5, section 53024, subdivision (b), are not state-mandated activities under *Kern High School Dist*.

Reporting Districts Use of Funds: (Cal. Code Regs., tit. 5, § 53034 (Register 2002, No. 35))

As relevant to this discussion, the 2002 version of title 5, section 53034,[239] requires community college districts to engage in the following activity:

> Submit a report on the use of Equal Employment Opportunity funds to the Chancellor's Office no later than September 30th of the fiscal year following the use of the funds.

As will be further discussed in Issue III of this analysis, the Equal Employment Opportunity Fund, community college districts opt to receive funds from the Equal Employment Opportunity Fund.[240] Thus, the submission of a report on the use of Equal Employment Opportunity funds is a downstream activity resulting from a community college district's decision to receive those funds, and therefore, under *Kern High School Dist*. it is not a state-mandated activity.

The claimants argue, "The *Kern* issue is not relevant because program activities are not a program 'downstream' to a request for funds."[241] However, absent a district opting to receive funds there would be no need to report the use of those funds. As a result, the activity required by the 2002 version of title 5, section 53034 is not a state-mandated activity.

(i) Summary of State-Mandated Activities:

1. Periodically submit to the Board of Governors of the California Community Colleges an affirmation of compliance with the provisions of Education Code sections 87100-87107, which address affirmative action hiring (as existing prior to September 4, 2001). (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

2. Have goals in the affirmative action employment program that ensure participation in, and commitment to, the program by district personnel, and timetables, for its

[239] Register 2002, number 35.

[240] Education Code section 87102, as repealed and replaced by Statutes 2002, chapter 1169.

[241] Claimant Comments to Draft Staff Analysis, *supra*, p. 12.

implementation. (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

3. Include steps in the faculty and staff diversity plan that the district will take in meeting and improving hiring goals for both full-time faculty and part-time faculty pursuant to Education Code section 87482.6 (Stats. 1988, ch. 973), and the development of the plan shall be a condition for receipt of allowances pursuant to Education Code section 87482.6. (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

4. Make the faculty and staff diversity plan/equal employment opportunity plan a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code). (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973); Cal. Code Regs., tit. 5, § 53003, subd. (d) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (e) (Register 2002, No. 35), beginning July 1, 2001.)

5. Publish and distribute a record of the success rate of the measurable progress, with respect to the district's goals and timetables, in hiring employees through its affirmative action employment program. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

   Make this publication a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code), and include data and information specified by the Board of Governors. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

6. Develop and adopt a district-wide written faculty and staff diversity plan/equal employment opportunity plan to implement its affirmative action employment program/equal employment opportunity program. (Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 2002, No. 35) beginning July 1, 2001.)

7. Submit faculty and staff diversity plans/equal employment opportunity plans and revisions to the Chancellor's Office for review and approval. (Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

8. Review the faculty and staff diversity plan/equal employment opportunity plans at least every three years and if necessary revise the plans and submit them to the Chancellor's Office for approval. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

9. Notify the Chancellor at least 30 days prior to adopting any amendments to the faculty and staff diversity plan/equal employment opportunity plan other than those made during the three year review. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

10. Include in the faculty and staff diversity plan/equal employment opportunity plan the following:

    a. Goals and timetables, as appropriate, for hiring and promotion of members of historically underrepresented groups developed pursuant to California Code of Regulations, title 5, section 53006 for each college in the district and for the district as a whole. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. The designation of the district employees who have been delegated responsibility and authority for implementing the faculty and staff diversity plan/equal employment opportunity plan and assuring compliance with the requirements of California Code of Regulations, title 5, section 53000 et seq. (Register 96, No. 23; and Register 2002, No. 35), pursuant to California Code of Regulations, title 5, section 53020. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(1) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (c)(1) (Register 2002, No. 35), beginning July 1, 2001.)

    c. The procedure for filing complaints pursuant to California Code of Regulations, title 5, section 53026 (Register 96, No. 23; Register 2002, No. 35) and the person with whom the complaints are to be filed. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(2) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (c)(2) (Register 2002, No. 35.), beginning July 1, 2001.)

    d. A process for notifying all district employees of the provisions of the faculty and staff diversity plan/equal employment opportunity plan and the commitment to affirmative action employment/equal employment opportunity policy statement required under California Code of Regulations, title 5, section 53002 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(3) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (c)(3) (Register 2002, No. 35), beginning July 1, 2001.)

    e. A process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of California Code of Regulations, title 5, section 53000 et seq., which addresses affirmative action/equal employment opportunity programs (Register 96, No. 23; Register 2002, No. 35) and of state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(4) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subdivision (c)(4) (Register 2002, No. 35), beginning July 1, 2001.)

    f. A process for providing annual written notice to appropriate community organizations concerning the district's faculty and staff diversity plan and the need for assistance from the community in identifying qualified members of historically underrepresented groups for openings with the district. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(5) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    g. A process for providing annual written notice to appropriate community-based and professional organizations concerning the district's equal employment

opportunity plan and the need for assistance from the community and such organizations in identifying qualified applicants. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(5) (Register 2002, No. 35), beginning August 11, 2002.)

h. An analysis of the number of persons from historically underrepresented groups (ethnic minorities, women, and persons with disabilities) are employed in the district's work force and those who have applied for employment in each of the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(6) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

i. An analysis of the number of persons from monitored groups (groups based on gender, ethnic group identification, and disability) who are employed in the district's work force and those who have applied for employment in each of the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35)). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(6) (Register 2002, No. 35), beginning August 11, 2002.)

j. An analysis of the degree to which women, ethnic minorities, and persons with disabilities are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

k. An analysis of the degree to which monitored groups (groups based on gender, ethnic group identification, and disability) are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 2002, No. 35), beginning August 11, 2002.)

l. The steps the district will take to achieve diversity in its workforce. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(8) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

m. Goals for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003, subdivision (c)(7) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(9) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

n. Methods for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003,

subdivision (c)(7). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(8) (Register 2002, No. 35), beginning August 11, 2002.)

o. Additional steps consistent with California Code of Regulations, title 5, section 53006, to remedy any significant underrepresentation identified in the plan. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(9) (Register 2002, No. 35), beginning August 11, 2002.)

p. A plan for corrective action consistent with California Code of Regulations, title 5, section 53006 (Register 96, No. 23), including goals and timetables for hiring and promotion, if necessary, to remedy any significant underrepresentation identified in the faculty and staff diversity plan by achieving expected representation for all historically underrepresented groups in all job categories listed in California Code of Regulations, title 5, § 53004, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(10) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

q. Any other measures necessary to further equal employment opportunity throughout the district. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(10) (Register 2002, No. 35). Beginning August 11, 2002.)

r. Any goals for hiring persons with disabilities that are required by California Code of Regulations, title 5, section 53025. (Cal. Code Regs., tit. 5, § 53003, subd. (d) (Register 2002, No. 35). Beginning August 11, 2002.)

11. Make a continuous good faith effort to comply with the requirements of the faculty and staff diversity plan/equal employment opportunity plan. (Cal. Code Regs., tit. 5, § 53003, subd. (e) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (f) (Register 2002, No. 35), beginning July 1, 2001.)

12. Adopt a policy statement setting forth the district's commitment to an affirmative action program/equal employment opportunity program. (Cal. Code Regs., tit. 5, § 53002 (Register 96, No. 23), one-time activity for the period beginning July 1, 2001 through August 10, 2002; Cal. Code Regs., tit. 5, § 53002 (Register 2002, No. 35) one-time activity beginning August 11, 2002.)

13. Survey district employees every even year (except for information regarding disability, which shall occur annually) and monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing the faculty and staff diversity plan/equal employment opportunity plan and to provide data needed for the analyses required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

14. Annually report to the Chancellor, in a manner described by the Chancellor, the results of its annual survey of employees at each college in the district. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

    Report employees 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. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

15. Afford each applicant or employee the opportunity to identify his or her gender, ethnicity and, if applicable, his or her disability for purposes of the survey and report required by California Code of Regulations, title 5, section 53004, subdivision (a) (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

    a. Count a person in only one ethnic group for reporting purposes if that person designates multiple ethnic groups with which he or she identifies. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

    b. Count and report Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians as part of the Asian/Pacific Islander group as well as in separate subcategories. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

16. Establish a Faculty and Staff Diversity Advisory Committee/Equal Employment Opportunity Advisory Committee to assist the district in developing and implementing the faculty and staff diversity plan/equal employment opportunity plan required under section 53003 (Register 96, No. 23; Register 2002, No. 35) which includes members of all historically underrepresented groups/diverse membership whenever possible. (Cal. Code Regs., tit. 5, § 53005 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53005 (Register 2002, No. 35), beginning July 1, 2001.)

17. If a community college district has existing goals:

    a. Update goals established prior to June 30, 1996 and set a new target date for achieving expected representation for a group in a job category if significant underrepresentation still exists. (Cal. Code Regs., tit. 5, § 53006, subd. (a) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    c. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective while updating goals and setting new target dates pursuant to California Code of

Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

d. Comply with California Code of Regulations, title 5, section 53006, subdivision (c) (Register 96, No. 23) while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

18. If a community college district has no existing goals:

a. Take corrective action if, pursuant to California Code of Regulations, title 5, section 53003, subdivision (c)(7), the district determines that a particular group is significantly underrepresented with respect to one or more job categories and no goal has previously been set. (Cal. Code Regs., tit. 5, § 53006, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

b. The district shall take, at a minimum, the following corrective action:

i. Review district recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

ii. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

iii. Determine whether the group is still significantly underrepresented in the job categories in question after the measures described in California Code of Regulations, title 5, section 53006, subdivision (b)(1) and (2) (Register 96, No. 23) have been in place a reasonable period of time. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

iv. Set a goal with a target date for achieving expected representation for the significantly underrepresented group in each job category where significant underrepresentation persists, if its persists. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

v. Monitor on an ongoing basis the staffing rate for the significantly underrepresented groups in the specified job categories. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

vi. Discontinue the use of goals when expected representation has been achieved for that group in the job categories in question. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

19. Additional measures to be taken if a goal has been set and after a reasonable period of time significant underrepresentation persists:

    a. Establish a specific timetable to project the levels of annual hiring of persons from the significantly underrepresented group which will be necessary to meet the existing goal by the target date. (Cal. Code Regs., tit. 5, § 53006, subd. (c) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. Implement the following additional corrective measures until expected representation has been achieved for that group in the job category in question: Consider, as one factor in the final selection process, the fact that a candidate is a member of a significantly underrepresented group, provided that the qualifications of the candidates under consideration are reasonably considered to be equivalent. (Cal. Code Regs., tit. 5, § 53006, subd. (c)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

20. If a community college district has no existing goals for women or persons with disabilities implement the measures required in California Code of Regulations, title 5, section 53006, subdivision (b)(1) and (2) (Register 96, No. 23) concurrently with setting a goal with a target date for achieving expected representation for women or persons with disabilities in each job category in which they are found to be significantly underrepresented. (Cal. Code Regs., tit. 5, § 53006, subd. (d) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    a. Goals shall remain in effect only until expected representation has been achieved for the group in the job category or categories in which significant underrepresentation is found. (Cal. Code Regs., tit. 5, § 53006, subd. (d) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. An aggregate labor force availability rate shall be utilized for setting goals for hiring persons with disabilities with respect to the total district work force until the Chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, § 53006, subd. (d), beginning July 1, 2001 through August 10, 2002.)

21. Take additional steps if a district determines that a particular monitored group is significantly underrepresented with respect to one or more categories, including at minimum:

    a. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(1) (Register 2002, No. 35), beginning August 11, 2002.)

    b. 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. (Cal.

Code Regs., tit. 5, § 53006, subd. (a)(2) (Register 2002, No. 35), beginning August 11, 2002.)

c. Determine whether the group is still significantly underrepresented in the categories in question after the measures described in subdivisions (a)(1) and (2) of California Code of Regulations, title 5, section 53006, have been in place a reasonable period of time (three years or longer). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(3) (Register 2002, No. 35), beginning August 11, 2002.)

d. Monitor the staffing rate for the significantly underrepresented group in the specified job categories in question on an ongoing basis until the projected representation has been achieved for that group if significant underrepresentation persists. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)

22. Be ultimately responsible for proper implementation of California Code of Regulations, title 5, section 53000 et seq., at all levels of district and college operation and for making measurable progress toward the goals established in the district's faculty and staff diversity plan or measurable progress toward equal employment opportunity by methods described in the district's equal employment opportunity plan. (Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

23. Ensure, upon the recommendation of the chief executive officer, that an affirmative action officer/equal employment opportunity officer is designated to oversee the day-to-day implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.), excluding overseeing the portion of the equal employment opportunity program regulations which require the provision of reasonable accommodations to disabled individuals (Cal. Code Regs., tit. 5, § 53025), and the portion of which require the job announcements and qualifications (Cal. Code Regs., tit. 5, § 53022), the applicant pool (Cal. Code Regs., tit. 5, § 53023), and the screening and selection procedures for employment (Cal. Code Regs., tit. 5, § 53024), to avoid adverse impact on groups based on disability or gender. (Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subdivision (a) (Register 2002, No. 35), beginning July 1, 2001.)

24. Describe in the district's faculty and staff diversity plan/equal employment opportunity plan the administrative structure created by any delegation of authority to the affirmative action officer/equal employment opportunity officer or others. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

25. Design the administrative structure created by any delegation of authority to the affirmative action officer/equal employment officer or others in such a manner so as to ensure prompt and effective implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23) beginning July 1, 2001.)

26. Designate in the faculty and staff diversity plan/equal employment opportunity plan a single officer, who may be the affirmative action officer/equal employment opportunity officer, who shall be given authority and responsibility for receiving complaints of violations of the equal employment opportunity program regulations, filed pursuant to California Code of Regulations, title 5, section 53026, excluding those based on disability or gender, for ensuring that such complaints are promptly and impartially investigated, and ensuring that selection procedures and the applicant pool are properly monitored for adverse impact, as required by California Code of Regulations, title 5, sections 53023 and 53024, excluding adverse impact on groups based on disability or gender. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23), beginning July 1, 2001.)

27. Actively recruit from both within and outside the district work force to attract qualified applicants for all new openings except as provided by California Code of Regulations, title 5, section 53021, subdivision (b). (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

    a. Active recruitment shall include focused outreach to historically underrepresented groups. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. Active recruitment shall include outreach to ensure all persons, including persons from monitored groups, are provided the opportunity to seek employment with the district. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning August 11, 2002.)

    c. Open recruitment applies 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. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

28. Recruit at least statewide for full-time faculty and educational administrator positions, and at a minimum, seek qualified applicants listed in the California Community Colleges Faculty and Staff Diversity Registry/Equal Employment Opportunity Registry. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

29. Recruit part-time faculty positions separately for each new opening or by annually establishing a pool of eligible candidates. In either case, full and open recruitment is required consistent with California Code of Regulations, title 5, section 53021. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

30. Notify the Faculty and Staff Diversity Advisory Committee/Equal Employment Opportunity Advisory Committee established pursuant to California Code of Regulations, title 5, section 53005 and the Chancellor, at least ten working days prior to offering the position to a candidate, if the district believes justification exists for use of any of the

exceptions listed in section 53021, subdivision(b). (Cal. Code Regs., tit. 5, § 53021, subd. (c) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)

31. Comply with the district's established hiring procedures and afford all qualified district employees the opportunity to apply even where in-house or promotional only recruitment is permitted under California Code of Regulations, title 5, section 53005, subdivision (b). (Cal. Code Regs., tit. 5, § 53021, subd. (d) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (d) (Register 2002, No. 35), beginning July 1, 2001.)

32. State clearly job specifications setting forth the knowledge, skills, and abilities necessary to job performance in job announcements. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

33. Include sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students in job requirements for faculty and administrative positions. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

34. Review job specifications, excluding any "required," "desired," or "preferred" qualifications beyond the state minimum qualifications (set forth in Subchapter 4 of Cal. Code Regs., tit. 5, commencing with § 53400) which the district wishes to utilize, before the position is announced to ensure conformity with the requirements of California Code of Regulations, title 5, section 53000 et seq., and state and federal nondiscrimination laws, excluding section 504 of the Rehabilitation Act, and Title IX of Education Amendments of 1972. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

35. Afford each applicant an opportunity to voluntarily identify his or her gender, ethnicity and, if applicable, his or her disability, in the district's application for employment. (Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

36. Keep information regarding an applicant's gender, ethnicity, and/or disability provided in an application for employment confidential. (Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

37. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that expected representation has been achieved for historically underrepresented groups. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

38. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that any failure to obtain projected representation for any group defined in terms of ethnicity is not due to discriminatory recruitment procedures. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

39. Extend the application deadline and conduct additional focused recruitment for historically underrepresented groups for which expected representation has not been

achieved, if necessary. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

40. Extend the application deadline and conduct additional recruitment, which eliminates discriminatory recruitment procedures and ensures that recruitment efforts provide a full and fair opportunity for participation to a wide diversity of potential applicants, if necessary. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

41. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when the expected representation of historically underrepresented groups is achieved, or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

42. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when recruitment efforts have offered an opportunity for participation to a wide diversity of potential applicants or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

43. Analyze the composition of the qualified applicant pool to ensure that no group defined in terms of ethnicity is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (m) (Register 96, No. 23).

    This analysis occurs after the analysis to ensure that expected representation has been achieved for groups defined in terms of ethnicity (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

44. Analyze the composition of the qualified applicant pool to ensure that no ethnic group is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (a) (Register 2002, No. 35).

    This analysis occurs after the analysis done to ensure that any failure to obtain projected representation for any group defined in terms of ethnicity is not due to discriminatory recruitment procedures (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

45. Take effective steps to address adverse impact on any group defined in terms of ethnicity found in the district's applicant pool before the selection process is continued. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)

46. Provide all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to the Chancellor upon request. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 2002, No. 35), beginning July 1, 2001.)

47. Design all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole, 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. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 2002, No. 35), beginning July 1, 2001.)

48. Base all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole solely on job-related criteria, except as authorized by California Code of Regulations, title 5, section 53006 (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53024, subd. (a)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

49. Base all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole solely on job-related criteria. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(3) (Register 2002, No. 35), beginning August 11, 2002.)

50. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to ensure that they do not have an adverse impact, as defined by California Code of Regulations, title 5, section 53001, subdivision (m), on any group defined in terms of ethnicity. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

51. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to avoid an adverse impact as defined in California Code of Regulations, title 5, section 53001, subdivision (a) on any group defined in terms of ethnicity, and to detect and address any adverse impact on any group defined in terms of ethnicity which does occur. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)

52. Suspend the selection process and take timely and effective steps to remedy adverse impact on any group defined in terms of ethnicity before the selection process resumes if monitoring under California Code of Regulations, title 5, section 53024, subdivision (a)(4) reveals that any selection technique or procedure has adversely impacted such ethnic group. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

53. Follow procedures as outlined in the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures" for selection testing for employees. (Cal. Code Regs., tit. 5, § 53024, subd. (e) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (e) (Register 2002, No. 35), beginning July 1, 2001.)

54. Include members of historically underrepresented groups in screening committees whenever possible. (Cal. Code Regs., tit. 5, § 53024, subd. (f) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

55. Include, whenever possible, a diverse membership in screening committees which will bring a variety of perspectives to the assessment of applicant qualifications. (Cal. Code Regs., tit. 5, § 53024, subd. (f) (Register 2002, No. 35), beginning August 11, 2002.)

56. Update a goal established prior to July 12, 2002 for persons with disabilities, set a new target date for achieving projected representation in a job category or categories, and concurrently comply with California Code of Regulations, title 5, section 53006, subdivisions (a)(1), (a)(2), and (b) with respect to persons with disability, if significant underrepresentation still exists in the job category or categories. (Cal. Code Regs., tit. 5, § 53025, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

57. Implement California Code of Regulations, title 5, section 53006, subdivisions (a)(1) and (a)(2) concurrently with setting a goal with a target date for achieving projected representation for persons with a disability in each job category where underrepresentation was found to exist. Goals are to remain in effect only until projected representation has been achieved for that group in the category or categories in question. (Cal. Code Regs., tit. 5, § 53025, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

58. Utilize an aggregate labor force availability rate for setting goals for hiring persons with disabilities with respect to the total district work force, until the chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, § 53025, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

59. Establish a process permitting any person to file a complaint alleging that the requirements of the affirmative action/equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) have been violated. This excludes the establishment of a process permitting an employee to file a complaint alleging a violation of the equal employment opportunity program regulations on the basis of disability or gender (i.e. failure to designate a person to coordinate efforts to comply Section 504 and Title IX (see Cal. Code Regs., tit. 5, § 53020); failure to provide reasonable accommodations (see Cal. Code Regs., tit. 5, § 53020); and employment discrimination on the basis of disability and gender in district employee selection procedures). (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

60. Forward immediately to the Chancellor a copy of the complaint. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

61. Provide a written investigative report within 90 days if required by the Chancellor. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

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

63. Submit a report on the use of Faculty and Staff Diversity funds to the Chancellor's Office no later than September 30 of the fiscal year following the use of the funds. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23) beginning July 1, 2001 and ending on August 10, 2002.)

64. Report the staffing rate of persons with disabilities by a separate survey as directed by the Chancellor's Office, until a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by California Code of Regulations, title 5, section 53004. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53034 (Register 2002, No. 35), beginning July 1, 2001.)

    f. <u>The state-mandated activities imposed by Education Code section 87102 (Statutes 1988, ch. 973) California Code of Regulations, title 5, sections 53002-53006, 53020-53024, 53026, and 53034 (Register 96, No. 23) and sections 53002-53006, 53020-53026, and 53034 (Register 2002, No. 35) constitute a new program or higher level of service</u>

To constitute a "new program or higher level of service" the activities must carry out the governmental function of providing a service to the public, or impose unique requirements on local governments that do not apply to all residents and entities in the state in order to implement a state policy.[242] In addition, the requirements must be new in comparison with the pre-existing scheme and must be intended to provide an enhanced service to the public.[243] To make this determination, the requirements must initially be compared with the legal requirements in effect immediately prior to its enactment.[244]

The Chancellor's Office asserts that that the equal employment opportunity test claim statutes and title 5 regulations reflect the requirements of the California Fair Employment and Housing Act (FEHA) and its implementing regulations.[245] The FEHA and its implementing regulations prohibit employment discrimination on the basis of a variety of characteristics (e.g. ethnicity, gender, age). Assuming that the Chancellor's Office assertion that the requirements of the FEHA and its implementing regulations are the same as those of the affirmative action/equal employment opportunity statutes and title 5 regulations is correct, it follows that the requirements of the affirmative action/equal employment opportunity statutes and title 5 regulations are not unique to community college districts. However, the FEHA and its implementing regulations do not require any of the state-mandated activities on employers that are imposed by the affirmative action/equal employment opportunity statutes and title 5 regulations on community college districts. Specifically, although the FEHA and its

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[242] *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56.

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

[244] *Ibid*.

[245] The Chancellor's Office cites specifically to Government Code section 12940 et seq., and California Code of Regulations, title 2, section 7287.4. See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on 02-TC-31, dated March 11, 2004, at p. 11.

implementing regulations prohibit employment discrimination, including the use of employee testing and selection practices that have an adverse impact on individuals,[246] the FEHA and its implementing regulations do not require employers to engage in the activities to ensure that their employment selection procedures do not violate these prohibitions, as are required by the affirmative action/equal employment opportunity statutes and title 5 regulations.

Given the above discussion, the following statutes and regulations impose unique requirements on community college districts that do not apply to all residents and entities in the state in order to implement the state policies of providing equal employment opportunity in community college districts and prohibiting discrimination or preferential treatment based on race gender, or disability:[247] (1) Education Code section 87102, as amended in 1988;[248] (2) title 5, sections 53002-53006, 53020-53024, 53026, and 53034, as amended in 1996;[249] and (3) title 5, sections 53002-53006, 53020-53026, and 53034, as amended in 2002.[250] Thus, the state-mandated activities found in the 1988 version of Education Code section 87102; the 1996 version of title 5, sections 53002-53006, 53020-53024, 53026, and 53034; and the 2002 version of title 5, sections 53002-53006, 53020-53026, and 53034; constitute "programs" within the meaning of Article XIII B, section 6 of the California Constitution.

Prior to determining whether the state-mandated activities imposed by the code section and regulations are new in comparison with the legal requirements in effect immediately prior, it is necessary to restate that the court's decision in *Connerly v. State Personnel Bd*. did not have the effect of repealing the regulations.[251] As a result, there is no gap between the requirements imposed by the regulations, as they existed in 1996, and the requirements imposed by the regulations, as amended in 2002.[252] In addition, because many of the activities that existed in the 1996 version of the regulations remained in the 2002 version of the regulations, a finding that an

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[246] Government Code section 12940 et seq., and California Code of Regulations, title 2, section 7287.4.

[247] See Education Code section 87100, subdivision (d), as it existed prior to the 2002 amendment, and section 87100, subdivision (b), as amended by Statutes 2002, chapter 1169, setting forth the legislative findings and declarations for Education Code section 87100 et seq.

[248] Statutes 1988, chapter 973.

[249] Register 96, number 23.

[250] Register 2002, number 35.

[251] Although the court in *Connerly v. State Personnel Bd*. notes that the regulations pled by the claimants in this test claim "do not come close to implementing [Education Code sections 87100-87107] in a constitutional manner," this statement and the subsequent discussion regarding the constitutionality of specific regulations does not constitute binding precedent because the regulations were not placed in issue in *Connerly v. State Personnel Bd*., nor were the statements in regard to the regulations necessary to the decision. Thus, the regulations continued to be operative.

[252] Unless otherwise stated, any reference to the "1996 version of the regulations" or the regulations "as amended in 1996," refers to Register 96, number 23. Similarly, any reference to "the 2002 version of the regulations" or the regulations "as amended in 2002" refers to Register 2002, number 35.

activity from the 1996 version is or is not a new program or higher level of service extends to the 2002 version of the regulations, unless otherwise stated.

Finally, it is necessary to note that the claimants pled most of the regulations as added in 1992, which coincides with Register 92, number 17 (March 26, 1992); however, the above analysis has only made findings in regard to the 1996 and 2002 versions of the regulations as these are the versions that fall within the reimbursement period.[253] The 1992 version of the regulations is the version immediately preceding the 1996 version; thus, where the claimant has pled a regulation as added in 1992 it is necessary to determine whether the activities mandated by the 1996 version of the regulations existed in the 1992 version, and if so, if the activities existed prior to 1992.

District Plan (Ed. Code, § 87102 (Stats. 1988, ch. 973))

The claimants have pled section 87102, as amended by Statutes 1988, chapter 973.[254] Section 87102, as amended by Statutes 1988, chapter 973, mandates:

1. Periodically submit to the Board of Governors of the California Community Colleges an affirmation of compliance with the provisions of Education Code sections 87100-87107, which address affirmative action hiring (as existing prior to September 4, 2001). (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)
2. Have goals in the affirmative action employment program that ensure participation in, and commitment to, the program by district personnel, and timetables, for its implementation. (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)
3. Include steps in the faculty and staff diversity plan that the district will take in meeting and improving hiring goals for both full-time faculty and part-time faculty pursuant to Education Code section 87482.6 (Stats. 1988, ch. 973), and the development of the plan shall be a condition for receipt of allowances pursuant to Education Code section 87482.6. (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)
4. Make the faculty and staff diversity plan/equal employment opportunity plan a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code). (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973); Cal. Code Regs., tit. 5, § 53003, subd. (d) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (e) (Register 2002, No. 35), beginning July 1, 2001.)

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[253] Register 92, number 17 (March 26, 1992) is the Register that coincides with the year in which the claimants have pled that the activities claimed were added. See, *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31) test claim, pgs. 46-52. Unless otherwise stated, any reference to the "1992 version of the regulations" or the regulations "as amended in 1992" refers to Register 92, number 17.

[254] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31." Specifically, "Attached Exhibit to Form CSM 2."

5. Publish and distribute a record of the success rate of the measurable progress, with respect to the district's goals and timetables, in hiring employees through its affirmative action employment program. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

   Make this publication a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code), and include data and information specified by the Board of Governors. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

However, prior to the Statutes 1988 amendment, Education Code section 87102, was added in 1978,[255] which was not pled by the claimants. The 1978 version requires community college districts to engage in the following activities:

1. Submit to the office of the Chancellor of the California Community Colleges an affirmation of compliance with the provisions of Education Code sections 87100-87106, not later than January 1, 1980.
2. Have goals in the affirmative action employment program, and timetables for its implementation.
3. Make the affirmative action plan a public record within the meaning of the California Public Records Act.

The first activity required by the 1978 version of 87102 was a one-time activity to submit an affirmation of compliance no later than January 1, 1980. In contrast, the first activity required by the 1988 version of section 87102 is an ongoing activity, and as a result, is new as compared to the requirement immediately prior to its enactment. The remaining activities of the 1978 version of section 87102 are the same as the second and fourth activities required by the 1988 version of section 87102, subdivision (a). Thus, the requirements to have goals in the affirmative action employment program and timetables for its implementation, and to make the faculty and staff diversity plan a public record, do not constitute a new program or higher level of service. However, the following activities mandated by Education Code section 87102, as amended by Statutes 1988, chapter 973, do constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution:

1. Periodically submit to the Board of Governors of the California Community Colleges an affirmation of compliance with the provisions of Education Code sections 87100-87107, which address affirmative action hiring (as existing prior to September 4, 2001). (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)
2. Include steps in the faculty and staff diversity plan that the district will take in meeting and improving hiring goals for both full-time faculty and part-time faculty pursuant to Education Code section 87482.6 (Stats. 1988, ch. 973), and the development of the plan shall be a condition for receipt of allowances pursuant to Education Code section 87482.6. (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

[255] Statutes 1978, chapter 766.

3. Publish and distribute a record of the success rate of the measurable progress, with respect to the district's goals and timetables, in hiring employees through its affirmative action employment program. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

   Make this publication a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code), and include data and information specified by the Board of Governors. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

Policy Statement (Cal. Code Regs., tit. 5, § 53002 (Register 96, No. 23 and Register 2002, No. 35))

Section 53002 as it existed in 1996 and 2002, mandates the adoption of a policy setting forth a community college district's commitment to an affirmative action/equal employment opportunity program. The claimants have pled section 53002, as added in 1992 and last amended in 2002.[256] The activity mandated in 1996 was also required in the 1992 version of section 53002.[257] However, immediately prior to 1992, title 5, section 53002, as amended in 1982,[258] required community college districts to engage in the following activity:

> Adopt by resolution an Affirmative Action Employment policy that covers all aspects of personnel policy and practice for all personnel, which will outline the district's commitment to implement "affirmatively" equal employment opportunity programs for all employees and applicants for employment regardless of race, color, religion, sex, national origin, age, handicap, status as a Vietnam-era veteran, or marital status. (Cal. Code Regs., tit. 5, § 53002 (Register 82, No. 6).)

Thus, immediately prior to 1992, community college districts were required to adopt a policy setting forth the districts' commitment to affirmative action/equal employment opportunity programs. Therefore, the requirement of California Code of Regulations, title 5, section 53002 (Register 96, No. 23 and Register 2002, No. 35) does not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

District Plan (Cal. Code Regs., tit. 5, § 53003 (Register 96, No. 23 and Register 2002, No. 35))

Section 53003, as it existed in 1996 and 2002, addresses the development and adoption of a district-wide faculty and staff diversity plan/equal employment opportunity plan and sets forth the required content of the plan. The claimants pled section 53003, as added in 1992 and last amended in 2002.[259] Subdivision (a) of section 53003, as amended in 1996, mandates community college districts to develop and adopt a district-wide written faculty and staff diversity plan to implement its affirmative action employment program. In addition, it mandates

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[256] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 47.

[257] California Code of Regulations, title 5, section 53002 (Register 92, No. 17).

[258] Register 82, number 6.

[259] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 47.

community college districts to submit the plan and revisions to the Chancellor's Office for review and approval. These activities were also required by section 53003 in 1992. However, as amended in 1982,[260] section 53003, subdivision (a), also required these activities, and thus, the activities of adopting a district-wide written faculty and staff diversity plan/equal employment opportunity plan to implement its affirmative action employment program/equal employment opportunity program and submitting the plan and revisions of the plan for review and approval by the Chancellor's Office do not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Subdivision (b) of section 53003, as amended in 1996, mandated community college districts to review the faculty and staff diversity plan at least every three years and if necessary revise the plan and submit it to the Chancellor's Office for approval and to notify the Chancellor at least 30 days prior to adopting any amendments to the faculty and staff diversity plan other than those made during the three year review. A similar activity was present in the 1992 and 1982 versions of 53003.[261] In the 1992 and 1982 versions of subdivision (b) of section 53003, community college districts were required to revise the goals and timetables in the plan every three years and submit them for approval to the Chancellor's Office as opposed to reviewing and possibly revising the *whole plan* every three years. The 1992 and 1982 versions both required community college districts to notify the Chancellor at least 30 days prior to adopting any other amendments. Thus, revising the goals and timetables every three years and notifying the Chancellor at least 30 days prior to any other change to the plan do not constitute new programs or higher levels of service. However, the mandate to review the faculty and staff diversity plan/equal employment opportunity plan, excluding the goals and timetables, every three years does constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Subdivision (b) of section 53003, as amended in 1996, also mandated community college districts to include in the faculty and staff diversity plan goals and timetables for hiring and promotion of members of historically underrepresented groups for each college in the district and for the district as a whole. This activity was required in the 1992 version of section 53003. Section 53051, as amended in Register 82, number 6 (February 1, 1982), similarly required:

> The affirmative action plan shall require that affirmative action programs be designed to eliminate discriminatory employment practices. Goals, timetables, and affirmative action commitments must be designed to correct any identifiable deficiencies in representation from ethnic minority groups and women at all levels within the district.

The distinction between the goals and timetables required in 1982 and 1992 is that the goals and timetables required in 1982 did not include persons with disabilities. Thus, immediately prior to 1992, community college districts were required to include in the district faculty and staff diversity plan goals and timetables for hiring and promotion of members of historically underrepresented groups, excluding persons with disabilities, for each college in the district and for the district as a whole. As a result, including goals and timetables in the faculty and staff diversity plan for historically underrepresented groups, excluding persons with disabilities does

[260] Register 82, number 6.

[261] Register 92, number 17; and Register 82, number 6.

not constitute a new program or higher level of service. However, including goals and timetables, as appropriate, for the hiring and promotion of persons with disabilities developed pursuant to California Code of Regulations, title 5, section 53006, for each college in the district and the district as a whole, does constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Subdivision (c)(1) of section 53003, as amended in 1996, mandates community college districts to include in the faculty and staff diversity plan the designation of the district employee or employees who have been delegated responsibility and authority for implementing the faculty and staff diversity plan and assuring compliance with the requirements of California Code of Regulations, title 5, section 53000 et seq. (Register 96, No. 23), which addresses community college districts' affirmative action/equal employment opportunity plans. This activity was also required in 1992, by section 53003, subdivision (c)(1), as amended in 1992. Immediately prior to 1992, however, California Code of Regulations, title 5, section 53042, as amended in 1982,[262] required community college districts to designate in the affirmative action plan an affirmative action officer to administer the affirmative action plan. As a result, the requirement to designate a district employee in the plan with the authority to implement, and duty to assure compliance with, the faculty and staff diversity plan/equal employment opportunity plan existed immediately prior to 1992, and thus, does not constitute a new program or higher level of service subject to article XIII B, section 6, of the California Constitution.

Subdivision (c)(2) of section 53003, as amended in 1996, mandates community college districts to include in the faculty and staff diversity plan the procedure for filing complaints and the person with whom to file the complaints. This activity is also required in the 1992 version of section 53003, subdivision (c)(2). Immediately prior to 1992, however, California Code of Regulations, title 5, section 53045, as amended in Register 82, number 6 (February 1, 1982), required community college districts to state in the affirmative action plan that an employee or applicant for employment may file a complaint with the district affirmative action officer alleging that the district has failed to satisfy the requirements of California Code of Regulations, title 5, section 53000 et seq. (Register 82, No. 6), and state the procedure for responding to complaints. Thus, the requirement to include in the faculty and staff diversity plan/equal employment opportunity plan the procedure for filing complaints and with whom to file the complaints was required prior to 1992, and therefore, does not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Subdivision (c)(3) of section 53003, as amended in 1996, mandates community college districts to include in the faculty and staff diversity plan a process for notifying all district employees of the provisions of the faculty and staff diversity plan and district policy statement. This requirement was also present in section 53003, subdivision (c)(3), as amended in 1992. Immediately prior to 1992, however, community college districts were already required to engage in this activity. Section 53043, as amended in1982,[263] required the affirmative action plan to require that all district employees be apprised of the equal employment opportunity/affirmative action policy, affirmative action plan, and the importance of the employee's participation and responsibility in ensuring the plan's implementation. Thus, the

[262] Register 82, number 6.

[263] Register 82, number 6.

activity to include a process to notify all district employees of the provisions of the faculty and staff diversity plan/equal employment opportunity plan and district policy statement does not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Subdivision (c)(5) of section 53003, as amended in 1992 and 1996, mandates community college districts to include in the faculty and staff diversity plan a process for providing annual written notice to appropriate community organizations concerning the district's faculty and staff diversity plan and the need for assistance from the community in identifying qualified members of historically underrepresented groups (ethnic minorities, women, and persons with disabilities)[264] for openings with the district. However, community college districts were already required to engage in this activity. Section 53044, as amended in 1982,[265] requires community college districts to require in the affirmative action plan that a written notice be provided at least annually to various community organizations concerning the district's affirmative action policy and to solicit their assistance in recruiting ethnic minority, female, handicapped, and Vietnam-era veteran candidates. Thus, the activity to include a process in the faculty and staff diversity plan to provide an annual notice to community organizations regarding the plan and the need for assistance in recruiting does not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

The 2002 version of subdivision (c)(5) of section 53003, however, added the requirement to include in the district equal employment opportunity plan a process for providing annual notice to professional organizations concerning the district's plan and the need for assistance from such organizations in identifying qualified applicants (not just qualified ethnic minorities, females, and disabled individuals). Thus, the following activity mandated by the 2002 version of subdivision (c)(5) of section 53003 constitutes a new program or higher level of service subject to article XIII B, section 6 of the California Constitution:

> Include in the equal employment opportunity plan the following:
>
> > A process for providing annual written notice to professional organizations concerning the district's equal employment opportunity plan and the need for assistance from the organizations in identifying qualified applicants. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(5) (Register 2002, No. 35), beginning August 11, 2002.)

Subdivision (c)(6) of section 53003, as amended in 1992 and 1996, mandates community college districts to include in the faculty and staff diversity plan an analysis of the number of persons from historically underrepresented groups who are employed in the district's work force and those who have applied for employment in each of the following job categories: (1) executive/administrative/managerial, (2) faculty and other instructional staff, (3) professional nonfaculty, (4) secretarial/clerical, (5) technical and paraprofessional, (6) skilled crafts, and (7) service and maintenance. California Code of Regulations, title 5, section 53046, as amended in Register 82, number 6 (February 1, 1982) required the affirmative action plan to include a

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[264] California Code of Regulations, title 5, section 53001, subdivision (h) (Register 92, No. 15; and Register 96, No. 23).

[265] *Ibid*.

work force analysis in which the district determines statistically the racial, ethnic, and sex composition of existing staff by the seven job categories. Although the 1982 activity is similar, the activity as mandated in 1996 includes an analysis of the number of persons with disabilities who are employed in the workforce and the number of historically underrepresented groups (including those with disabilities) who have applied for employment. As a result, only the following activity mandated by the 1996 version of subdivision (c)(6) constitutes a new program or higher level of service subject to article XIII B, section 6 of the California Constitution:

> Include in the faculty and staff diversity plan an analysis of the number of *persons with disabilities* who are employed in the district's work force and the number of historically underrepresented groups (including persons with disabilities) who have applied for employment in the following job categories:
> (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance.

Subdivision (c)(6) of section 53003, as amended in 2002, imposes a similar mandate on community college districts, as was imposed by the 1996 version of subdivision (c)(6), however, the 2002 version requires an analysis of monitored groups (groups identified by gender, ethnic group identification, and disability) rather than an analysis of historically underrepresented groups (ethnic minorities, women, and persons with disabilities).[266] Thus, in 2002, the scope of the analysis that must be done was broadened to include the ethnic majority and men. As a result, the following activity mandated by the 2002 version of title 5, section 53003, subdivision (c)(6), constitutes a new program or higher level of service:

> An analysis of the number of persons within the ethnic majority, men, and persons with disabilities who are employed in the district's work force and the number of persons from monitored groups who have applied for employment in each of the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35)). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(6) (Register 2002, No. 35), beginning August 11, 2002.)

Subdivision (c)(7) of section 53003, as amended in 1992 and 1996, requires community college districts to include in the faculty and staff diversity plan an analysis of the degree to which women, ethnic minorities, and persons with disabilities are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation is significant. Prior to 1992, California Code of Regulations, title 5, section 53049, as amended in Register 82, number 6 (February 1, 1982), required community college districts to include in the affirmative action plan:

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[266] California Code of Regulations, title 5, section 53001, subdivision (i) (Register 2002, No. 35) defining "monitored group." California Code of Regulations, title 5, section 53001, subdivision (h) (Register 96, No. 23) defining "historically underrepresented group."

> [A] utilization analysis that includes a determination of whether minorities and women are being underrepresented or underutilized in any job category. The district shall consider the numbers and percentages of staff in each position category within each of the job categories by ethnic and sex classification compared with the general availability of minorities and women in the relevant work force having requisite skills to fill vacancies as they occur.

Missing from the 1982 regulation is the requirement to include in the analysis persons with disabilities. In addition, the 1982 regulation did not require districts to determine if the underrepresentation was significant. As a result, only the following activity mandated by subdivision (c)(7) constitutes a new program or higher level of service subject to article XIII B, section 6 of the California Constitution:

> Include in the faculty and staff diversity plan an analysis of the degree to which persons with disabilities are underrepresented in comparison to the numbers of disabled persons whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation for women, ethnic minorities, or persons with disabilities is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

The 2002 version of title 5, section 53003, subdivision (c)(7), broadens the analysis of underrepresentation to include the ethnic majority, and men. Thus, the following activity mandated by the 2002 version of section 53003, subdivision (c)(7), constitutes a new program or higher level of service subject to article XIII B, section 6 of the California Constitution:

> Include in the equal employment opportunity plan an analysis of the degree to which persons within the ethnic majority, men, and persons with disabilities are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 2002, No. 35), beginning August 11, 2002.)

Subdivision (d) of section 53003, as amended in 1992 and 1996, and subdivision (e) of section 53003, as amended in 2002, require community college districts to make the faculty and staff diversity plan a public record. Immediately prior to 1992, this activity was required by California Code of Regulations, title 5, section 53003, subdivision (c), as amended in Register 82, number 6 (February 1, 1982).[267] As a result, making the faculty and staff diversity plan/equal employment opportunity plan a public record does not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Subdivision (e) of section 53003, as amended in 1992 and 1996, and subdivision (f) of section 53003, as amended in 2002, require community college districts to make a continuous good faith effort to comply with the requirements of the faculty and staff diversity plan/equal

[267] Note also, Education Code section 87102, as added in Statutes 1978, chapter 766, required community college districts to make districts' affirmative action/faculty staff diversity/equal employment opportunity plan a public record.

employment opportunity plan. Immediately prior to 1992, California Code of Regulations, title 5, section 53003, as amended in Register 82, number 6 (February 1, 1982), required this activity. As a result, the mandate to make a continuous good faith effort to comply with the requirements of the faculty and staff diversity plan/equal employment opportunity plan does not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Section 53003, subdivisions (c)(4), (8), (9), and (10), as amended in 1996 and 2002, require community college districts to include other information in district faculty and staff diversity plans/equal employment opportunity plans, including, but not limited to: (1) a process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of the affirmative action/equal employment opportunity regulations, and state and federal antidiscrimination laws; (2) steps the district will take to achieve diversity in its workforce; and (3) methods for addressing any underrepresentation. Immediately prior to 1992, community college districts were not required to engage in the activities mandated by section 53003, subdivisions (c)(4), (8), (9), and (10), as amended in 1996 and 2002, and as a result, these activities constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

District Evaluation (Cal Code Regs., tit. 5, § 53004 (Register 96, No. 23 and Register 2002, No. 35))

Section 53004, subdivision (a), as it existed in 1996 and 2002, mandates community college districts to engage in the following activities:

1. Survey district employees every even year (except for information regarding disability, which shall occur annually) and monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing its faculty and staff diversity plan/equal employment opportunity plan and to provide data needed for the analyses required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

2. Annually report to the Chancellor, in a manner described by the Chancellor, the results of its annual survey of employees at each college in the district. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

   Report each employee 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. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

3. Afford each applicant or employee the opportunity to identify his or her gender, ethnicity and, if applicable, his or her disability for purposes of the survey and report required by California Code of Regulations, title 5, section 53004, subdivision (a) (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96,

No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

a. Count a person in only one ethnic group for reporting purposes if that person designates multiple ethnic groups with which he or she identifies. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

b. Count and report Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians as part of the Asian/Pacific Islander group as well as in separate subcategories. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

The claimants have pled section 53004, as added in 1992 and last amended in 2002.[268] Immediately prior to 1992, however, California Code of Regulations, title 5, section 53004, as amended in Register 82, number 6 (February 1, 1982), required community college districts to engage in the following activities:

1. Annually survey its employment patterns in an effort to evaluate its progress in reaching the goals set forth in its affirmative action plan. (Cal. Code Regs., tit. 5, § 53004 (Register 82, No. 6).)
2. Annually report the results of the annual survey in a manner prescribed by the Chancellor. (Cal. Code Regs., tit. 5, § 53004 (Register 82, No. 6).)

Thus, the requirements to conduct a biennial survey to evaluate the district's faculty and staff diversity plan/equal employment opportunity plan, and to report the results of the survey to the Chancellor existed prior to 1992, and as a result, do not constitute a new program or higher level of service. However, the following activities mandated by section 53004, did not exist prior to 1992, and therefore, constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution:

1. Monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing the faculty and staff diversity plan/equal employment opportunity plan and to provide data needed for the analyses required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)
2. In the report to the Chancellor's Office of the results of the employee survey, report each employee so that they 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. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

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[268] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 48.

3. Afford each applicant or employee the opportunity to identify his or her gender, ethnicity and, if applicable, his or her disability for purposes of the survey and report required by California Code of Regulations, title 5, section 53004, subdivision (a) (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

    a. Count a person in only one ethnic group for reporting purposes if that person designates multiple ethnic groups with which he or she identifies. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

    b. Count and report Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians as part of the Asian/Pacific Islander group as well as in separate subcategories. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

<u>Advisory Committee (Cal. Code Regs., tit. 5, § 53005 (Register 96, No. 23 and Register 2002, No. 35))</u>

The claimants have pled section 53005, as added in 1992 and last amended in 2002.[269] Section 53005, as it existed in 1992 and 2002, mandates community college districts to establish a Faculty and Staff Diversity Advisory Committee/Equal Employment Opportunity Advisory Committee to assist districts in developing and implementing districts' faculty and staff diversity plan/equal employment opportunity plan. In addition, in 1992 the committee was required to include members of all historically underrepresented groups whenever possible. In 2002 the committee was required to include a diverse membership whenever possible. However, immediately prior to 1992 California Code of Regulations, title 5, section 53052, as amended in Register 82, number 6 (February 1, 1982) required community college districts to engage in the following activity:

> Establish an affirmative action advisory committee to assist the district to achieve understanding and support of affirmative action/equal employment opportunity policies and programs, and shall assist in the developing of the affirmative action program in conformity with state and federal statutes, regulations, and guidelines, monitoring its progress and acting as an advisory body to the affirmative action officer. The committee shall include ethnic minorities, women, the handicapped and Vietnam-era veterans whenever possible. (Cal. Code Regs., tit. 5, § 53052 (Register 82, No. 6).)

Thus, immediately prior to 1992, community college districts were required to establish a committee to assist districts in developing and implementing faculty and staff diversity/equal employment opportunity plans. In addition, the committee was to have a diverse membership whenever possible. As a result, the activity mandated by California Code of Regulations, title 5, section 53005, as amended by Register 96, number 23, and Register 2002, number 35, does not

[269] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 48.

constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Corrective Action and Additional Steps (Cal. Code Regs., tit. 5, § 53006 (Register 96, No. 23 and Register 2002, No. 35))

The claimants have pled section 53006, as added in 1996 and last amended in 2002.[270] Section 53006, as it existed in 1996 and in 2002, mandates community college districts to take specific actions if significant underrepresentation exists in a job category, including but not limited to: (1) taking corrective action if the community college district determines that a particular group is significantly underrepresented; (2) reviewing district recruitment procedures; and (3) monitoring the staffing rates for significantly underrepresented groups. Immediately prior to 1996, none of the activities mandated by section 53006 were required. As a result, the activities required by section 53006, as amended by Register 96, number 23, and Register 2002, number 35, constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Delegation of Authority (Cal. Code Regs., tit. 5, § 53020 (Register 96, No. 23 and Register 2002, No. 35))

Section 53020, as it existed in 1996 and 2002, mandate activities related to the responsibility for implementing district faculty and staff diversity/equal employment opportunity plans and the delegation of authority within a district. The claimants have pled section 53020, as added in 1992 and last amended in 2002.[271] Section 53020, as it existed in 1996 and 2002, places ultimate responsibility on community college districts for the proper implementation of the regulations addressing affirmative action/equal employment opportunity, and for making measurable progress toward equal employment opportunity as set forth in its faculty and staff diversity plan/equal employment opportunity plan.[272] This requirement existed in the 1992 version of section 53020. Immediately prior to 1992, however, California Code of Regulations, title 5, section 53041, as amended by Register 82, number 6 (February 1, 1982), places:

> [O]verall responsibility [on community college districts] for ensuring affirmative action and equal employment opportunity including, but not limited to, recruitment, assignment, promotion, retention, compensation, and training, and for improving representation of minority racial and ethnic groups, women, handicapped persons and Vietnam-era veterans.

Thus, the overall or ultimate responsibility for implementing affirmative action/equal employment opportunity in community college districts was placed on community college districts prior to 1992. However, the requirement to be responsible for "measurable progress" toward equal employment opportunity as set forth in its faculty and staff diversity plan/equal employment opportunity plan was not required prior to 1992, and therefore constitutes a new

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[270] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 48.

[271] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 49.

[272] California Code of Regulations, title 5, section 53020, subdivision (a) (Register 96, No. 23 and Register 2002, No. 35).

program or higher level of service subject to article XIII B, section 6 of the California Constitution.

In addition section 53020, as it existed in 1996 and 2002, mandates community college districts to designate an affirmative action/equal employment opportunity officer to oversee the day-to-day implementation of the requirements of the regulations.[273] Section 53020 requires that the administrative structure created by the delegation of authority to the affirmative action/equal employment opportunity officer be described in the faculty and staff diversity/equal employment opportunity plan.[274] These requirements were also present in the Register 92 version of section 53020. Immediately prior to 1992, California Code of Regulations, title 5, section 53042, as amended in Register 82, number 6 (February 1, 1982), required community college districts to designate in its affirmative action plan an affirmative action officer to administer the affirmative action program. In addition, section 53042 required the affirmative action officer designated in the plan to report to the chief district administrator, or designee who reports to the chief district administrator, thus setting forth the administrative structure created by the delegation of authority to the affirmative action officer. As a result, the requirements to designate an affirmative action/equal employment officer and to describe the administrative structure created by the delegation of authority do not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Section 53020, as it existed n 1996 and 2002, also mandated that community college districts design the administrative structure created by the delegation of authority to the affirmative action/equal employment opportunity officer so as to ensure prompt and effective implementation of the requirements of the regulations.[275] This requirement existed in 1992 but did not exist prior to 1992, and as result, constitutes a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Finally, section 53020, as it existed in 1996 and 2002, mandates that districts designate a single officer, that may be the affirmative action/equal employment opportunity officer, who is given the authority and responsibility for receiving complaints, for ensuring that such complaints are promptly and impartially investigated, and for ensuring that selection procedures and the applicant pool are properly monitored as required by California Code of Regulations, title 5, sections 53023 and 53024 (Register 96, No. 23 and Register 2002, No. 35).[276] As relevant to this discussion, section 53024 requires the selection process as a whole to be based solely on job related criteria, and designed and monitored to avoid an adverse impact. These activities were required in the Register 92 version of sections 53020 and 53024.

Immediately prior to 1992, California Code of Regulations, title 5, section 53045, as amended by Register 82, number 6 (February 1, 1982), required a community college district to state in its affirmative action plan that an employee or applicant for employment may file a complaint with

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[273] California Code of Regulations, title 5, section 53020, subdivision (a) (Register 96, No. 23 and Register 2002, No. 35).

[274] California Code of Regulations, title 5, section 53020, subdivision (b) (Register 96, No. 23 and Register 2002, No. 35).

[275] *Ibid*.

[276] *Ibid*.

the district affirmative action officer alleging that the district has failed to satisfy the requirements of California Code of Regulations, title 5, section 53000 et seq. (Register 82, No. 6). In addition, California Code of Regulations, title 5, section 53026, as amended by Register 82, number 6 (February 1, 1982), required the affirmative action officer to ensure that the entire selection process be solely based on job-related criteria, a fair impartial examination of the candidates based on job-related criteria, with job-related questions prepared in advance. California Code of Regulations, title 5, section 53027, as amended by Register 82, number 6 (February 1, 1982), required the affirmative action officer to monitor throughout the entire selection process for adverse impact. Thus, the mandates to designate an employee to receive complaints, and for the affirmative action/equal employment opportunity officer to ensure that the selection procedures be based solely on job related criteria and monitored to avoid an adverse impact, do not constitute a new program or higher level of service. However, the following mandate does constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution:

> Designate in the faculty and staff diversity plan/equal employment opportunity plan a single officer, who may be the affirmative action officer/equal employment opportunity officer, for ensuring complaints of violations of the equal employment opportunity program regulations (excluding those based on disability or gender), filed pursuant to California Code of Regulations, title 5, section 53026, are promptly and impartially investigated, and ensuring that selection procedures and the applicant pool are properly monitored (excluding ensuring that the selection procedure is based solely on job-related criteria and monitoring for adverse impact) as required by California Code of Regulations, title 5, sections 53023 and 53024. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23), beginning July 1, 2001.)

<u>Recruitment (Cal. Code Regs., tit. 5, § 53021 (Register 96, No. 23 and Register 2002, No. 35))</u>

The claimants have pled section 53021, as added in 1992 and last amended in 2002.[277] Section 53021 mandates community college districts to engage in specific activities associated with recruiting applicants for employment with the district. Although some of the activities mandated by the 1996 and 2002 version of 53021 did not exist in 1992, it is unnecessary to identify which activities were present because none of the activities were required prior to 1992. As a result, the activities mandated by section 53021 (Register 96, No. 23 and Register 2002, No. 35) constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

<u>Job Announcements (Cal. Code of Regs., tit. 5, § 53022 (Register 96, No. 23 and Register 2002, No. 35))</u>

The claimants have pled section 53022, as added in 1992 and last amended in 2002.[278] Section 53022, as amended in 1996 and 2002, mandates community college districts to engage in

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[277] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 49.

[278] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 49.

activities associated with job announcements and required qualifications. These activities include the mandate for community college districts to state clearly in job announcements the job specifications setting forth the knowledge, skills, and abilities necessary to job performance. This activity was also required in the Register 92 version of section 53022. However, immediately prior to 1992, California Code of Regulations, title 5, section 53022, as amended in 1982,[279] required community college districts to state clearly in job announcements the job specifications setting forth those skills necessary to job performance and the required training and experience related to those skills. As a result, this portion of section 53022, as it existed in 1992 and 2002, does not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

California Code of Regulations, title 5, section 53022, as it existed in 1996 and 2002, also required the job requirements for faculty and administrative positions to include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. Finally, section 53022 mandates district job specifications, excluding locally established "desired," "required," or "preferred" qualifications beyond state minimum qualifications, to be reviewed before the position is announced. These activities were also required in the Register 92 version of section 53022, but were not required prior to 1992, and as a result, constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Applicant Pool (Cal. Code Regs., tit. 5, § 53023 (Register 96, No. 23 and Register 2002, No. 35))

The claimants have pled section 53023, as added in 1992 and last amended in 2002.[280] Section 53023, as amended in 1996 and 2002, mandates activities associated with community college districts' application for employment and response to a failure to obtain expected representation of a gender, ethnic group, or persons with disabilities. Although some of these activities were not present in 1992, none of these activities were required prior to 1992, and as a result, constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Selection Procedures (Cal. Code Regs., tit. 5, § 53024 (Register 96, No. 23 and Register 2002, No. 35))

The claimants have pled section 53024, as added in 1992 and last amended in 2002.[281] Section 53024, as it existed in 1996 and 2002, mandates community college districts to engage in activities associated with the employee screening and selection procedures of a community college district. In 1996 and 1992, subdivision (a)(3) of section 53024 mandated community college districts to base all screening or selection techniques and the selection process as a whole solely on job-related criteria. However, in 1982 section 53026, as amended in Register 82, number 6, required selection procedures such as interviews to be solely based on job-related

[279] Register 82, number 6.

[280] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 50.

[281] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 50.

requirements, and required the affirmative action officer to ensure that the entire selection process be solely based on job-related criteria, a fair impartial examination of candidates based on job-related criteria, with job related questions prepared in advance. Thus, the requirement to base employee screening and selection techniques and the selection process as a whole solely on job-related criteria existed prior to 1992, and therefore, does not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Subdivisions (e) and (f) of section 53024, as amended in Register 92, number 17, and Register 96, number 23, requires community college districts to follow procedures as outlined in the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures" for selection testing for employees, and to include members of historically underrepresented groups in selection committees whenever possible. Immediately prior to 1992, California Code of Regulations, title 5, section 53024, as amended in Register 82, number 6 (February 1, 1982), already required these activities, and as a result, these activities do not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

However, the following activities mandated by section 53024, as amended in 1996 and 2002, were not required immediately prior to 1996, and as a result, constitute a new program or higher level of service subject article XIII B, section 6 of the California Constitution:

1. Provide all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to the Chancellor upon request. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 2002, No. 35), beginning July 1, 2001.)
2. Design all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole, 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. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 2002, No. 35), beginning July 1, 2001.)
3. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to ensure that they do not have an adverse impact, as defined by California Code of Regulations, title 5, section 53001, subdivision (m), on any group defined in terms of ethnicity. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)
4. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to avoid an adverse impact as defined in California Code of Regulations, title 5, section 53001, subdivision (a) on any group defined in terms of ethnicity, and to detect and address any adverse impact on any group defined in terms of ethnicity which does occur. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)
5. Suspend the selection process and take timely and effective steps to remedy adverse impact on any group defined in terms of ethnicity before the selection process resumes if

monitoring under California Code of Regulations, title 5, section 53024, subdivision (a)(4) reveals that any selection technique or procedure has adversely impacted such ethnic group. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

Persons with Disabilities (Cal. Code Regs., tit. 5, § 53025 (Register 2002, No. 35))

The claimants have pled section 53025, as added in 1992 and last amended in 2002.[282] As discussed above in the federal mandate analysis for section 53025, the 1996 version of section 53025 does not impose any state-mandated activities. The 2002 version of 53025, however, imposes various mandated activities related to setting goals for hiring persons with disabilities. The state-mandated activities found in the 2002 version of section 53025 did not exist in the 1996 version of section 53025, which was the version immediately preceding the 2002 version. As a result, the state-mandated activities found in California Code of Regulations, title 5, section 53025, as amended in Register 2002, number 35, constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Complaints (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23 and Register 2002, No. 35))

The claimants have pled section 53026, as added in 1992 and last amended in 2002.[283] In relevant part, section 53026, as amended in 1992 and 2002, requires community college districts to establish a process permitting any person[284] to file a complaint alleging that the requirements of California Code of Regulations, title 5, section 53000 et seq. have been violated. Immediately prior to 1992, California Code of Regulations, title 5, section 53045, as amended in 1982,[285] required community college districts to allow employees or applicants for employment to file a complaint with the district affirmative action officer alleging that the district has failed to satisfy the requirements of California Code of Regulations, title 5, section 53000 et seq. Thus, establishing a complaint process for employees and applicants for employment does not constitute a new program or higher level of service.

The section 53026 requirement, however, exceeds the requirement set forth in section 53045, because it allows "any person" to file a complaint alleging a violation of California Code of Regulations, title 5, section 53000 et seq. Thus, the requirement to establish a process permitting any person, excluding employees and applicants for employment, to file a complaint alleging that the requirements of California Code of Regulations, title 5, section 53000 et seq. has been violated, constitutes a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

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[282] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 51.

[283] *Ibid*.

[284] Excluding an employee filing a complaint alleging a violation of California Code of Regulations, title 5, section 53000 et seq., to the extent that the requirements coincide with the requirements of Section 504 and Title IX (i.e. failure to designate a person to coordinate efforts to comply Section 504 and Title IX (see Cal. Code Regs., tit. 5, § 53020); failure to provide reasonable accommodations (see Cal. Code Regs., tit. 5, § 53020); and employment discrimination on the basis of disability and gender in district employee selection procedures).

[285] Register 82, number 6.

In addition, to the above discussed activity, the following state-mandated activities found in California Code of Regulations, title 5, section 53026, did not exist prior to 1992, and as a result, constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution:

1. Forward immediately to the Chancellor a copy of the complaint. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)
2. Provide a written investigative report within 90 days if required by the Chancellor. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)
3. Process complaints which also allege discrimination prohibited by Government Code Section 11135 et seq. according to the procedures set forth in California Code of Regulations, title 5, section 59300 et seq. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

<u>Reporting Use of Funds (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23 and Register 2002, No. 35))</u>

Section 53034, as amended in 1996 and 2002, mandates community college districts to engage in the following activities:[286]

1. 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. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23) beginning July 1, 2001 and ending on August 10, 2002.)
2. Report the staffing rate of persons with disabilities by a separate survey as directed by the Chancellor's Office, until a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by California Code of Regulations, title 5, section 53004. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53034 (Register 2002, No. 35), beginning July 1, 2001. There is no evidence in the record indicating whether a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by title 5, section 53004. As a result, the Commission cannot determine an end date for this activity.)

The claimants have pled section 53034, as added in 1992 and last amended in 2002.[287] These activities existed in 1992. However, the activities did not exist immediately prior to 1992, and

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[286] Note that the first activity is not mandated by California Code of Regulations, title 5, section 53034, as amended in Register 2002, number 35, because receipt of funds from the "Equal Employment Opportunity Fund" (the functional replacement of the "Faculty and Staff Diversity Fund") is optional. Thus, reporting the use of the funds is a downstream activity triggered by a discretionary decision, and as a result, is not a mandated activity, after August 10, 2002.

[287] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 52.

thus, constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

(i) Summary of State-Mandated New Program or Higher Level of Service

1. Periodically submit to the Board of Governors of the California Community Colleges an affirmation of compliance with the provisions of Education Code sections 87100-87107, which address affirmative action hiring (as existing prior to September 4, 2001). (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

2. Include steps in the faculty and staff diversity plan that the district will take in meeting and improving hiring goals for both full-time faculty and part-time faculty pursuant to Education Code section 87482.6 (Stats. 1988, ch. 973), and the development of the plan shall be a condition for receipt of allowances pursuant to Education Code section 87482.6. (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

3. Publish and distribute a record of the success rate of the measurable progress, with respect to the district's goals and timetables, in hiring employees through its affirmative action employment program. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

   Make this publication a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code), and include data and information specified by the Board of Governors. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

4. Review the faculty and staff diversity plan/equal employment opportunity plans, excluding goals and timetables, at least every three years and if necessary revise the plan and submit it to the Chancellor's Office for approval. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

5. Include in the faculty and staff diversity plan/equal employment opportunity plan the following:

   a. Goals and timetables, as appropriate, for hiring and promotion of persons with disabilities developed pursuant to California Code of Regulations, title 5, section 53006 for each college in the district and for the district as a whole. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

   b. A process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of California Code of Regulations, title 5, section 53000 et seq., which addresses affirmative action/equal employment opportunity programs (Register 96, No. 23; Register 2002, No. 35) and of state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(4) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subdivision (c)(4) (Register 2002, No. 35), beginning July 1, 2001.)

c. A process for providing annual written notice to professional organizations concerning the district's equal employment opportunity plan and the need for assistance from the organizations in identifying qualified applicants. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(5) (Register 2002, No. 35), beginning August 11, 2002.)

d. An analysis of the number of persons with disabilities who are employed in the district's work force and the number of historically underrepresented groups (including persons with disabilities) who have applied for employment in the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance. (listed in Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(6) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

e. An analysis of the number of ethnic majority, men, and persons with disabilities who are employed in the district's work force and the number of persons from monitored groups who have applied for employment in each of the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35)). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(6) (Register 2002, No. 35), beginning August 11, 2002.)

f. An analysis of the degree to which persons with disabilities are underrepresented in comparison to the numbers of disabled persons whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation for women, ethnic minorities, or persons with disabilities is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

g. An analysis of the degree to which persons within the ethnic majority, men, and persons with disabilities are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 2002, No. 35), beginning August 11, 2002.)

h. The steps the district will take to achieve diversity in its workforce. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(8) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

i. Goals for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003, subdivision (c)(7) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(9) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

j. Methods for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003, subdivision (c)(7). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(8) (Register 2002, No. 35), beginning August 11, 2002.)

k. Additional steps consistent with California Code of Regulations, title 5, section 53006, to remedy any significant underrepresentation identified in the plan. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(9) (Register 2002, No. 35), beginning August 11, 2002.)

l. A plan for corrective action consistent with California Code of Regulations, title 5, section 53006 (Register 96, No. 23), including goals and timetables for hiring and promotion, if necessary, to remedy any significant underrepresentation identified in the faculty and staff diversity plan by achieving expected representation for all historically underrepresented groups in all job categories listed in California Code of Regulations, title 5, § 53004, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(10) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

m. Any other measures necessary to further equal employment opportunity throughout the district. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(10) (Register 2002, No. 35), beginning August 11, 2002.)

n. Any goals for hiring persons with disabilities that are required by California Code of Regulations, title 5, section 53025. (Cal. Code Regs., tit. 5, § 53003, subd. (d) (Register 2002, No. 35), beginning August 11, 2002.)

6. Monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing the faculty and staff diversity plan/equal employment opportunity plan and to provide data needed for the analyses required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

7. In the report to the Chancellor's Office of the results of the employee survey, report each employee so that they 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. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

8. Afford each applicant or employee the opportunity to identify his or her gender, ethnicity and, if applicable, his or her disability for purposes of the survey and report required by California Code of Regulations, title 5, section 53004, subdivision (a) (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

   a. Count a person in only one ethnic group for reporting purposes if that person designates multiple ethnic groups with which he or she identifies. (Cal. Code

Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

b. Count and report Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians as part of the Asian/Pacific Islander group as well as in separate subcategories. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

9. If a community college district has existing goals:

a. Update goals established prior to June 30, 1996 and set a new target date for achieving expected representation for a group in a job category if significant underrepresentation still exists. (Cal. Code Regs., tit. 5, § 53006, subd. (a) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

b. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

c. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

d. Comply with California Code of Regulations, title 5, section 53006, subdivision (c) (Register 96, No. 23) while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

10. If a community college district has no existing goals:

a. Take corrective action if, pursuant to California Code of Regulations, title 5, section 53003, subdivision (c)(7), the district determines that a particular group is significantly underrepresented with respect to one or more job categories and no goal has previously been set. (Cal. Code Regs., tit. 5, § 53006, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

b. The district shall take, at a minimum, the following corrective action:

i. Review district recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code

Regs., tit. 5, § 53006, subd. (b)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

ii. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

iii. Determine whether the group is still significantly underrepresented in the job categories in question after the measures described in California Code of Regulations, title 5, section 53006, subdivision (b)(1) and (2) (Register 96, No. 23) have been in place a reasonable period of time. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

iv. Set a goal with a target date for achieving expected representation for the significantly underrepresented group in each job category where significant underrepresentation persists, if it persists. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

v. Monitor on an ongoing basis the staffing rate for the significantly underrepresented groups in the specified job categories. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

vi. Discontinue the use of goals when expected representation has been achieved for that group in the job categories in question. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

11. Additional measures to be taken if a goal has been set and after a reasonable period of time significant underrepresentation persists:

    a. Establish a specific timetable to project the levels of annual hiring of persons from the significantly underrepresented group which will be necessary to meet the existing goal by the target date. (Cal. Code Regs., tit. 5, § 53006, subd. (c) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. Implement the following additional corrective measures until expected representation has been achieved for that group in the job category in question: Consider, as one factor in the final selection process, the fact that a candidate is a member of a significantly underrepresented group, provided that the qualifications of the candidates under consideration are reasonably considered to be equivalent. (Cal. Code Regs., tit. 5, § 53006, subd. (c)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

12. If a community college district has no existing goals for women or persons with disabilities implement the measures required in California Code of Regulations, title 5, section 53006, subdivision (b)(1) and (2) (Register 96, No. 23) concurrently with setting a goal with a target date for achieving expected representation for women or persons with

disabilities in each job category in which they are found to be significantly underrepresented. (Cal. Code Regs., tit. 5, § 53006, subd. (d) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

a. Goals shall remain in effect only until expected representation has been achieved for the group in the job category or categories in which significant underrepresentation is found. (Cal. Code Regs., tit. 5, § 53006, subd. (d) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

b. An aggregate labor force availability rate shall be utilized for setting goals for hiring persons with disabilities with respect to the total district work force until the Chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, § 53006, subd. (d), beginning July 1, 2001 through August 10, 2002.)

13. Take additional steps if a district determines that a particular monitored group is significantly underrepresented with respect to one or more categories, including at minimum:

    a. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(1) (Register 2002, No. 35), beginning August 11, 2002.)

    b. 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. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(2) (Register 2002, No. 35), beginning August 11, 2002.)

    c. Determine whether the group is still significantly underrepresented in the categories in question after the measures described in subdivisions (a)(1) and (2) of California Code of Regulations, title 5, section 53006, have been in place a reasonable period of time (three years or longer). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(3) (Register 2002, No. 35), beginning August 11, 2002.)

    d. Monitor the staffing rate for the significantly underrepresented group in the specified job categories in question on an ongoing basis until the projected representation has been achieved for that group if significant underrepresentation persists. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)

14. Be ultimately responsible for making measurable progress toward the goals established in the district's faculty and staff diversity plan or measurable progress toward equal employment opportunity by methods described in the district's equal employment opportunity plan. (Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

15. Design the administrative structure created by any delegation of authority to the affirmative action officer/equal employment officer or others in such a manner so as to ensure prompt and effective implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) (Cal. Code

Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23) beginning July 1, 2001.)

16. Designate in the faculty and staff diversity plan/equal employment opportunity plan a single officer, who may be the affirmative action officer/equal employment opportunity officer, for ensuring complaints of violations of the equal employment opportunity program regulations (excluding those based on disability or gender), filed pursuant to California Code of Regulations, title 5, section 53026, are promptly and impartially investigated, and ensuring that selection procedures and the applicant pool are properly monitored (excluding ensuring that the selection procedure is based solely on job-related criteria and monitoring for adverse impact) as required by California Code of Regulations, title 5, sections 53023 and 53024. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23), beginning July 1, 2001.)

17. Actively recruit from both within and outside the district work force to attract qualified applicants for all new openings except as provided by California Code of Regulations, title 5, section 53021, subdivision (b). (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

    a. Active recruitment shall include focused outreach to historically underrepresented groups. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. Active recruitment shall include outreach to ensure all persons, including persons from monitored groups, are provided the opportunity to seek employment with the district. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning August 11, 2002.)

    c. Open recruitment applies 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. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

18. Recruit at least statewide for full-time faculty and educational administrator positions, and at a minimum, seek qualified applicants listed in the California Community Colleges Faculty and Staff Diversity Registry/Equal Employment Opportunity Registry. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

19. Recruit part-time faculty positions separately for each new opening or by annually establishing a pool of eligible candidates. In either case, full and open recruitment is required consistent with California Code of Regulations, title 5, section 53021. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

20. Notify the Faculty and Staff Diversity Advisory Committee/Equal Employment Opportunity Advisory Committee established pursuant to California Code of Regulations,

title 5, section 53005 and the Chancellor, at least ten working days prior to offering the position to a candidate, if the district believes justification exists for use of any of the exceptions listed in section 53021, subdivision(b). (Cal. Code Regs., tit. 5, § 53021, subd. (c) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)

21. Comply with the district's established hiring procedures and afford all qualified district employees the opportunity to apply even where in-house or promotional only recruitment is permitted under California Code of Regulations, title 5, section 53005, subdivision (b). (Cal. Code Regs., tit. 5, § 53021, subd. (d) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (d) (Register 2002, No. 35), beginning July 1, 2001.)

22. Include sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students in job requirements for faculty and administrative positions. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

23. Review job specifications, excluding any "required," "desired," or "preferred" qualifications beyond the state minimum qualifications (set forth in Subchapter 4 of Cal. Code Regs., tit. 5, commencing with § 53400) which the district wishes to utilize, before the position is announced to ensure conformity with the requirements of California Code of Regulations, title 5, section 53000 et seq., and state and federal nondiscrimination laws, excluding section 504 of the Rehabilitation Act, and Title IX of Education Amendments of 1972. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

24. Afford each applicant an opportunity to voluntarily identify his or her gender, ethnicity and, if applicable, his or her disability, in the district's application for employment. (Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

25. Keep information regarding an applicant's gender, ethnicity, and/or disability provided in an application for employment confidential. (Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

26. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that expected representation has been achieved for historically underrepresented groups. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

27. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that any failure to obtain projected representation for any group defined in terms of ethnicity is not due to discriminatory recruitment procedures. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

28. Extend the application deadline and conduct additional focused recruitment for historically underrepresented groups for which expected representation has not been achieved, if necessary. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

29. Extend the application deadline and conduct additional recruitment, which eliminates discriminatory recruitment procedures and ensures that recruitment efforts provide a full and fair opportunity for participation to a wide diversity of potential applicants, if necessary. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

30. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when the expected representation of historically underrepresented groups is achieved, or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

31. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when recruitment efforts have offered an opportunity for participation to a wide diversity of potential applicants or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

32. Analyze the composition of the qualified applicant pool to ensure that no group defined in terms of ethnicity is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (m) (Register 96, No. 23).

    This analysis occurs after the analysis to ensure that expected representation has been achieved for groups defined in terms of ethnicity (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

33. Analyze the composition of the qualified applicant pool to ensure that no ethnic group is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (a) (Register 2002, No. 35).

    This analysis occurs after the analysis done to ensure that any failure to obtain projected representation for any group defined in terms of ethnicity is not due to discriminatory recruitment procedures (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

34. Take effective steps to address adverse impact on any group defined in terms of ethnicity found in the district's applicant pool before the selection process is continued. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)

35. Provide all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to the Chancellor upon request. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 2002, No. 35), beginning July 1, 2001.)

36. Design all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole, 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. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 2002, No. 35), beginning July 1, 2001.)

37. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to ensure that they do not have an adverse impact, as defined by California Code of Regulations, title 5, section 53001, subdivision (m), on any group defined in terms of ethnicity. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

38. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to avoid an adverse impact as defined in California Code of Regulations, title 5, section 53001, subdivision (a) on any group defined in terms of ethnicity, and to detect and address any adverse impact on any group defined in terms of ethnicity which does occur. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)

39. Suspend the selection process and take timely and effective steps to remedy adverse impact on any group defined in terms of ethnicity before the selection process resumes if monitoring under California Code of Regulations, title 5, section 53024, subdivision (a)(4) reveals that any selection technique or procedure has adversely impacted such ethnic group. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

40. Update a goal established prior to July 12, 2002 for persons with disabilities, set a new target date for achieving projected representation in a job category or categories, and concurrently comply with California Code of Regulations, title 5, section 53006, subdivisions (a)(1), (a)(2), and (b) with respect to persons with disability, if significant underrepresentation still exists in the job category or categories. (Cal. Code Regs., tit. 5, § 53025, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

41. Implement California Code of Regulations, title 5, section 53006, subdivisions (a)(1) and (a)(2) concurrently with setting a goal with a target date for achieving projected representation for persons with a disability in each job category where underrepresentation was found to exist. Goals are to remain in effect only until projected representation has been achieved for that group in the category or categories in question. (Cal. Code Regs., tit. 5, § 53025, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

42. Utilize an aggregate labor force availability rate for setting goals for hiring persons with disabilities with respect to the total district work force, until the Chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, § 53025, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

43. Establish a process permitting any person (excluding employees and applicants for employment) to file a complaint alleging that the requirements of the affirmative action/equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) have been violated. This excludes the establishment of a process

permitting an employee to file a complaint alleging a violation of the equal employment opportunity program regulations on the basis of disability or gender (i.e. failure to designate a person to coordinate efforts to comply Section 504 and Title IX (see Cal. Code Regs., tit. 5, § 53020); failure to provide reasonable accommodations (see Cal. Code Regs., tit. 5, § 53020); and employment discrimination on the basis of disability and gender in district employee selection procedures). (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

44. Forward immediately to the Chancellor a copy of the complaint. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

45. Provide a written investigative report within 90 days if required by the Chancellor. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

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

47. Submit a report on the use of Faculty and Staff Diversity funds to the Chancellor's Office no later than September 30 of the fiscal year following the use of the funds. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23) beginning July 1, 2001 and ending on August 10, 2002.)

48. Report the staffing rate of persons with disabilities by a separate survey as directed by the Chancellor's Office, until a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by California Code of Regulations, title 5, section 53004. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53034 (Register 2002, No. 35), beginning July 1, 2001. There is no evidence in the record indicating whether a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by title 5, section 53004. As a result, the Commission cannot determine an end date for this activity.)

(3) Student Equity (Ed. Code, §§ 212, 212.5, 213, 214, 221.5, 221.7, 66010.2, 66010.7, 66016, 66030, 66251, 66252, 66261, 66261.5, 66262, 66262.5, 66263, 66264, 66270, 66271.7, 66281.5, 66290, 66291, 66292, 66292.3, and 72011-72014; and Cal. Code Regs., Tit. 5, § 54220)[288]

This section addresses the provision of community college services, classes, and programs on an equal basis to all students. The claimants have pled code sections addressing nondiscrimination (Ed. Code, §§ 212, 212.5, 213, 214, 221.5, 221.7), code sections from the Sex Equity in Education Act (Ed. Code, §§ 66251, 66252, 66261.5, 66262, 66262.5, 66263, 66264, 66270, 66271.7, 66281.5, 66290, 66291, 66292, and 66292.3), general provisions applicable to the three segments of higher education (Ed. Code, §§ 66010.2, 66010.7, 66016, and 66030), and nondiscrimination provisions applicable specifically to community college districts (Ed. Code, §§ 72011-72014). In addition, this section addresses the adoption of a student equity plan (Cal. Code Regs., tit. 5, § 54220).

a. Background

Some of the law governing educational equity was originally adopted to be applicable to both K-12 school districts and postsecondary institutions, including community college districts.[289] In 1998, legislation was enacted to create parallel legislative schemes governing educational equity, one for K-12 school districts (Ed. Code, § 200 et seq.) and one for postsecondary educational institutions (Ed. Code, § 66250 et seq.).[290] Although community college districts were included in the legislative scheme applicable to postsecondary educational institutions, Education Code section 72012, which was added as part of the legislation, required community colleges to comply with part of the K-12 school district legislative scheme (Ed. Code, §§221.5 and 221.6) in addition to the postsecondary legislative scheme. Education Code section 72012 continued to require community colleges to comply with a portion of the K-12 school district legislative scheme until 2007.[291] Thus, during the reimbursement period for this test claim (starting July 1, 2001), community college districts were subject to parts of both the K-12 school district and the postsecondary educational district statutory schemes.[292] The claimants have pled some of the "parallel" code sections, and for ease of discussion, this analysis will address these

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[288] Although the claimants have pled the "Student Equity: Guidelines for Developing a Plan" issued by the Academic Senate for California Community Colleges as part of the "student equity" section, the guidelines do not constitute an executive order, and as a result, is not within the Commission's jurisdiction. Thus, the "Student Equity Guidelines for Developing a Plan" will not be addressed in this section.

[289] Former Education Code section 210, as added by Statutes 1982, chapter 1117.

[290] Statutes 1998, chapter 914.

[291] Statutes 2007, chapter 569, section 51. The 2007 version of Education Code section 72012 removes reference to the K-12 legislative scheme (Ed. Code, § 200 et seq.), and replaces it with reference to the postsecondary educational institution legislative scheme (Ed. Code, § 66250 et seq.).

[292] Test Claim number 02-TC-31, was filed June 13, 2003. See Government Code section 17557, subdivision (e).

sections together when appropriate. The Commission is not taking jurisdiction over the code sections from the K-12 school district statutory scheme as applicable to K-12 school districts; rather these sections are being analyzed as applicable to community college districts.

The following discussion will first address whether the student equity code sections and regulation require any activities. Secondly, the discussion will analyze whether the activities required by the code sections and regulation constitute federal mandates. Thirdly, the discussion will analyze whether the activities required by the code sections and regulation constitute state-mandated activities. Finally, the discussion will address whether the code sections and regulation constitute a new program or higher level of service.

b. Education Code sections 221.5, 66010.2, 66010.7, 66281.5, 66290, 66291, 66292, 66292.3, and 72012 require community college districts to engage in activities

The following discussion will analyze whether the language of the Education Code sections and title 5 regulation pled in the "student equity" section of this analysis require any activities. Each code section and regulation is introduced with a header that describes the content of the code sections or regulation discussed.

Institutional Goals and Intersegmental Collaboration: (Ed. Code, §§ 66010.2 and 66010.7)

In 1959, a study titled, "A Master Plan for Higher Education in California, 1960-75 (Master Plan)" was prepared primarily to address the need to differentiate the functions of the segments of higher education and rapidly increasing enrollments.[293] Legislation was enacted to implement some of the recommendations of the Master Plan, including the Donahoe Higher Education Act (Ed. Code, §§ 66000-67400), which outlines the general mission and structure of governance for each of the three public higher education segments (the University of California (UC), the California State University (CSU), and the California Community Colleges).[294]

Sections 66010.2 and 66010.7 were enacted as part of AB 617.[295] AB 617 was enacted in response to the 1989 report "California Faces…California's future: Education for Citizenship in a Multicultural Democracy," that affirmed the achievements of the basic structure of the Master Plan and identified new challenges for California's institutions of higher education. As part of AB 617 the Legislature enacted Education Code sections 66002 and 66003, which set forth the legislative findings and intent for the Donahoe Higher Education Act. Noting the dramatic change in ethnic composition that California was undergoing, and that the state's future economic, social, and cultural development depends on ensuring that all citizens have opportunities to contribute their best to society, the Legislature found, among other things, that California must support an educational system which prepares all Californians for responsible citizenship and meaningful careers in a multicultural society.[296] In addition, Education Code section 66003 provides, "It is the intent of the Legislature to outline in statute the broad policy

[293] Education Code section 66002, as added by Statutes 1991, chapter 1198.

[294] Former Education Code sections 22500-22705, as added by Statutes 1960, 1st Extraordinary Session, chapter 49; renumbered to Education Code section 66000 et seq., by Statutes 1976, chapter 1010.

[295] Statutes 1991, chapter 1198.

[296] Education Code section 66003, Statutes 1991, chapter 1198.

and programmatic goals of the master plan and to expect higher education segments to be accountable for attaining those goals."

In the context of the Legislature's findings and intent to outline in statute the broad policy and programmatic goals of the Master Plan, sections 66010.2 and 66010.7 were enacted as part of the "Comprehensive Mission Statement" (Ed. Code, §§ 66010.1-66010.8) of the Donahoe Higher Education Act. The plain language of sections 66010.2 and 66010.7 requires community college districts to engage in the following activities:

1. Provide access to education, and the opportunity for educational success, for all qualified Californians. (Ed. Code, § 66010.2, subd. (a) (Stats. 1991, ch. 1198).)
2. Provide quality teaching and programs of excellence for their students, providing all students the opportunity to address issues, including ethical issues, that are central to their full development as responsible citizens. (Ed. Code, § 66010.2, subd. (b) (Stats. 1991, ch. 1198).)
3. Provide educational equity not only through a diverse and representative student body and faculty, but also through educational environments in which each person, regardless of race, gender, age, disability, or economic circumstances, has a reasonable chance to fully develop his or her potential. (Ed. Code, § 66010.2, subd. (c) (Stats. 1991, ch. 1198).)
4. Undertake intersegmental collaboration and coordination (with the University of California and California State University) particularly when it can do any of the following: (1) enhance the achievement of the institutional missions shared by the segments; (2) provide more effective planning of postsecondary education on a statewide basis; (3) facilitate achievement of the goals of educational equity; (4) enable public and independent higher education to meet more effectively the educational needs of a geographic region; and (5) facilitate student progress from one segment to another, particularly with regard to preparation of students for higher education as well as the transfer from the California Community Colleges to four-year institutions. (Ed. Code, § 66010.7, subd. (b) (Stats. 1991, ch. 1198).)
5. Work together with other leaders responsible for public (University of California and California State University) and independent institutions of higher education and the Superintendent of Public Instruction to promote and facilitate the development of intersegmental programs and other cooperative efforts aimed at improving the progress of students through the educational systems and at strengthening the teaching profession at all levels. (Ed. Code, § 66010.7, subd. (c) (Stats. 1991, ch. 1198).)

<u>Equal Opportunity in Athletics: (Ed. Code, § 66016)</u>

Section 66016 provides in relevant part, "It is the intent of the Legislature that opportunities for participation in intercollegiate athletic programs in the community colleges … be provided on as equal a basis as is practicable to male and female students." This language, sets forth legislative intent, but does not require community college districts to engage in any activity. In addition, even if the language of section 66016 were construed to require an activity associated with providing equal opportunity to participate in intercollegiate athletic programs, there is no

requirement to offer intercollegiate athletic programs.[297] Thus, the Commission finds that Education Code section 66016, as amended by Statutes 1983, chapter 143, does not require community college districts to engage in any activities.

The claimants disagree with the above interpretation of section 66016, arguing that "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."[298] However, as stated by the court in *Shamsian v. Department of Conservation*, "the Courts of Appeal have repeatedly held, a statement of legislative intent may not give rise to a mandatory duty."[299] Thus, the language of section 66016 does not require community college districts to engage in any activities.

Educational Equity: (Ed. Code, § 66030)

Section 66030, as added in 1991,[300] sets forth the Legislature's intent regarding educationally equitable environments in institutions of higher education, including community colleges. Section 66030 provides, in relevant part:

> It is the responsibility of the governing boards of institutions of higher education to ensure and maintain multicultural learning environments free from all forms of discrimination and harassment in accordance with state and federal law. (Ed. Code, § 66030,subd. (b) (Stats. 1991, ch. 1198).)

The above language of section 66030, subdivision (b), provides that it is the responsibility of community college districts to engage in a specific act "*in accordance with state and federal law*," or in other words, to comply with state and federal law. However, if "state and federal law" do not require community college districts to ensure or maintain multicultural learning environments free from all forms of discrimination and harassment, then there is nothing for community college districts to act in accordance with. Thus, the Commission finds that Education Code section 66030, as added by Statutes 1991, chapter 1198, in and of itself, does not require community college districts to engage in any activities.

In addition, even if "state and federal law" require community college districts to ensure and maintain multicultural environments free from all forms of discrimination and harassment, the activity of acting in accordance with these laws is already required of community college districts due to the fact that they are subject to those laws, and as a result, cannot constitute a new program.

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[297] Education Code section 78223, as added by Statutes 1981, chapter 470, provides that districts may enforce rules and regulations relating to eligibility for and participation in intercollegiate athletics, however, does not require the creation of intercollegiate athletics. The discretionary decision to offer intercollegiate athletic programs, would trigger any alleged activity in Education Code section 66016, and as a result, would not constitute a state-mandated activity under *Kern High School Dist*.

[298] Claimant Comments on Draft Staff Analysis, *supra*, p. 13.

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

[300] Statutes 1991, chapter 1198.

Sex Equity in Education: (Ed. Code, sections 221.5, 221.7, 66271.7, and 72012:

Education Code section 72012, as amended in 1998,[301] provides that community colleges "shall comply with [Education Code] Sections 221.5, 221.7, and 66016, relating to sex discrimination." As amended in 1998,[302] Education Code sections 221.5 and 221.7 are part of the legislative scheme addressing sex equity in education for K-12 school districts. In addition to being subject to a portion of the K-12 legislative scheme, community college districts are subject to a parallel scheme applicable to postsecondary educational institutions. Education Code section 66271.7, as amended in 1998,[303] is the parallel provision to Education Code sections 221.5 and 221.7.

Section 66271.7, subdivisions (a)-(e) provide:

> (a) It is the policy of the state that community college classes and courses, including nonacademic and elective classes and courses, shall be conducted without regard to the sex of the student enrolled in these classes and courses.
>
> (b) No community college district shall prohibit any student from enrolling in any class or course on the basis of the sex of the student.
>
> (c) No community college district shall require students of one sex to enroll in a particular class or course, unless the same class or course is also required of students of the opposite sex.
>
> (d) No school counselor, teacher, instructor, administrator, or aide shall, on the basis of the sex of a student, offer vocational or school program guidance to students of one sex which is different from that offered to students of the opposite sex or, in counseling students, differentiate career, vocational or higher education opportunities on the basis of the sex of the student counseled. Any school personnel acting in a career counseling or course selection capacity to any pupil shall affirmatively explore with the pupil the possibility of careers, or courses leading to careers, that are nontraditional for that pupil's sex.
>
> (e) Participation in a particular physical education activity or sport, if required of students of one sex, shall be available to students of each sex.
>
> (f) The Legislature finds and declares that female students are not accorded opportunities for participation in community college athletic programs equal to those accorded male students. It is the intent of the Legislature that opportunities for participation in community college athletics be provided equally to male and female students and on an equitable basis to all students.
>
> (g) Insofar as practicable, in apportioning public funds, community college district governing boards shall apportion amounts available for athletics to ensure that equitable amounts will be allocated for all students, except that allowances may be made for differences in the costs of various athletic programs.

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[301] Statutes 1998, chapter 914.

[302] *Ibid*.

[303] Statutes 1998, chapter 914.

> Notwithstanding any other provisions of law, no public funds shall be used in connection with any athletic program conducted under the auspices of the governing board of a community college district, or any student organization within the district, which does not provide equal opportunity to both sexes for participation and for use of facilities. Facilities and opportunities for participation shall include, but are not limited to, equipment and supplies, scheduling of games and practice time, compensation for coaches, travel arrangements, per diem, locker rooms, and medical services.
>
> (h) It is the further intent of the Legislature that females be given the same opportunity to participate in athletics and compete with other females in individual and team sports as is available to males who compete with other males in individual and team sports. Nothing in this section shall be construed to require a community college to require competition between male and female students in school-sponsored athletic programs.

As relevant to this test claim, section 221.5 is substantively the same as section 66271.7 except that section 221.5, subdivision (d), includes the following language:

> The parents or legal guardian of the pupil shall be notified in a general manner at least once in the manner prescribed by Section 48980, in advance of career counseling and course selection commencing with course selection for grade 7 so that they may participate in the counseling sessions and decisions.

Although this provision was written to be applicable to K-12 school districts (a fact emphasized by career counseling and course selection starting at grade 7), application to community college districts (as required by section 72012) does not produce absurd results because community colleges are authorized to admit high school students.[304] However, this provision is only applicable to students attending community college districts who are not emancipated or adults as defined by Family Code section 6501.[305]

In addition, the language of section 221.7 parallels the language of subdivisions (f)-(h) of section 66271.7, except 221.7 does not contain the language of section 66271.7, subdivision (g), regarding apportioning public funds for athletic programs.

The plain language of subdivisions (a)-(c) of sections 221.5 and 66271.7 does not require community college districts to engage in any activities. Instead, subdivisions (a)-(c) of sections 221.5 and 66271.7 set forth a policy statement and prohibit community college districts from engaging in specific activities.

Subdivision (d) of sections 221.5 and 66271.7 require that any school personnel acting in a career counseling or course selection capacity to any pupil must affirmatively explore with the pupil the possibility of careers, or courses leading to careers, that are nontraditional for that pupil's sex. In addition, as quoted above, subdivision (d) of section 221.5 also requires that parents or the legal guardian of the pupil be notified in a general manner at least once in advance of career counseling and course selection.

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[304] See Education Code section 76001.

[305] Family Code sections 6501 defines "adult" as an individual who is 18 years of age or older. See Family Code section 7050, for effect of emancipation on parental rights.

Subdivisions (f) and (h) of section 66271.7 and section 221.7 do not require community college districts to engage in any activities. Rather, the plain language of those subdivisions sets forth findings by the Legislature and legislative intent, and prohibits community colleges from engaging in activities.

The language of subdivision (g) of section 66271.7, however, does require community college districts to engage in the following activity:

> Apportion public fund amounts available for athletics to ensure that equitable amounts will be allocated for all students, insofar as practicable, except that allowances may be made for differences in the costs of various athletic programs. (Ed. Code, § 66271.7, subd. (g) (Stats. 1998, ch. 914).)

Education Code section 72012 requires community college districts to comply with sections 221.5, 221.7, and 66016. However, most of sections 221.5, 221.7, and all of section 66016 either do not require community college districts to engage in any activities or prohibit community college districts from engaging in an activity. To the extent that sections 221.5 and 221.7 require activities, section 72012 requires community college districts to comply with those activities.

Pursuant to the above discussion, the Commission finds Education Code sections 72012 and 221.5, subdivision (d); 66271.7, subdivisions (d) and (g), require the following activities:

1. Notify the parents or legal guardian of a student, who is under the age of 18 and not emancipated, in a general manner at least once in the manner prescribed by Education Code section 48980, in advance of career counseling and course selection so that they may participate in the counseling sessions and decisions. (Ed. Code, §§ 221.5, subd. (d); and 72012 (Stats. 1998, ch. 914).)
2. Any school personnel acting in a career counseling or course selection capacity to any pupil must affirmatively explore with the pupil the possibility of careers, or course leading to careers, that are nontraditional for that pupil's sex. (Ed. Code, §§ 221.5, subd. (d); 72012; and 66271.7, subd. (d) (Stats. 1998, ch. 914).)
3. Apportion public fund amounts available for athletics to ensure that equitable amounts will be allocated for all students, insofar as practicable, except that allowances may be made for differences in the costs of various athletic programs. (Ed. Code, § 66271.7, subd. (g) (Stats. 1998, ch. 914).)

<u>Sex Equity in Education – Policy, Legislative Findings, Prohibited Discrimination: (Ed. Code, §§ 66251, 66252, 66270, and 66281.5)</u>

Sections 66251, 66252, 66270, 66281.5, like section 66271.7 discussed above, are part of the legislative scheme addressing sex equity in postsecondary educational institutions (Sex Equity in Education Act).[306]

[306] The Sex Equity in Education Act was amended and renamed the Equity in Higher Education Act by Statutes 2007, chapter 569. For purposes of this analysis, the Education Code sections 66250-66292.4 will continue to be referred to as the Sex Equity in Education Act.

Sections 66251, as amended 1999,[307] sets forth the policy behind the Sex Equity in Education Act. Section 66251 provides:

> It is the policy of the State of California to afford all persons, regardless of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other basis that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code, equal rights and opportunities in the postsecondary institutions of the state. The purpose of [the Sex Equity in Education Act] is to prohibit acts that are contrary to that policy and to provide remedies therefor.[308]

The plain language of section 66251 does not impose any state-mandated activities on community college districts. Instead, the language sets forth a policy prohibiting discrimination in the postsecondary institutions of the state. Thus, the Commission finds that Education Code section 66251 does not mandate community college districts to engage in any activities.

Section 66252, as added in 1998,[309] sets forth the findings and intent of the Legislature in regard to the Sex Equity in Education Act. Section 66252 provides:

> (a) All students have the right to participate fully in the educational process, free from discrimination and harassment.
>
> (b) California's postsecondary educational institutions have an affirmative obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity.
>
> (c) Harassment on school grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and jeopardizes equal educational opportunity as guaranteed by the California Constitution and the United States Constitution.
>
> (d) There is an urgent need to prevent and respond to acts of hate violence and bias-related incidents that are occurring at an increasing rate in California's public schools.
>
> (e) There is an urgent need to teach and inform students in the public schools about their rights, as guaranteed by the federal and state constitutions, in order to increase students' awareness and understanding of their rights and the rights of others, with the intention of promoting tolerance and sensitivity in postsecondary

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[307] Statutes 1999, chapter 587.

[308] Penal Code section 422.6, subdivision (a), cites to Penal Code section 422.55, which defines "hate crime" as a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: (1) Disability, (2) Gender, (3) Nationality, (4) Race or ethnicity, (5) Religion, (6) Sexual orientation, and (7) Association with a person or group with one or more of these actual or perceived characteristics.

[309] Statutes 1998, chapter 914.

> educational institutions and in society as a means of responding to potential harassment and hate violence.
>
> (f) It is the intent of the Legislature that each postsecondary educational institution undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of students to equal educational opportunity.
>
> (g) It is the intent of the Legislature that this chapter shall be interpreted as consistent with Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code, Title VI of the federal Civil Rights Act of 1964 (42 U.S.C. Sec. 1981, et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681, et seq.), Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794 (a)), the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), the federal Equal Educational Opportunities Act (20 U.S.C. Sec. 1701, et seq.), the Unruh Civil Rights Act (Secs. 51 to 53, incl., Civ. C.), and the Fair Employment and Housing Act (Pt. 2.8 (commencing with Sec. 12900), Div. 3, Gov. C.), except where this chapter may grant more protections or impose additional obligations, and that the remedies provided herein shall not be the exclusive remedies, but may be combined with remedies that may be provided by the above statutes.

As stated by the court in *Shamsian v. Department of Conservation*, "the Courts of Appeal have repeatedly held, a statement of legislative intent may not give rise to a mandatory duty."[310] In *Shamsian* the plaintiff argued that the language of a statute imposed a joint mandatory duty on the defendants, including the state government, to engage in specific activities associated with recycling of beverage containers. However, noting that the statute was unofficially entitled "Legislative Findings and Declarations," that the statute begins with the phrase "The Legislature finds and declares as follows…," and that the language of the statute, "simply states, 'The responsibility to provide convenient, efficient, and economical redemption opportunities rests jointly with manufacturers, distributors, …, and the Department of Conservation,'" the court in *Shamsian* found that a plain reading of the statute in question reveals that it is a statement of legislative intent.[311] As a result, the court found that the statute does not impose a mandatory duty.

Here, section 66252 is unofficially entitled, "Legislative findings and intent."[312] In addition, like the statutory language in *Shamsian*, section 66252 sets forth broad findings, statements of intent, and statements of the rights, obligations, and needs of the parties involved in postsecondary education (i.e. students and postsecondary institutions). Thus, the Commission finds that section

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[310] *Shamsian v. Department of Conservation*, *supra*, 136 Cal.App.4th at pgs. 633-634.

[311] *Ibid*.

[312] See West's Annotated California Codes, Education Code section 66252. Similarly, Deering's Annotated California Codes, Education Code section 66252, is entitled "Findings and legislative intent."

66252, is simply a statement of legislative intent, and as a result, does not require community college districts to engage in any activities.

Section 66270, as amended in 1999,[313] addresses prohibited discrimination in community college districts. Section 66270 provides:

> No person shall be subjected to discrimination on the basis of sex, ethnic group identification, race, national origin, religion, color, or mental or physical disability, or any basis that is contained in the prohibition of hate crimes set forth in subdivision (a) of section 422.6 of the Penal Code in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid.[314]

The claimants assert that section 66270 requires community college districts to ensure that no person is subject to discrimination in the community colleges on the basis of their sex, ethnic group identification, race, national origin, religion, mental or physical disability, color, ancestry, sexual orientation, or perception by others that the person has any of these characteristics.[315] However, while the plain language of section 66270 prohibits certain activities, it does not require any activities. As a result, the Commission finds that Education Code section 66270 does not require community college districts to engage in any activities.

As amended in 1998,[316] section 66281.5 addresses the state and community college district policy prohibiting sexual harassment as a form of sexual discrimination. Section 66281.5 was enacted as part of the Sex Equity in Education Act (Ed. Code, §§ 66250-66292.4). The plain language of section 66281.5, subdivision (a), sets forth the state's policy against sexual harassment in postsecondary educational institutions, and provides that "the purpose of this section is to provide notification of the prohibition against sexual harassment as a form of sexual discrimination and to provide notification of available remedies." Subdivision (b) requires each postsecondary educational institution in the State of California to have a written policy on sexual harassment. Subdivision (b) also provides that "[i]t is the intent of the Legislature that each educational institution in this state include this policy in its regular policy statement rather than distribute an additional written document." Subdivision (c) requires the policy to include information on where to obtain the specific rules and procedures for reporting charges of sexual harassment and for pursuing remedies. Subdivision (d) requires a copy of the policy to be displayed in a prominent location on campus. Subdivision (e) requires that the policy, as it pertains to students, be provided to new students as part of any orientation program conducted at the beginning of each session. Subdivision (f) requires school employees to receive the policy at the beginning of each year or at the time a new employee is hired. Subdivision (g) requires a

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[313] Statutes 1999, chapter 587.

[314] After Test Claim 02-TC-31 was filed, Education Code section 66270 was subsequently amended by Statutes 2007, chapter 569.

[315] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 357.

[316] Statutes 1998, chapter 914.

copy of the policy to appear in any publication of the institution that sets forth the comprehensive rules, regulations, procedures, and standards of conduct for the institution.

The claimant asserts that section 66281.5 also requires a community college to implement its written policy on sexual harassment. However, the plain language of the section does not provide for implementation of a community college's policy; rather section 66281.5 sets forth the *notice* requirements of a community college's sexual harassment policy, and thus, implementation of the sexual harassment policy is not required by Education Code section 66281.5.

Therefore, the Commission finds that Education Code section 66281.5 requires community college districts to engage in the following activities:

1. Have a written policy on sexual harassment, which includes information on where to obtain specific rules and procedures for reporting charges of sexual harassment and for pursuing remedies (Ed. Code, § 66281.5, subd. (b) and (c) (Stats. 1998, ch. 914).)
2. Display the policy in a prominent location on campus (Ed. Code, § 66281.5, subd. (d) (Stats. 1998, ch. 914).)
3. Provide the policy, as it pertains to students, to new students as part of any orientation program conducted at the beginning of each session (Ed. Code, § 66281.5, subd. (e) (Stats. 1998, ch. 914).)
4. Provide school employees with the policy at the beginning of each year or at the time a new employee is hired (Ed. Code, § 66281.5, subd. (f) (Stats. 1998, ch. 914).)
5. Include a copy of the policy in any publication of the community college that sets forth the comprehensive rules, regulations, procedures, and standards of conduct for the college (Ed. Code, § 66281.5, subd. (g) (Stats. 1998, ch. 914).)

<u>Sex Equity in Education – Assurance of Compliance, Reports, Responsibilities, Remedies: (Ed. Code, §§ 66290, 66291, 66292, and 66292.3)</u>

Sections 66290, 66291, 66292, and 66292.3 are part of the compliance and enforcement provisions of the Sex Equity in Education Act. As added or amended in 1998,[317] these code sections require community college districts to engage in the following activities:

1. Provide assurance to the agency administering state financial assistance or state student financial aid, in the manner required by the funding agency, that each program or activity will be conducted in compliance with the Sex Equity in Education Act and all other applicable provisions of state law prohibiting discrimination on the basis of sex, prior to receipt of any state financial assistance or state student financial aid. (Ed. Code, § 66290 (Stats. 1998, ch. 914).)
2. Submit timely, complete, and accurate compliance reports to the Chancellor's Office, as that entity may require. (Ed. Code, § 66291, subd. (a) (Stats. 1998, ch. 914).)
3. Make all reports submitted pursuant to Education Code section 66291, subdivision (a), available for public inspection during business hours. (Ed. Code, § 66291, subd. (b) (Stats. 1998, ch. 914).)

[317] Statutes 1998, chapter 914.

4. Have primary responsibility for ensuring that community college district programs and activities are free from discrimination based on ethnic group identification, religion, age, sex, color, or physical or mental disability. (Ed. Code, § 66292, subd. (a) (Stats. 1998, ch. 914).)
5. Advise persons who have filed a complaint pursuant to the Sex Equity in Education Act, with the community college district that civil law remedies, including, but not limited to injunctions, restraining orders, or other remedies or orders, may also be available to complainants. (Ed. Code, § 66292.3, subd. (b) (Stats. 1998, ch. 914).)
6. Make the information regarding the availability of civil remedies to people who have filed a complaint pursuant to the Sex Equity in Education Act available by publication in appropriate informational materials. (Ed. Code, § 66292.3, subd. (b) (Stats. 1998, ch. 914).)

Nondiscrimination: (Ed. Code, §§ 72011, 72013, and 72014)

Education Code sections 72011, 72013, and 72014, as added in 1981 and 1990;[318] generally address discrimination in community colleges. None of the code sections, however, impose any activities on community college districts.

As added in 1981, section 72011 provides, "Every community college district shall provide access to its services, classes, and programs without regard to race, religious creed, color, national origin, ancestry, handicap, or sex." The language of section 72011 is prohibitory in nature. The use of the language "without regard to" indicates that community college districts must not provide services, classes, and programs with regard to race, religious creed, color, national origin, ancestry, handicap, or sex. In other words, section 72011 prohibits the provision of community college district services in a discriminatory manner, and as a result, does not require community college districts to engage in any activities.

As added in 1990, section 72013 states that "handicap" and "disability" have the same meaning for purposes of access to community college services, classes, and programs, and for all references within Education Code sections 70900-88551. Section 72013 indicates the Legislature's intent to define two different terms in the same manner; however, it does not require any activity of community college districts.

Section 72014, as added in 1990, provides in relevant part:

> No funds under the control of a community college district shall ever be used for membership or for any participation involving a financial payment or contribution, on behalf of the district or any individual employed by or associated therewith, in any private organization whose membership practices are discriminatory on the basis of race, creed, color, sex, religion, or national origin.

The above language prohibits community college districts from using community college district funds for specified purposes; it does not, however, require districts to engage in any activities.

[318] Education Code section 72011, as added by Statutes 1981, chapter 470; and Education Code sections 72013 and 72014, as added by Statutes 1990, chapter 1372.

Thus, the Commission finds that Education Code section 72011, as added by Statutes 1981, chapter 470; and Education Code sections 72013 and 72014, as added by Statutes 1990, chapter 1372; do not require community college districts to engage in any activities.

Student Equity Plan: (Cal. Code Regs., tit. 5, § 54220 (Register 98, No. 3))

As amended in 1998,[319] section 54220 addresses the adoption of student equity plans by community college districts. The plain language of section 54220 requires community college districts to adopt a student equity plan which is required to include specific information. In addition, the activity of adopting a student equity plan is a one-time activity. Although section 54220 requires an activity, it also provides that community college districts "shall adopt, *by July 1, 1993*, a student equity plan … ." Under Government Code section 17557, subdivision (e), the reimbursement period for these test claims begins on July 1, 2001.[320] Because the one-time activity required by section 54220 was required to be done outside the period of reimbursement and there is no evidence in the record that a district incurred costs for this activity within the reimbursement period, it is not reimbursable under article XIII B, section 6 of the California Constitution.

The claimants argue:

> 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.[321]

The claimants' argument suggests that the Commission should either take jurisdiction over an amendment to a regulation that was not pled or should use the subsequent amendment of the regulation to imply an activity not present in the version of the regulation that was pled. However, the Commission only has jurisdiction of the test claim statutes and regulations pled. In addition, an amendment to section 54220 in 2006 could indicate that the Board of Governors intended to add a new activity to section 54220 in 2006. It does not necessarily show intent to clarify that the new activity should have been done prior to the amendment as suggested by the claimants. Thus, as pled by the claimants, the plain language of section 54220 imposes a one-

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[319] Register 98, number 3.

[320] The claimants filed Test Claim 02-TC-25, and Test Claim 02-TC-31, on June 5, 2003, and June 13, 2003, alleging reimbursable costs mandated by the state under Article XIII B resulting from the Education Code sections and the regulations.

[321] Claimant Comments on Draft Staff Analysis, *supra*, p. 13.

time activity required to be performed outside of the reimbursement period for the test claim. Thus, section 54220 does not impose a reimbursable state-mandated activity.

(i) Summary of Required Activities:

1. Provide access to education, and the opportunity for educational success, for all qualified Californians. (Ed. Code, § 66010.2, subd. (a) (Stats. 1991, ch. 1198).)
2. Provide quality teaching and programs of excellence for their students, providing all students the opportunity to address issues, including ethical issues that are central to their full development as responsible citizens. (Ed. Code, § 66010.2, subd. (b) (Stats. 1991, ch. 1198).)
3. Provide educational equity not only through a diverse and representative student body and faculty, but also through educational environments in which each person, regardless of race, gender, age, disability, or economic circumstances, has a reasonable chance to fully develop his or her potential. (Ed. Code, § 66010.2, subd. (c) (Stats. 1991, ch. 1198).)
4. Undertake intersegmental collaboration and coordination (with the University of California and California State University) particularly when it can do any of the following: (1) enhance the achievement of the institutional missions shared by the segments; (2) provide more effective planning of postsecondary education on a statewide basis; (3) facilitate achievement of the goals of educational equity; (4) enable public and independent higher education to meet more effectively the educational needs of a geographic region; and (5) facilitate student progress from one segment to another, particularly with regard to preparation of students for higher education as well as the transfer from the California Community Colleges to four-year institutions. (Ed. Code, § 66010.7, subd. (b) (Stats. 1991, ch. 1198).)
5. Work together with other leaders responsible for public (University of California and California State University) and independent institutions of higher education and the Superintendent of Public Instruction to promote and facilitate the development of intersegmental programs and other cooperative efforts aimed at improving the progress of students through the educational systems and at strengthening the teaching profession at all levels. (Ed. Code, § 66010.7, subd. (c) (Stats. 1991, ch. 1198).)
6. Notify the parents or legal guardian of a student, who is under the age of 18 and not emancipated, in a general manner at least once in the manner prescribed by Education Code section 48980, in advance of career counseling and course selection so that they may participate in the counseling sessions and decisions. (Ed. Code, §§ 221.5, subd. (d); and 72012 (Stats. 1998, ch. 914).)
7. Any school personnel acting in a career counseling or course selection capacity to any pupil must affirmatively explore with the pupil the possibility of careers, or course leading to careers, that are nontraditional for that pupil's sex. (Ed. Code, §§ 221.5, subd. (d); 72012; and 66271.7, subd. (d) (Stats. 1998, ch. 914).)
8. Apportion public fund amounts available for athletics to ensure that equitable amounts will be allocated for all students, insofar as practicable, except that allowances may be made for differences in the costs of various athletic programs. (Ed. Code, § 66271.7, subd. (g) (Stats. 1998, ch. 914).)

9. Have a written policy on sexual harassment, which includes information on where to obtain specific rules and procedures for reporting charges of sexual harassment and for pursuing remedies (Ed. Code, § 66281.5, subd. (b) and (c) (Stats. 1998, ch. 914).)
10. Display the policy on sexual harassment in a prominent location on campus (Ed. Code, § 66281.5, subd. (d) (Stats. 1998, ch. 914).)
11. Provide the policy on sexual harassment, as it pertains to students, to new students as part of any orientation program conducted at the beginning of each session (Ed. Code, § 66281.5, subd. (e) (Stats. 1998, ch. 914).)
12. Provide school employees with the policy on sexual harassment at the beginning of each year or at the time a new employee is hired (Ed. Code, § 66281.5, subd. (f) (Stats. 1998, ch. 914).)
13. Include a copy of the policy on sexual harassment in any publication of the community college that sets forth the comprehensive rules, regulations, procedures, and standards of conduct for the college (Ed. Code, § 66281.5, subd. (g) (Stats. 1998, ch. 914).)
14. Provide assurance to the agency administering state financial assistance or state student financial aid, in the manner required by the funding agency, that each program or activity will be conducted in compliance with the Sex Equity in Education Act and all other applicable provisions of state law prohibiting discrimination on the basis of sex, prior to receipt of any state financial assistance or state student financial aid. (Ed. Code, § 66290 (Stats. 1998, ch. 914).)
15. Submit timely, complete, and accurate compliance reports to the Chancellor's Office, as that entity may require. (Ed. Code, § 66291, subd. (a) (Stats. 1998, ch. 914).)
16. Make all reports submitted pursuant to Education Code section 66291, subdivision (a), available for public inspection during business hours. (Ed. Code, § 66291, subd. (b) (Stats. 1998, ch. 914).)
17. Have primary responsibility for ensuring that community college district programs and activities are free from discrimination based on ethnic group identification, religion, age, sex, color, or physical or mental disability. (Ed. Code, § 66292, subd. (a) (Stats. 1998, ch. 914).)
18. Advise persons who have filed a complaint pursuant to the Sex Equity in Education Act, with the community college district that civil law remedies, including, but not limited to injunctions, restraining orders, or other remedies or orders, may also be available to complainants. (Ed. Code, § 66292.3, subd. (b) (Stats. 1998, ch. 914).)
19. Make the information regarding the availability of civil remedies to people who have filed a complaint pursuant to the Sex Equity in Education Act available by publication in appropriate informational materials. (Ed. Code, § 66292.3, subd. (b) (Stats. 1998, ch. 914).)

c. Some of the requirements of Education Code sections 221.5, 66010.2, 66010.7, 66281.5, 66290, 66291, 66292, 66292.3, and 72012 constitute federal mandates not subject to article XIII B, section 6 of the California Constitution.

The Chancellor's Office asserts that the regulations pled in this section are not subject to article XIII B, section 6 of the California Constitution, arguing that the activities that may be required by the Education Code sections are federally mandated by the federal Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Americans with Disabilities Act, section 504 of the Rehabilitation Act, the Age Discrimination Act of 1975.[322]

Article XIII B places spending limits on both the state and local governments; however, costs mandated by courts or federal law are expressly excluded from these spending limits. Article XIII B, section 9, subdivision (b), of the California Constitution excludes from either the state or local spending limit any "[a]ppropriations required to complying with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly."

When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[323] However, when federal law imposes a mandate on the state, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless of whether the costs were imposed upon the state by the federal government."[324]

The following discussion will address whether the activities required by the test claim statutes are mandated by federal laws. This will be done first by analyzing what federal law requires as relevant to the "student equity" section of this analysis. Then the discussion will analyze whether the activities required by the test claim statutes and regulations are required by or exceed federal law.

(i) Federal Requirements

The following federal laws will be analyzed in the below discussion: (1) Equal Protection Clause of the Fourteenth Amendment (U.S. Const., 14th Amend., § 1); (2) Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.); (3) Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.); (4) the Americans with Disabilities Act (42 U.S.C. § 12111 et

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[322] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on 02-TC-31, dated March 11, 2004," pgs. 19-21.

[323] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593 citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; see also, Government Code section 17513.

[324] *Hayes, supra*, 11 Cal.App.4th at p. 1594.

seq.); (5) section 504 of the Rehabilitation Act (29 U.S.C. § 794); and (6) the Age Discrimination Act (42 U.S.C. § 6101).

Equal Protection Clause of the Fourteenth Amendment (U.S. Const., 14th Amend., § 1)

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall … deny to any person within its jurisdiction the equal protection of the laws." As discussed above in the "equal employment opportunity" section of this analysis, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution does not require any specific administrative activities. Instead, the Equal Protection Clause generally prohibits different treatment of similarly situated individuals in community college programs and activities.

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

Title VI of the Civil Rights Act of 1964 (Title VI) (codified at 42 U.S.C. § 2000d et seq.) and its implementing regulations (34 C.F.R. § 100 et seq.) prohibit discrimination on the basis of race, color, or national origin with respect to "any program or activity receiving Federal financial assistance."[325] Compliance with Title VI and its implementing regulations is a condition for the receipt of any federal financial assistance, and thus, community college districts are not *legally* required to comply with Title VI and its implementing regulations.

The courts, however, have acknowledged that federal financial assistance to education is pervasive.[326] Failure to comply with the provisions of Title VI and its implementing regulations can result in termination of, refusal to grant, or refusal to continue federal financial assistance to the program in which noncompliance has been found.[327] Community college districts also face lawsuits by private individuals and the United States Department of Justice to enforce Title VI.[328] In addition, the purpose of Title VI is to "halt federal funding of entities that violate a prohibition of discrimination similar to that of the Constitution."[329] As a result, the Commission finds that community college districts face practical compulsion to comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.) and its implementing regulations (34 C.F.R. § 100 et seq.). Thus, Title VI and its implementing regulations constitute a federal mandate.

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[325] Title 42 United States Code section 2000d (July 2, 1964).

[326] *Hayes, supra*, 11 Cal.App.4th 1564, 1584.

[327] Title 42 United States Code section 2000d-1 (July 2, 1964) and 34 Code of Federal Regulations part 100.8 (May 9, 1980). See U.S. Department of Justice, Civil Rights Division, Title VI Legal Manual (Jan. 11, 2001) pgs. 93-98, for discussion of the "pin-point" provision of section 2000d-1.

[328] *Barnes v. Gorman* (2002) 536 U.S. 181, 185, finding that Title VI has an implied private right of action. For referral to the Department of Justice to initiate enforcement proceedings see, Title 42 United States Code section 2000d-1 34 Code of Federal Regulations part 100.8 (2009).

[329] *Regents of University of California v. Bakke* (1978) 438 U.S. 265, 284.

As relevant to the "Student Equity" section of this analysis, Title VI requires:

1. No person in the United States shall on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under all the operations of a community college district receiving federal financial assistance. (42 U.S.C. § 2000d (July 2, 1964), and 34 C.F.R. § 100.3 (Nov. 13, 2000).)

Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.):

Title IX of Education Amendments of 1972 (Title IX) (codified at 20 U.S.C. § 1681 et seq.) and its implementing regulations (34 C.F.R. § 106 et seq.) prohibit discrimination on the basis of sex under any education program or activity receiving federal financial assistance, including employment.[330] Title IX applies to community college districts as recipients of federal financial assistance.[331] In addition, Title IX and its implementing regulations extend to all of the operations of a college, including employment, any part of which is extended federal financial assistance.[332] Compliance with Title IX is a condition of receipt of all federal financial assistance, and as a result, community college districts are not *legally* required to comply with the provisions of Title IX.

However, community college districts face practical compulsion to comply with Title IX and its implementing regulations. A failure to comply with Title IX and its implementing regulations can result in the termination of federal financial assistance to the program in which noncompliance is found.[333] In addition, community college districts face litigation by aggrieved employees or applicants for employment for violations of Title IX.[334] Further, the principal objectives of Title IX are to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those discriminatory practices.[335] Thus, the Commission finds that community college districts are practically compelled to comply with the requirements of Title IX (20 U.S.C. § 1681 et seq.) and its implementing

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[330] Title 20 United States Code section 1681; 34 Code of Federal Regulations part 106.51; and *North Haven Bd. of Ed. v. Bell* (1982) 456 U.S. 512, 530-535.

[331] *Hayes, supra,* 11 Cal.App.4th 1564, 1584, noting the pervasiveness of federal financial assistance in education.

[332] Title 20 United States Code section 1687. See *Sharif by Salahuddin v. New York State Educ. Dept.* (S.D.N.Y. 1989) 709 F.Supp. 345, 360 fn. 34, noting that Congress broadened the scope of title 20 United States Code section 1687 with the 1988 adoption of the Civil Rights Restoration Act, such that receipt of federal financial assistance results in institution-wide application of Title IX.

[333] Title 20 United States Code section 1682. See *Dougherty County School System v. Bell* (5th Cir. 1982) 694 F.2d 78, 81, finding that deferring school's federal funding must be done on a program by program basis.

[334] *Cannon v. University of Chicago* (1979) 441 U.S. 677, 717, in which the court found an implied private right of action under Title IX.

[335] *Id*. at p. 704.

regulations. As a result, the requirements of Title IX and its implementing regulations constitute a federal mandate (34 C.F.R. § 106 et seq.).

As relevant to the "Student Equity" section of this analysis, Title IX requires:

1. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under all the operations of a community college district receiving federal financial assistance. (20 U.S.C. 1681 (Pub.L.No. 99-514 (Oct. 22, 1986).)
2. Notify all students and employees of the name, office address and telephone number of the employee or employees appointed to coordinate community college district efforts to comply with and carry out district responsibilities under 34 Code of Federal Regulations part 106 et seq., including any investigation of any complaint communicated to the district alleging noncompliance or any act that would be prohibited by 34 Code of Federal Regulations part 106 et seq. (34 C.F.R. § 106.8, subd. (a) (May 9, 1980).)
3. Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by 34 Code of Federal Regulations part 106 et seq. (34 C.F.R. § 106.8, subd. (b) (May 9, 1980).)
4. Implement specific and continuing steps to notify applicants for admission and employment, and employees, that it does not discriminate on the basis of sex and that it is required by Title IX and 34 Code of Federal Regulations part 106 et seq. not to discriminate in such a manner. (34 C.F.R. § 106.9, subd. (a) (Nov. 13, 2000).)
5. Prominently include a statement of the policy prohibiting discrimination on the basis of sex, required under 34 Code of Federal Regulations part 106.9, subdivision (a), in each announcement, bulletin, catalog, application form which it makes available to any person listed in part 106.9, subdivision (a), including applicants for admission and employment, students, and employees, or which is otherwise used in connection with the recruitment of students or employees. (34 C.F.R. § 106.9, subd. (b) (Nov. 13, 2000).)
6. Provide equal athletic opportunity for members of both sexes, if the district operates or sponsors interscholastic, intercollegiate, club, or intramural athletics. (34 C.F.R. § 106.41, subd. (c) (May 9, 1980).)
    a. Equal opportunity is determined based on various factors, including: (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice facilities and services; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity; and (11) Failure to provide necessary funds for teams for one sex. (34 C.F.R. § 106.41, subd. (c) (May 9, 1980).)

The Americans with Disabilities Act (42 U.S.C. § 12131-12134):

The Chancellor's Office also cites generally to the Americans with Disabilities Act (ADA) as federal law that may require activities to ensure student equity which would constitute a federal mandate.[336] In the "equal employment opportunity" section of this analysis, the Commission finds that Title I of the ADA which specifically applies to employment discrimination based on disability constitutes a federal mandate. This section focuses on discrimination in services to students, and thus, will focus on Title II of the ADA, which consists of Title 42 United States Code sections 12131-12134, and its implementing regulations (28 C.F.R. § 35 et seq.). Title II of the ADA prohibits the exclusion of individuals from participation in or the denial of benefits to individuals of the services, programs, or activities of a public entity due to disability, or for the entity to subject an individual to discrimination based on disability. This prohibition applies to community college districts as "public entities" without regard to the receipt of any federal funds. [337]

As relevant to the "Student Equity" section of this analysis, Title II of the ADA requires:

> No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a community college district, or be subjected to discrimination by any district. (42 U.S.C. § 12132 (Pub.L.No. 101-336 (July 26, 1990), and 28 C.F.R. § 35.130, subd. (a) (July 26, 1991).)

Section 504 of the Rehabilitation Act (29 U.S.C. § 794):

The Rehabilitation Act of 1973, section 504 (Section 504) (29 U.S.C. § 794) and its implementing regulations (34 C.F.R. § 104 et seq.) prohibits discrimination on the basis of physical or mental disability with respect to "any program or activity receiving federal financial assistance." For the same reasons discussed in the "equal employment opportunity" section of this analysis Section 504 constitutes a federal mandate.

As relevant to the "Student Equity" section of this analysis, Section 504 requires:

> No otherwise qualified individual with a disability, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under all operations of a community college district receiving Federal financial assistance. (29 U.S.C. § 794 (Pub.L.No. 105-220 (Aug. 7, 1998) and 34 C.F.R. 104.4 (Nov. 13, 2000).)

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[336] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on 02-TC-31, dated March 11, 2004," p. 21.

[337] Title 42 United States Code sections 12132 and 12131(1)(A) and (B). See, *Coleman v. Zatechka* (D.Neb. 1993) 824 F.Supp. 1360, 1367-1368, finding that the University of Nebraska was established by the Nebraska Legislature as a state institution, and is properly considered a "public entity" within the meaning of the ADA. Similarly, California Community Colleges were established by the California Legislature and fall within the meaning of public entity.

The Age Discrimination Act (42 U.S.C. § 6101):

The Age Discrimination Act of 1975 (codified at 42 U.S.C. § 6101 et seq.) and its implementing regulations (34 C.F.R. 110) prohibit discrimination on the basis of age in programs or activities receiving federal financial assistance.[338] The Age Discrimination Act defines "programs or activities" in the same manner as Title IX, Title VI, and Section 504, thus, the Age Discrimination Act extends to all of the operations of a college, any part of which is extended federal financial assistance. As noted above, courts have acknowledged that federal financial assistance to education is pervasive.[339] Also like Section 504, Title IX, and Title VI, violations of the Age Discrimination Act can result in the termination of federal funding to the program in which noncompliance is found.[340] In addition, community college districts face litigation by the Attorney General to enforce the Age Discrimination Act and its implementing regulations.[341] Thus, the Commission finds that the Age Discrimination Act constitutes a federal mandate.

As relevant to the "Student Equity" section of this analysis, the Age Discrimination Act requires:

1. No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under all operations of a community college district receiving Federal financial assistance. (42 U.S.C. § 6101 (Pub.L.No. 99-272 (April 7, 1986); and 45 C.F.R. § 90.12 (June 12, 1979).)
2. Have primary responsibility to ensure that its programs or activities are in compliance with the Age Discrimination Act and shall take steps to eliminate violations of the Act. (34 C.F.R. § 110.20 (Nov. 13, 2000.)

(ii) The activities required by the Student Equity statutes that are also mandated by federal law are not subject to reimbursement under Article XIII B, section 6 of the California Constitution.

The following will discuss whether activities required by the state are mandated by the federal laws described above. If the activities required by the Education Code sections pled in the "student equity" section of this analysis are required by federal law they do not constitute state-mandated activities.

Institutional Goals and Sex Equity in Education – Legislative Findings, Responsibilities: (Ed. Code, §§ 66010.2, subd. (b) (Stats. 1991, ch. 1198))

Education Code section 66010.2, subdivision (b), as added in 1991,[342] requires community college districts to engage in the following activity:

> Provide educational equity not only through a diverse and representative student body and faculty but also through educational environments in which each person,

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[338] Title 42 United States Code section 6102.

[339] *Hayes, supra,* 11 Cal.App.4th 1564, 1584.

[340] Title 42 United States Code section 6104 (Pub.L.No. 96-88 (Oct. 17, 1979)) and 34 Code of Federal Regulations part 110.35 (Nov. 13, 2000).

[341] *Ibid.*

[342] Statutes 1991, chapter 1198.

> regardless of race, gender, age, disability, or economic circumstances, has a reasonable chance to fully develop his or her potential. (Ed. Code, § 66010.2, subd. (c) (Stats. 1991, ch. 1198).)

This requirement, read in the context of the statutory scheme in which it is contained, requires that community college districts provide programs and activities without engaging in impermissible discrimination.[343] However, as discussed above, community college districts are subject to the requirements of the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Americans with Disabilities Act, section 504 of the Rehabilitation Act, and the Age Discrimination Act, which prohibit discrimination based on ethnicity, religion,[344] age, sex color, or disability. The claimants argue that the prohibitory language of federal law does not "require any specific activities upon college districts so they cannot be applied to reduce any state mandated specific activities."[345] Rather, the language in federal law simply prohibits discrimination. Thus, claimants contend, federal law does not mandate the activity required by Education Code section 66010.2.

The Commission disagrees. Providing education in an inequitable or discriminatory manner would violate federal anti discrimination laws. As a result, community college districts are mandated by federal law to provide programs and activities in a nondiscriminatory manner. Thus, the Commission finds that the activities required by Education Code sections 66010.2, subdivision (b), as added by Statutes 1991, chapter 1198, constitute a federal mandate, and therefore, are not subject to reimbursement under article XIII B, section 6 of the California Constitution.

<u>Sex Equity in Education – Written Policy: (Ed. Code, § 66281.5, subds. (b), (c), (e), and (f) (Stats. 1998, ch. 914))</u>

As added in 1998, Education Code section 66281.5, subdivisions (b), (c), (e), and (f),[346] requires community college districts to engage in the following activities:

1. Have a written policy on sexual harassment, which includes information on where to obtain specific rules and procedures for reporting charges of sexual harassment and for pursuing remedies (Ed. Code, § 66281.5, subd. (b) and (c)).
2. Provide the policy on sexual harassment, as it pertains to students, to new students as part of any orientation program conducted at the beginning of each session (Ed. Code, § 66281.5, subd. (e)).

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[343] See Education Code sections 66002 and 66030 as added by Statutes 1991, chapter 1198, which indicate an intent to provide education in an environment free from all forms of discrimination.

[344] Classifications, or discrimination, on the basis of religion has been held to violate the Equal Protection Clause. See *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco* (9th Cir. 1986) 784 F.2d 1010.

[345] Claimant Comments on Draft Staff Analysis, p. 6.

[346] Statutes 1998, chapter 914.

3. Provide school employees with the policy on sexual harassment at the beginning of each year or at the time a new employee is hired (Ed. Code, § 66281.5, subd. (f)).

Title IX requires community college districts to engage in the following activities:

1. Notify all students and employees of the name, office address and telephone number of the employee or employees appointed to coordinate community college district efforts to comply with and carry out district responsibilities under 34 Code of Federal Regulations part 106 et seq., including any investigation of any complaint communicated to the district alleging noncompliance or any act that would be prohibited by 34 Code of Federal Regulations part 106 et seq. (34 C.F.R. § 106.8, subd. (a) (May 9, 1980).)
2. Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by 34 Code of Federal Regulations part 106 et seq. (34 C.F.R. § 106.8, subd. (b) (May 9, 1980).)
3. Implement specific and continuing steps to notify applicants for admission and employment, and employees, that it does not discriminate on the basis of sex and that it is required by Title IX and 34 Code of Federal Regulations part 106 et seq. not to discriminate in such a manner. (34 C.F.R. § 106.9, subd. (a) (Nov. 13, 2000).)
4. Prominently include a statement of the policy prohibiting discrimination on the basis of sex, required under 34 Code of Federal Regulations part 106.9, subdivision (a), in each announcement, bulletin, catalog, application form which it makes available to any person listed in part 106.9, subdivision (a), including applicants for admission and employment, students, and employees, or which is otherwise used in connection with the recruitment of students or employees. (34 C.F.R. § 106.9, subd. (b) (Nov. 13, 2000).)

Courts have recognized claims of sexual harassment as part of Title IX's prohibition against gender discrimination.[347] In addition, the Office for Civil Rights (OCR) of the United States Department of Education,[348] maintains that sexual harassment is prohibited as gender discrimination by Title IX and the regulations adopted by OCR to implement Title IX.[349]

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[347] *Davis v. Monroe County Bd. of Educ.* (1999) 526 U.S. 629, 650, stating "Having previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute." See also, *Franklin v. Gwinnett County Public Schools* (*Franklin*) (1992) 503 U.S. 60, 75, in which the court states, "Unquestionably, Title IX placed on the Gwinnet County Public Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.' *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 64."

[348] The primary federal agency responsible for implementing and enforcing Title IX in institutions of education.

[349] Office for Civil Rights of the United States Department of Education, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Title IX, (Jan. 2001), pgs. 3-4.

Education Code section 66281.5, subdivisions (b) and (c), require districts to have a written policy on sexual harassment, including information on where to obtain specific rules and procedures for reporting charges of sexual harassment. As shown above, however, community college districts are mandated by Title IX and its implementing regulations to have a policy against gender discrimination, including sexual harassment, and to notify all students and employees of the name and contact information of the employee designated to carry out the grievance procedures for allegations of gender discrimination.[350] In addition, this policy is required to be prominently included in announcements, bulletins, catalogs, and applications, and thus, the policy must be written.[351] As a result, the activity required by Education Code section 66281.5, subdivisions (b) and (c), constitute a federal mandate, and as a result is not subject to article XIII B, section 6 of the California Constitution.

Education Code section 66281.5, subdivisions (e) and (f), require that the policy on sexual harassment be given to new students as part of any orientation program conducted at the beginning of each session and to employees each year or when a new employee is hired. As noted above, Title IX's implementing regulations require community college districts to implement specific steps to notify applicants for admission and employment, and employees that it does not discriminate on the basis of gender, and to include the policy against sexual harassment in various publications used for recruitment purposes or made available to applicants for admission and employment, students, and employees. However, Title IX's implementing regulations do not specify that community college districts are required to provide the sexual harassment policy to students as part of an orientation program at the beginning of each session, or to provide the policy on sexual harassment to employees each time a new employee is hired or at the beginning of each year. Thus, the Commission finds that the requirements of Education Code section 66281.5, subdivisions (e), and (f), as added by Statutes 1998, chapter 914, exceed the requirements of federal law, and as a result, do not constitute federal mandates.

If the requirements of a test claim statute or regulation go beyond or exceed the requirements of federal law, those activities are *not* federal mandates and *may* be subject to article XIII B, section 6. For example, in *Long Beach Unified School Dist. v. State of California*, federal law required school districts to take reasonable steps to alleviate racial and ethnic segregation, and the federal courts suggested certain approaches to comply.[352] State law was enacted to require specific action of school districts to alleviate segregation. The court found that the state law requirements went beyond federal constitutional and case law requirements or suggestions and mandated a higher level of service.[353] In addition, Government Code section 17556, subdivision (c), requires the Commission to not find costs mandated by the state if "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and imposes costs mandated by the federal government, *unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation*." (Emphasis added.) In this case, there are several activities that exceed the requirements of federal law and are, thus, not mandated by federal law.

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[350] 34 Code of Federal Regulations part 106.9 (a) (Nov. 13, 2000).

[351] 34 Code of Federal Regulations part 106.9 (b) (Nov. 13, 2000).

[352] *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d at p. 173.

[353] *Ibid*.

Exhibit A

(iii) Summary of Required Activities that Exceed the Requirements of Federal Law:

1. Provide access to education, and the opportunity for educational success, for all qualified Californians. (Ed. Code, § 66010.2, subd. (a) (Stats. 1991, ch. 1198).)
2. Provide quality teaching and programs of excellence for their students, providing all students the opportunity to address issues, including ethical issues that are central to their full development as responsible citizens. (Ed. Code, § 66010.2, subd. (b) (Stats. 1991, ch. 1198).)
3. Undertake intersegmental collaboration and coordination (with the University of California and California State University) particularly when it can do any of the following: (1) enhance the achievement of the institutional missions shared by the segments; (2) provide more effective planning of postsecondary education on a statewide basis; (3) facilitate achievement of the goals of educational equity; (4) enable public and independent higher education to meet more effectively the educational needs of a geographic region; and (5) facilitate student progress from one segment to another, particularly with regard to preparation of students for higher education as well as the transfer from the California Community Colleges to four-year institutions. (Ed. Code, § 66010.7, subd. (b) (Stats. 1991, ch. 1198).)
4. Work together with other leaders responsible for public (University of California and California State University) and independent institutions of higher education and the Superintendent of Public Instruction to promote and facilitate the development of intersegmental programs and other cooperative efforts aimed at improving the progress of students through the educational systems and at strengthening the teaching profession at all levels. (Ed. Code, § 66010.7, subd. (c) (Stats. 1991, ch. 1198).)
5. Notify the parents or legal guardian of a student, who is under the age of 18 and not emancipated, in a general manner at least once in the manner prescribed by Education Code section 48980, in advance of career counseling and course selection so that they may participate in the counseling sessions and decisions. (Ed. Code, §§ 221.5, subd. (d); and 72012 (Stats. 1998, ch. 914).)
6. Any school personnel acting in a career counseling or course selection capacity to any pupil must affirmatively explore with the pupil the possibility of careers, or course leading to careers, that are nontraditional for that pupil's sex. (Ed. Code, §§ 221.5, subd. (d); 72012; and 66271.7, subd. (d) (Stats. 1998, ch. 914).)
7. Apportion public fund amounts available for athletics to ensure that equitable amounts will be allocated for all students, insofar as practicable, except that allowances may be made for differences in the costs of various athletic programs. (Ed. Code, § 66271.7, subd. (g) (Stats. 1998, ch. 914).)
8. Provide the policy on sexual harassment, as it pertains to students, to new students as part of any orientation program conducted at the beginning of each session (Ed. Code, § 66281.5, subd. (e) (Stats. 1998, ch. 914).)
9. Provide school employees with the policy on sexual harassment at the beginning of each year or at the time a new employee is hired (Ed. Code, § 66281.5, subd. (f) (Stats. 1998, ch. 914).)

10. Display the policy on sexual harassment in a prominent location on campus (Ed. Code, § 66281.5, subd. (d) (Stats. 1998, ch. 914).)
11. Include a copy of the policy on sexual harassment in any publication of the community college that sets forth the comprehensive rules, regulations, procedures, and standards of conduct for the college (Ed. Code, § 66281.5, subd. (g) (Stats. 1998, ch. 914).)
12. Provide assurance to the agency administering state financial assistance or state student financial aid, in the manner required by the funding agency, that each program or activity will be conducted in compliance with the Sex Equity in Education Act and all other applicable provisions of state law prohibiting discrimination on the basis of sex, prior to receipt of any state financial assistance or state student financial aid. (Ed. Code, § 66290 (Stats. 1998, ch. 914).)
13. Submit timely, complete, and accurate compliance reports to the Chancellor's Office, as that entity may require. (Ed. Code, § 66291, subd. (a) (Stats. 1998, ch. 914).)
14. Make all reports submitted pursuant to Education Code section 66291, subdivision (a), available for public inspection during business hours. (Ed. Code, § 66291, subd. (b) (Stats. 1998, ch. 914).)
15. Have primary responsibility for ensuring that community college district programs and activities are free from discrimination based on ethnic group identification, religion, age, sex, color, or physical or mental disability. (Ed. Code, § 66292, subd. (a) (Stats. 1998, ch. 914).)
16. Advise persons who have filed a complaint pursuant to the Sex Equity in Education Act, with the community college district that civil law remedies, including, but not limited to injunctions, restraining orders, or other remedies or orders, may also be available to complainants. (Ed. Code, § 66292.3, subd. (b) (Stats. 1998, ch. 914).)
17. Make the information regarding the availability of civil remedies to people who have filed a complaint pursuant to the Sex Equity in Education Act available by publication in appropriate informational materials. (Ed. Code, § 66292.3, subd. (b) (Stats. 1998, ch. 914).)

While these activities go beyond the requirements of federal law, the Commission finds that some of these activities are not mandated by the state because they are downstream requirements triggered by discretionary decisions by community college districts.

d. Some of the activities required by Education Code sections 221.5, 66010.2, 66010.7, 66271.7, 66281.5, 66290, 66291, 66292.3, and 72012 do not constitute state-mandated activities.

In 2003, the California Supreme Court decided the *Kern High School Dist.* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. The court held that when analyzing state mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[354]

[354] *Kern High School Dist., supra,* 30 Cal.4th at p. 743.

Sex Equity in Education: (Ed. Code, §§ 221.5, subd. (d); 66271.7, subds. (d) and (g); and 72012 (Stats. 1998, ch. 914))

Education Code sections 221.5, subdivision (d); 66271.7, subdivision (d), and 72012, as these sections existed in 1998,[355] require community college districts to engage in the following activities:

1. Notify the parents or legal guardian of a student, who is under the age of 18 and not emancipated, in a general manner at least once in the manner prescribed by Education Code section 48980, in advance of career counseling and course selection so that they may participate in the counseling sessions and decisions. (Ed. Code, §§ 221.5, subd. (d); and 72012 (Stats. 1998, ch. 914).)
2. Any school personnel acting in a career counseling or course selection capacity to any pupil must affirmatively explore with the pupil the possibility of careers, or course leading to careers, that are nontraditional for that pupil's sex. (Ed. Code, §§ 221.5, subd. (d); 72012; and 66271.7, subd. (d) (Stats. 1998, ch. 914).)
3. Apportion public fund amounts available for athletics to ensure that equitable amounts will be allocated for all students, insofar as practicable, except that allowances may be made for differences in the costs of various athletic programs. (Ed. Code, § 66271.7, subd. (g) (Stats. 1998, ch. 914).)

However, as further discussed below, districts are not required to provide career counseling or athletic programs, but they are required to provide course selection counseling, thus the Commission finds that only the first two activities as they relate to *course selection* are mandated by the state on community college districts. Specifically, community college districts are mandated by the state to perform the following activities:

1. Notify the parents or legal guardian of a student, who is under the age of 18 and not emancipated, at least once in the manner prescribed by Education Code section 48980, in advance of course selection counseling so that they may participate in the counseling sessions and decisions. (Ed. Code, §§ 221.5, subd. (d); and 72012 (Stats. 1998, ch. 914).)
2. Any school personnel acting in a course selection counseling capacity to any pupil must affirmatively explore with the pupil the possibility of careers, or courses leading to careers, that are nontraditional for that pupil's sex. (Ed. Code, §§ 221.5, subd. (d); 72012; and 66271.7, subd. (d) (Stats. 1998, ch. 914).)

Notifying parents or legal guardians of students prior to career counseling and course selection, and affirmatively exploring careers or courses leading to careers that are nontraditional for a pupil's sex, are downstream activities triggered by community college districts offering career and course counseling. Similarly, the apportionment of public funds available for athletics to ensure that equitable amounts are allocated for all students is a downstream activity triggered by community college districts offering athletic programs. Thus, it is necessary to determine whether offering career counseling, course counseling, and athletic programs are discretionary activities.

[355] Statutes 1998, chapter 914.

California Code of Regulations, title 5, section 51018, provides that the "governing board of a community college district shall provide and publicize an organized and functioning counseling program in each college within the district." However, for the same reasons discussed in section "(II)(B)(1)" of this analysis addressing "minimum conditions," the requirements of title 5, section 51018, are a condition to be entitled to state aid, and as a result do not constitute state-mandated activities. In addition, Education Code section 72620, which is cited as a reference for section 51018, provides that the "governing board of a community college district *may* provide in each college within the district an organized and functioning counseling program," but does not *require* that a district provide a counseling program. Education Code section 66736, which is part of the statutory scheme addressing the transfer functions of public post secondary institutions (UC, CSU, and community colleges), provides in relevant part:

> Each community college district governing board shall ensure that its college or colleges maintain student transfer counseling centers or other counseling and student services designed and implemented to affirmatively seek out, counsel, advise, and monitor the progress of potential and identified community college transfer students.

Thus, as part of its *transfer* functions a community college district is required to have *course selection* counseling. However, there are no statutes or regulations, nor is there evidence in the record, that requires community college districts to provide *career* counseling.

In regard to athletic programs, there are no statutes requiring community college districts to provide athletic programs. Education Code section 78223 provides community college districts the authority to enforce rules and regulations relating to eligibility for and participation in intercollegiate athletics. In addition, community college districts are authorized under the general authority granted to districts by Education Code section 70902 to provide athletic programs as part of the regular curriculum. However, Education Code sections 78223 and 70902 do not require districts to use this authority or to provide athletics.

Thus, the Commission finds the activities required by the following code sections as they relate to career counseling do not constitute state-mandated activities under *Kern High School Dist.*: (1) Education Code section 221.5, subdivision (d); (2) Education Code section 66271.7, subdivision (d); and (3) Education Code section 72012. Also, Education Code section 66271.7, subdivision (g), which requires a district to apportion public fund amounts available for athletics to ensure that equitable amounts will be allocated for all students, does not constitute a state-mandated activity under *Kern High School Dist*.[356]

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[356] Claimant Comments on Draft Staff Analysis, *supra*, p. 13. The claimants argue that "The DSA has made no finding of law of [*sic*] 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." The claimants have interpreted the above analysis to be based on state funding. However, the above analysis is based on a district's discretionary decision to offer career counseling and athletic programs, which then triggers some of the above activities. Thus, under *Kern High School Dist*. these activities do not constitute state-mandated activities.

(i) Summary of State-Mandated Activities:

1. Provide access to education, and the opportunity for educational success, for all qualified Californians. (Ed. Code, § 66010.2, subd. (a) (Stats. 1991, ch. 1198).)
2. Provide quality teaching and programs of excellence for their students, providing all students the opportunity to address issues, including ethical issues that are central to their full development as responsible citizens. (Ed. Code, § 66010.2, subd. (b) (Stats. 1991, ch. 1198).)
3. Undertake intersegmental collaboration and coordination (with the University of California and California State University) particularly when it can do any of the following: (1) enhance the achievement of the institutional missions shared by the segments; (2) provide more effective planning of postsecondary education on a statewide basis; (3) facilitate achievement of the goals of educational equity; (4) enable public and independent higher education to meet more effectively the educational needs of a geographic region; and (5) facilitate student progress from one segment to another, particularly with regard to preparation of students for higher education as well as the transfer from the California Community Colleges to four-year institutions. (Ed. Code, § 66010.7, subd. (b) (Stats. 1991, ch. 1198).)
4. Work together with other leaders responsible for public (University of California and California State University) and independent institutions of higher education and the Superintendent of Public Instruction to promote and facilitate the development of intersegmental programs and other cooperative efforts aimed at improving the progress of students through the educational systems and at strengthening the teaching profession at all levels. (Ed. Code, § 66010.7, subd. (c) (Stats. 1991, ch. 1198).)
5. Notify the parents or legal guardian of a student, who is under the age of 18 and not emancipated, at least once in the manner prescribed by Education Code section 48980, in advance of course selection counseling so that they may participate in the counseling sessions and decisions. (Ed. Code, §§ 221.5, subd. (d); and 72012 (Stats. 1998, ch. 914).)
6. Any school personnel acting in a course selection counseling capacity to any pupil must affirmatively explore with the pupil the possibility of careers, or courses leading to careers, that are nontraditional for that pupil's sex. (Ed. Code, §§ 221.5, subd. (d); 72012; and 66271.7, subd. (d) (Stats. 1998, ch. 914).)
7. Display the policy on sexual harassment in a prominent location on campus. (Ed. Code, § 66281.5, subd. (d) (Stats. 1998, ch. 914).)
8. Provide the policy on sexual harassment, as it pertains to students, to new students as part of any orientation program conducted at the beginning of each session. (Ed. Code, § 66281.5, subd. (e).)
9. Provide school employees with the policy on sexual harassment at the beginning of each year or at the time a new employee is hired. (Ed. Code, § 66281.5, subd. (f).)
10. Include a copy of the policy on sexual harassment in any publication of the community college that sets forth the comprehensive rules, regulations, procedures, and standards of conduct for the college (Ed. Code, § 66281.5, subd. (g) (Stats. 1998, ch. 914).)

11. Provide assurance to the agency administering state financial assistance or state student financial aid, in the manner required by the funding agency, that each program or activity will be conducted in compliance with the Sex Equity in Education Act and all other applicable provisions of state law prohibiting discrimination on the basis of sex, prior to receipt of any state financial assistance or state student financial aid. (Ed. Code, § 66290 (Stats. 1998, ch. 914).)
12. Submit timely, complete, and accurate compliance reports to the Chancellor's Office, as that entity may require. (Ed. Code, § 66291, subd. (a) (Stats. 1998, ch. 914).)
13. Make all reports submitted pursuant to Education Code section 66291, subdivision (a), available for public inspection during business hours. (Ed. Code, § 66291, subd. (b) (Stats. 1998, ch. 914).)
14. Have primary responsibility for ensuring that community college district programs and activities are free from discrimination based on ethnic group identification, religion, age, sex, color, or physical or mental disability. (Ed. Code, § 66292, subd. (a) (Stats. 1998, ch. 914).)
15. Advise persons who have filed a complaint pursuant to the Sex Equity in Education Act, with the community college district that civil law remedies, including, but not limited to injunctions, restraining orders, or other remedies or orders, may also be available to complainants. (Ed. Code, § 66292.3, subd. (b) (Stats. 1998, ch. 914).)
16. Make the information regarding the availability of civil remedies to people who have filed a complaint pursuant to the Sex Equity in Education Act available by publication in appropriate informational materials. (Ed. Code, § 66292.3, subd. (b) (Stats. 1998, ch. 914).)

e. <u>Some of the state-mandated activities imposed by Education Code sections 66010.2 and 66010.7 (Stats. 1991, ch. 1198) constitute a new program or higher level of service.</u>

To constitute a "new program or higher level of service" the activities must carry out the governmental function of providing a service to the public, or impose unique requirements on local governments that do not apply to all residents and entities in the state in order to implement a state policy.[357] In addition, the requirements must be new in comparison with the pre-existing scheme and must be intended to provide an enhanced service to the public.[358] To make this determination, the requirements must initially be compared with the legal requirements in effect immediately prior to their enactment.[359]

The Chancellor's Office argues that Civil Code section 51 (Unruh Act) imposes on all businesses in California the requirements imposed on community colleges by the statutes pled in the "Student Equity" section of this analysis, and "[b]ecause the Claimant is already required by

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[357] *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56.

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

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

general law to do these things, these actions cannot be the basis of a claim for reimbursement."[360] Thus, the Chancellor's Office argument suggests that the state-mandated activities imposed by the student equity statutes are not unique to local government (here, community college districts), and as a result, do not constitute a "program" subject to article XIII B, section 6 of the California Constitution. The Unruh Act provides in relevant part:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.[361]

The Unruh Act, however, does not require any of the specific administrative acts required by the student equity statutes, including activities associated with course counseling, and submitting reports to the Chancellor's Office. Instead, all of the activities mandated by Education Code sections 221.5, 66010.2, 66010.7, 66271.7, 66281.5, 66290, 66294, 66292.3, and 72012 impose unique requirements on community college districts that do not apply to all residents and entities in the state in order to implement a state policy to "support an educational system which prepares all Californians for responsible citizenship and meaningful careers in a multicultural society…."[362] Thus, the Commission finds that these state-mandated activities constitute programs. Some of these programs, however, are not new as compared with the legal requirements in effect immediately prior to the enactment of the state-mandated activities as discussed below, and therefore do not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

<u>Institutional Goals: (Ed. Code, § 66010.2 (Stats. 1991, ch. 1198))</u>

The claimants pled Education Code section 66010.2, as added in 1991,[363] which mandates community college districts to engage in the following activities:

1. Provide access to education, and the opportunity for educational success, for all qualified Californians. (Ed. Code, § 66010.2, subd. (a) (Stats. 1991, ch. 1198).)
2. Provide quality teaching and programs of excellence for their students, providing all students the opportunity to address issues, including ethical issues that are central to their full development as responsible citizens. (Ed. Code, § 66010.2, subd. (b) (Stats. 1991, ch. 1198).)

Since at least 1974, however, community college districts have been directed in various Education Code sections to provide access to education and the opportunity for educational success for all qualified Californians. Former Education Code section 25502.5, as amended in 1974, required community colleges to provide for the education of students in the 13th and 14th

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[360] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on 02-TC-31, dated March 11, 2004," p. 21.

[361] Civil Code section 51, subdivision (b).

[362] Education Code section 66002, subdivision (e)(3), setting forth the legislative findings of the Donahoe Higher Education Act.

[363] Statutes 1991, chapter 1198. Test Claim 02-TC-31, p. 130.

grades and for the education of such adults and minors as may properly be admitted but who are not classified by grade.[364] Similarly former Education Code section 22651, as amended in 1974, directed community colleges to offer instruction through but not beyond the second year of college.[365] By requiring community colleges to provide for the education or to offer instruction to qualified individuals, community colleges were providing access to education and the opportunity for educational success. The requirement for community college districts to provide education was continuous since at least 1974.[366] Thus, prior to 1975 community college districts were already required to provide for all qualified Californians access to education and an opportunity for educational success.

In addition, in 1960 the Legislature identified the three segments of public higher education as community colleges, state colleges (CSU), and the UC, and set forth the role of each segment in higher education.[367] Along with identifying the three segments of public higher education and the roles of each segment, the Legislature required, "Each segment of public higher education [to] strive for excellence in its sphere."[368] The "sphere" as described in 1960 was to offer instruction through the 14th grade level. This requirement exists today at Education Code section 66013.[369] Thus, community college districts were already required to strive for excellence in the programs and teaching in the programs that districts offered since 1960. However, prior to 1991, community college districts were not required to provide as part of their quality teaching and programs of excellence, opportunities to address issues, including ethical issues that are central to students' full development as responsible citizens.

As a result, the Commission finds that Education Code section 66010.2, subdivisions (a) and (b), as added by Statutes 1991, chapter 1198, do constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution, except for the following activity:

> Provide all students the opportunity to address issues, including ethical issues that are central to their full development as responsible citizens, in community college programs. (Ed. Code, § 66010.2, subd. (b) (Stats. 1991, ch. 1198).)

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[364] Statutes 1974, chapter 989.

[365] Statutes 1974, chapter 921.

[366] Former Education Code section 22502.5, was renumbered to former Education Code section 78000 by Statutes 1976, chapter 1010, and repealed by Statutes 1977, chapter 36. However, former Education Code section 22651, was renumbered to former Education Code section 66701 by Statutes 1976, chapter 1010, and renumbered again to Education Code section 66010.4, as added by Statutes 1990, chapter 1587.

[367] Former Education Code section 22500, as added by Statutes 1961, 1st Extraordinary Session, chapter 49.

[368] Former Education Code section 22502, as added by Statutes 1961, 1st Extraordinary Session, chapter 49.

[369] Former Education Code section 22502 was renumbered to Education Code section 66013, by Statutes 1976, chapter 1010.

Intersegmental Collaboration: (Ed. Code, § 66010.7, subds. (b) and (c) (Stats. 1991, ch. 1198))

The claimants pled Education Code section 66010.7, as added in 1991.[370] Education Code section 66010.7, subdivisions (b) and (c), mandate community college districts to engage in the following activities:

1. Undertake intersegmental collaboration and coordination (with the University of California and California State University) particularly when it can do any of the following: (1) enhance the achievement of the institutional missions shared by the segments; (2) provide more effective planning of postsecondary education on a statewide basis; (3) facilitate achievement of the goals of educational equity; (4) enable public and independent higher education to meet more effectively the educational needs of a geographic region; and (5) facilitate student progress from one segment to another, particularly with regard to preparation of students for higher education as well as the transfer from the California Community Colleges to four-year institutions. (Ed. Code, § 66010.7, subd. (b) (Stats. 1991, ch. 1198).)
2. Work together with other leaders responsible for public (University of California and California State University) and independent institutions of higher education and the Superintendent of Public Instruction to promote and facilitate the development of intersegmental programs and other cooperative efforts aimed at improving the progress of students through the educational systems and at strengthening the teaching profession at all levels. (Ed. Code, § 66010.7, subd. (c) (Stats. 1991, ch. 1198).)

Former Education Code section 23521, as added in 1974, required community college districts to:[371]

> Undertake intersegmental cooperation when it can: (1) enhance the achievement of the institutional missions shared by the segments; (2) enable public and private postsecondary education to more effectively meet the educational needs of a geographical region; and (3) provide more effective planning of postsecondary education on a statewide basis.

Former Education Code section 23521 required intersegmental cooperation by a community college district "when it can" achieve specific goals. Section 66010.7 requires intersegmental cooperation by a community college district "particularly when it can" achieve specific goals. With the addition of the word "particularly," even if a community college district cannot achieve the specified goals the district still must engage in intersegmental cooperation.

Thus, prior to 1991, community college districts were already required to engage in intersegemental cooperation when it could: (1) enhance the achievement of the institutional missions shared by the segments; (2) enable public and private postsecondary education to more effectively meet the educational needs of a geographical region; and (3) provide more effective planning of postsecondary education on a statewide basis. Thus, this activity required by

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[370] Statutes 1991, chapter 1198. See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at p. 130.

[371] Education Code section 23521,as added by Statutes 1974, chapter 921, was renumbered to Education Code section 22670, by Statutes 1976, chapter 1079, which was renumbered to Education Code section 66020, by Statutes 1976, chapter 1010, operative April 30 1977.

Education Code section 66010.7, subdivision (b), as added 1991, is not new as compared with the legal requirements in effect immediately prior to its enactment.

However, the following state-mandated activity imposed by Education Code section 66010.7, subdivision (b), constitutes a new program or higher level of service:

> Undertake intersegmental collaboration and coordination (with the University of California and California State University) particularly when it can do either of the following: (1) facilitate achievement of the goals of educational equity; (2) facilitate student progress from one segment to another, particularly with regard to preparation of students for higher education as well as the transfer from the California Community Colleges to four-year institutions.
>
> This activity excludes instances in which cooperation can: (1) enhance the achievement of the institutional missions shared by the segments; (2) enable public and private postsecondary education to more effectively meet the educational needs of a geographical region; and (3) provide more effective planning of postsecondary education on a statewide basis. (Ed. Code, § 66010.7, subd. (b) (Stats. 1991, ch. 1198).)

In addition, immediately prior 1991 community college districts were not required to engage in the activity mandated by Education Code section 66010.7, subdivision (c), as added in 1991, and thus, that activity constitutes a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

<u>Sex Equity in Education: (Ed. Code, §§ 221.5, 66271.7, and 72012)</u>

The claimants pled Education Code sections 221.5, 66271.7, and 72012, as amended in 1998.[372] These Education Code sections mandate community college districts to engage in the following activities:

1. Notify the parents or legal guardian of a student, who is under the age of 18 and not emancipated, at least once in the manner prescribed by Education Code section 48980, in advance of course selection counseling so that they may participate in the counseling sessions and decisions. (Ed. Code, §§ 221.5, subd. (d); and 72012 (Stats. 1998, ch. 914).)
2. Any school personnel acting in a course selection counseling capacity to any pupil must affirmatively explore with the pupil the possibility of careers, or courses leading to careers, that are nontraditional for that pupil's sex. (Ed. Code, §§ 221.5, subd. (d); 72012; and 66271.7, subd. (d) (Stats. 1998, ch. 914).)

However, immediately prior to 1998 former Education Code section 40, as it existed in 1990,[373] required the same activities as required by Education Code sections 221.5 and 66271.7, above.[374]

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[372] Statutes 1998, chapter 914. See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at pgs. 132 and 140.

[373] Statutes 1990, chapter 1372.

[374] Former Education Code section 40, was made applicable to community college districts by Education Code section 72012 (Stats. 1981, ch. 470) and former Education Code section 72015 (Stats. 1990, ch. 1372).

Thus, the requirements of Education Code section 221.5, subdivision (d), as applicable to community college districts; and Education Code section 66271.7, subdivision (d), do not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Sex Equity in Education – Written Policy, Assurance of Compliance, Compliance Reports, Remedies: (Ed. Code, §§ 66281.5, subds. (d) and (g); 66290; 66291, subds. (a) and (b); 66292, subd. (a); 66292.3, subd. (b) (Stats. 1998, ch. 914))

The claimants pled Education Code sections 66281.5, 66290, 66291, and 66292.3, as added in 1998.[375] These Education Code sections mandate community college districts to engage in the following activities:

1. Display the policy on sexual harassment in a prominent location on campus. (Ed. Code, § 66281.5, subd. (d) (Stats. 1998, ch. 914).)
2. Provide the policy on sexual harassment, as it pertains to students, to new students as part of any orientation program conducted at the beginning of each session. (Ed. Code, § 66281.5, subd. (e).)
3. Provide school employees with the policy on sexual harassment at the beginning of each year or at the time a new employee is hired. (Ed. Code, § 66281.5, subd. (f).)
4. Include a copy of the policy on sexual harassment in any publication of the community college that sets forth the comprehensive rules, regulations, procedures, and standards of conduct for the college (Ed. Code, § 66281.5, subd. (g) (Stats. 1998, ch. 914).)
5. Provide assurance to the agency administering state financial assistance or state student financial aid, in the manner required by the funding agency, that each program or activity will be conducted in compliance with the Sex Equity in Education Act and all other applicable provisions of state law prohibiting discrimination on the basis of sex, prior to receipt of any state financial assistance or state student financial aid. (Ed. Code, § 66290 (Stats. 1998, ch. 914).)
6. Submit timely, complete, and accurate compliance reports to the Chancellor's Office, as that entity may require. (Ed. Code, § 66291, subd. (a) (Stats. 1998, ch. 914).)
7. Make all reports submitted pursuant to Education Code section 66291, subdivision (a), available for public inspection during business hours. (Ed. Code, § 66291, subd. (b) (Stats. 1998, ch. 914).)
8. Have primary responsibility for ensuring that community college district programs and activities are free from discrimination based on ethnic group identification, religion, age, sex, color, or physical or mental disability. (Ed. Code, § 66292, subd. (a) (Stats. 1998, ch. 914).)
9. Advise persons who have filed a complaint pursuant to the Sex Equity in Education Act, with the community college district that civil law remedies, including, but not limited to

[375] Statutes 1998, chapter 914. See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," at pgs. 136-139.

injunctions, restraining orders, or other remedies or orders, may also be available to complainants. (Ed. Code, § 66292.3, subd. (b) (Stats. 1998, ch. 914).)

10. Make the information regarding the availability of civil remedies to people who have filed a complaint pursuant to the Sex Equity in Education Act available by publication in appropriate informational materials. (Ed. Code, § 66292.3, subd. (b) (Stats. 1998, ch. 914).)

However, immediately prior to 1998 community college districts were required to engage in all of the above activities.

In 1992, former Education Code section 212.6, subdivisions (d), (e), (f), and (g), already required community college districts to display their policies on sexual harassment in a prominent location on campus, provide the policy on sexual harassment to new students as part of any orientation program conducted at the beginning of each session, provide school employees with the policy on sexual harassment at the beginning of each year or at the time a new employee is hired, and include a copy of the policy on sexual harassment in any publication of the institution that sets forth the comprehensive rules for the college.[376] In 1982, former Education Code section 250 required community college districts to provide assurance to the agency administering state financial assistance or state student financial aid that each program or activity will be conducted in compliance with state law prohibiting discrimination on the basis of sex.[377] In 1982, former Education Code section 251, required community college districts to submit timely, complete, and accurate compliance reports to the Chancellor's Office, and to make all reports available for public inspection during business hours.[378] In 1982, former Education Code section 262 required community college districts to have primary responsibility for ensuring that community college district programs are free from discrimination.[379] In 1988, former Education Code section 265 required community college districts to advise persons who have filed a complaint with the district that civil law remedies may also be available to complainants, and to make this information available by publication in appropriate informational materials.[380]

Thus, the above requirements of Education Code sections 66281.5, 66290, 66291, and 66292.3, do not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

(i) Summary of State-Mandated New Program or Higher Level of Service

1. Provide all students the opportunity to address issues, including ethical issues that are central to their full development as responsible citizens, in community college programs. (Ed. Code, § 66010.2, subd. (b) (Stats. 1991, ch. 1198), beginning July 1, 2001.)
2. Undertake intersegmental collaboration and coordination (with the University of California and California State University) particularly when it can do either of

[376] Statutes 1992, chapter 906.

[377] Statutes 1982, chapter 1117.

[378] *Ibid.*

[379] *Ibid.*

[380] Statutes 1988, chapter 1514.

the following: (1) facilitate achievement of the goals of educational equity; (2) facilitate student progress from one segment to another, particularly with regard to preparation of students for higher education as well as the transfer from the California Community Colleges to four-year institutions.

This activity excludes instances in which cooperation can: (1) enhance the achievement of the institutional missions shared by the segments; (2) enable public and private postsecondary education to more effectively meet the educational needs of a geographical region; and (3) provide more effective planning of postsecondary education on a statewide basis. (Ed. Code, § 66010.7, subd. (b) (Stats. 1991, ch. 1198), beginning July 1, 2001.)

3. Work together with other leaders responsible for public (University of California and California State University) and independent institutions of higher education and the Superintendent of Public Instruction to promote and facilitate the development of intersegmental programs and other cooperative efforts aimed at improving the progress of students through the educational systems and at strengthening the teaching profession at all levels. (Ed. Code, § 66010.7, subd. (c) (Stats. 1991, ch. 1198), beginning July 1, 2001.)

(4) Discrimination Complaint Procedures (Gov. Code, §§ 11135, 11136, 11137, 11138, 11139; and Cal. Code Regs., Tit. 5, §§ 59300, 59303, 59304, 59310, 59311, 59320, 59322, 59324, 59326, 59327, 59328, 59329, 59330, 59332, 59334, 59336, 59338, 59339, 59340, 59342, 59350, 59351, 59352, 59354, 59356, 59358, 59360, and 59362)

This section addresses the complaint procedures for violations of state and federal antidiscrimination laws prohibiting discrimination on the basis of ethnic group identification, national origin, religion, age, sex, race, color, ancestry, sexual orientation, or physical or mental disability in community college districts. Specifically, this section addresses Government Code sections 11135-11139, and California Code of Regulations, title 5, section 59300, 59303, 59304, 59310, 59311, 59320, 59322, 59324, 59326, 59327, 59328, 59329, 59330, 59332, 59334, 59336, 59338, 59339, 59340, 59342, 59350, 59351, 59352, 59354, 59356, 59358, 59360, and 59362.

a. Background

In 1977, Government Code sections 11135-11139 were enacted to prohibit state-funded programs or activities from unlawfully denying benefits or unlawfully discriminating on the basis of ethnic group identification, religion, age, sex, color, or physical or mental disability. In addition, sections 11135-11139 require a state agency to determine if a violation of the provisions of sections 11135-11139 has occurred by a contractor, grantee, or local agency receiving state financial assistance from the agency, and if so the state agency is required to sanction the violator. Section 11138 also requires the adoption of regulations by state agencies to carry out the provisions of sections 11135-11139. The primary purpose for enacting Government Code sections 11135-11139 was to shift the burden of proving unlawful discrimination in a state-funded program from the person being discriminated against to the state agency administering the program.[381] In 1981 the Board of Governors of the California

[381] Senate Committee on Governmental Organization, Staff Analysis of Assembly Bill No. 803 (1976-1977 Reg. Sess.) as amended June 21, 1977.

Community Colleges adopted California Code of Regulations, title 5, section 59300 et seq., pursuant to the directive in Government Code section 11138. Among other things, the regulations adopted by the Board of Governors set forth the complaint procedures within community college districts for alleged violations Government Code sections 11135-11139.

Since the enactment of the Government Code sections in 1977 and the adoption of the implementing regulations in 1981, subsequent amendments were made to the Government Code sections and implementing regulations. These amendments include specific provisions that indicate that certain federal laws are applicable to state entities covered by Government Code section 11135 et seq. Some of these amendments have occurred after the start of the reimbursement period (July 1, 2001).[382] Any substantive amendment made to the Government Code sections and the implementing regulations after the start of the reimbursement period will be addressed below where appropriate.

The following discussion will first address whether the discrimination complaint procedure code sections and regulations require any activities. Secondly, the discussion will analyze whether the activities required by the code sections and title 5 regulations constitute federal mandates. Thirdly, the discussion will analyze whether the activities required by the code sections and regulations constitute state-mandated activities. Finally, the discussion will address whether the code sections and regulations constitute a new program or higher level of service.

b. Government Code Section 11135; and California Code of Regulations, Title 5, Sections 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, 59340, 59342, require some activities.

The following discussion will analyze whether the language of the Government Code sections and title 5 regulations pled in the "discrimination complaint procedures" section of this analysis require any activities. Each code section and regulation is introduced with a header that describes the content of the code section or regulation discussed.

Prohibition Against Discrimination (Gov. Code, § 11135)

Government Code section 11135 addresses the prohibition of unlawful discrimination in programs and activities funded directly or receiving any financial assistance from the state. Community college districts are entities that provide programs and activities funded directly by the state or receive financial assistance from the state, and as a result, are subject to section 11135. The claimants have pled multiple versions of section 11135, including as amended by Statutes 1994, chapter 146; Statutes 2001, chapter 708; and Statutes 2002, chapter 1102, section 2.5.[383] All three versions were effective within the reimbursement period of this

[382] Test claim 02-TC-46 was filed June 27, 2003. See also, Government Code section 17557, subdivision (e).

[383] Statutes 2002, chapter 1102, section 2.5 incorporates the amendments made to Government Code section 11135, by Statutes 2002, chapter 300, and became operative pursuant to section 7 of Statutes 2002, chapter 1102.

test claim beginning on July 1, 2001.[384] As amended by Statutes 1994, chapter 146, Government Code section 11135 provides:

> (a) No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color, or disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state.
>
> (b) With respect to discrimination on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, except that if the laws of this state prescribe stronger protections and prohibitions, the programs and activities subject to subdivision (a) shall be subject to the stronger protections and prohibitions.
>
> (c) As used in this section, "disability" means any of the following with respect to an individual: (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual, (2) a record of an impairment as described in paragraph (1), or (3) being regarded as having an impairment as described in paragraph (1).

Statutes 2001, chapter 708, amended Government Code section 11135, subdivision (a), to add the italicized language below:

> No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color or disability, be unlawfully denied *full and equal access to* the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is *conducted, operated, or administered by the state or by any state agency, is* funded directly by the state, or receives any financial assistance from the state. (Italics added.)

Subdivision (c) was amended to add the italicized language below:

> (c) As used in this section, "disability" means *any mental or physical disability as defined in [Government Code] Section 12926*. (Italics added.)

In 2002, section 11135 was amended by Statutes 2002, chapter 1102, section 2.5, and became effective January 1, 2003. Government Code section 11135 was amended to add "race" and "national origin" as prohibited bases for unlawful discrimination. In addition, section 11135 was amended to require state-funded entities to comply with the section 508 of the Rehabilitation Act of 1973 (29 U.S.C. § 794d) and its implementing regulations. Specifically, section 11135 was amended to add subdivision (d) which provides:

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[384] The Statutes 2001, chapter 708 version of Government Code section 11135 was effective January 1, 2002. Thus, between July 1, 2001 and December 31, 2001, the Statutes 1994, chapter 146 version was still in effect.

> (d) (1) The Legislature finds and declares that the ability to utilize electronic or information technology is often an essential function for successful employment in the current work world.
>
> (2) In order to improve accessibility of existing technology, and therefore increase the successful employment of individuals with disabilities, particularly blind and visually impaired and deaf and hard-of-hearing persons, state governmental entities, in developing, procuring, maintaining, or using electronic or information technology, either indirectly or through the use of state funds by other entities, shall comply with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794d), and regulations implementing that act as set forth in Part 1194 of Title 36 of the Federal Code of Regulations.
>
> (3) Any entity that contracts with a state or local entity subject to this section for the provision of electronic or information technology or for the provision of related services shall agree to respond to, and resolve any complaint regarding accessibility of its products or services that is brought to the attention of the entity.

As shown by the plain language above, all versions of subdivisions (a) and (c) of Government Code section 11135 do not impose any activities on community college districts. Rather, subdivision (a) prohibits community college districts from engaging in unlawful activities. Subdivision (c) defines "disability" as used in Government Code section 11135; however, it does not, in and of itself, require any activities.

In contrast, subdivisions (b) and (d) require community college districts to comply with federal antidiscrimination laws regarding disability. Subdivision (b) requires any program or activity funded directly by the state or that receives any financial assistance from the state to comply with the provisions of Title II of the ADA (42 U.S.C. § 12132 et seq.) and its implementing regulations. As an entity that receives state funding to provide programs and activities, community college districts are subject to the provisions of subdivision (b). It is important to note that "program or activity" includes the provision of employment.[385]

Subdivision (d)(2) requires *state governmental entities* to comply with the accessibility requirements of section 508 of the Rehabilitation Act and its implementing regulations when developing, procuring, maintaining, or using electronic information technology. However, subdivision (d)(3) provides "Any entity that contracts with a state *or local entity* subject to *this section* for the provision of electronic or information technology … ." The language of subdivision (d)(3) suggests that community college districts are subject to the provisions of subdivision (d)(2). Courts have held that where the provisions of a statute are ambiguous or conflict, the court may look to the legislative record and committee reports to determine the

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[385] "Program or activity" is undefined in Government Code section 11135, as originally enacted by Statutes 1977, chapter 972, however, the Board of Governors' original regulations (Cal. Code Regs., tit. 5, § 59310 (Register 81, No. 16)) incorporated the definitions adopted by the Secretary of the Health and Welfare Agency (see Cal. Code Regs., tit. 22, § 98100 et seq., whose terms are generally defined by § 98010), which defines the term to include "the provisions of employment."

legislative intent.[386] The Senate Rules Committee third reading analysis of Senate Bill number 105 indicates:

> This bill:
>
> [¶] … [¶]
>
> 7. Requires state entities *and state-funded entities*, in developing, procuring, maintaining, or using electronic or information technology, to comply with the accessibility requirements of the federal Rehabilitation Act of 1973 … . (Emphasis added.)[387]

The Senate Rules Committee analysis indicates that the Legislature intended the provisions of subdivision (d)(2) to apply to state-funded entities. Thus, community college districts, as state-funded entities, are subject to the provisions of subdivision (d)(2).

On February 8, 2011, Finance submitted comments in response to the draft staff analysis disagreeing with the analysis of subdivision (d)(2).[388] Finance argues that the term, "state governmental entities," is not ambiguous, and as a result, resort to legislative history is inappropriate.[389]

The Commission is not persuaded by Finance's argument. The term "state governmental entities" is unclear in the context of Government Code section 11135 and is not defined by the Government Code. The provisions of subdivision (d)(2), including the term "state governmental entities," must be read within the context of the whole of the statute while keeping in mind the purpose of the statute.[390] In context with the statute as a whole the term "state governmental entities" is capable of two reasonable constructions, and as a result, resort to the code section's legislative history is appropriate to determine legislative intent.[391]

Government Code section 11000 defines the term "*state agency*" as used in Government Code section 11135 to include "every state office, officer, department, division, bureau, board, and commission." Unlike the term "state agency," the term "state governmental entities" used in subdivision (d)(2) is not defined in the Government Code, nor is there a common use of the term.[392] Finance interprets "state governmental entities" to mean governmental entities at the

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[386] *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal. 4th 382, 394.

[387] Senate Rules Com., Office of Senate Floor Analyses, 3d reading analysis of Senate Bill number 105 (2001-2002 Reg. Sess.) as amended July 18, 2002.

[388] Department of Finance Comments in response to draft staff analysis on 02-TC-46, dated February 8, 2011.

[389] *Ibid.*

[390] *DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal. 4th at pgs.387-388 and 939-394.

[391] *Ibid.*

[392] *Mitchell v. Los Angeles Community College Dist.* (9th Cir. 1989) 861 F.2d 198, 201-202, which addresses whether a state's 11th amendment immunity from private damage actions and suits for injunctive relief brought in federal court extends to community college districts. The court held that community college districts are state entities for purposes of 11th amendment immunity, and that the 11th amendment immunity extends to district employees acting in their

state level or "state agency" as defined by Government Code section 11000. However, in the context of a statute that seeks to prohibit discrimination in, and the denial of full and equal access to the benefits of, programs and activities of state *and* local entities, "state governmental entities" can be reasonably interpreted to mean governmental entities of the state, both state and local.

The latter interpretation of "state governmental entities" is consistent with the language of subdivision (d)(3), which suggests that "local entities" are subject to the requirements imposed on "state governmental entities" in subdivision (d)(2). Subdivision (d)(3) provides:

> Any entity that contracts with a state or local entity subject to this section for the provision of electronic or information technology or for the provision of related services shall agree to respond to, and resolve any complaint regarding accessibility of its products or services that is brought to the attention of the entity.

The complaints "regarding accessibility" referred to in subdivision (d)(3) relate back to the accessibility requirements of Section 508 of the Rehabilitation Act that "state governmental entities" must comply with under subdivision (d)(2). Thus, contracts with community college districts for the provision of electronic or information technology include the requirement that the contracting entity resolve accessibility complaints arising from Section 508 of the Rehabilitation Act, suggesting that local entities constitute "state governmental entities."

Finance also argues that because the Legislature was specific in its references to the "California State University (CSU)" and "state or local entities" in Government Code section 11135, it would seem to be inconsistent of the Legislature to be imprecise when using the term "state governmental entities."[393] In regard to the Legislature's specific reference to the CSU, this was done because the CSU is specifically excluded from the definition of "state agency" unless explicitly stated otherwise.[394] As a result, to have the provisions of Government Code section 11135 apply to the CSU the Legislature was required to expressly state that the CSU was included within the provisions of Government Code section 11135. This is not the case for local entities, which are included in Government Code section 11135 by the language, "any program or activity that … is funded directly by the state, or receives any financial assistance from the state." Thus, the specificity used when referring to the CSU is not inconsistent with the use of the term "state governmental entities" to include both state and local entities.

Because two reasonable constructions of "state governmental entities" exist, it is appropriate to turn to the legislative history of Government Code section 11135, subdivision (d), in order to determine the Legislature's intent.[395] As discussed above, the report by the Senate Rules Committee states that Government Code section 11135, subdivision (d):

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official capacity because such suits "are in essence, actions against the governmental entity of which the officer is an agent."

[393] Department of Finance Comments in response to draft staff analysis on 02-TC-46, dated February 8, 2011.

[394] Government Code section 11000 defines "state agency" to not include "the California State University unless the section explicitly provides that it applies to the university."

[395] *DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal. 4th at pgs.393-394.

> Requires state entities *and state-funded entities*, in developing, procuring, maintaining, or using electronic or information technology, to comply with the accessibility requirements of the federal Rehabilitation Act of 1973 …. (Emphasis added.)[396]

Finance suggests that the legislative staff analysis appears to overreach in its attempt to summarize the bill.[397] However, courts have found committee reports are appropriate aids to determine legislative intent because "it is reasonable to infer that those who actually voted on the proposed measure read and considered the materials presented in explanation of it, and that the materials therefore provided some indication of how the measure was understood at the time by those who voted to enact it."[398] Thus, although Finance disagrees with the legislative staff's interpretation of "state governmental entities," the legislative staff's interpretation provides an indication of how the Legislature understood Government Code section 11135, subdivision (d)(2).

Thus, Government Code section 11135 requires community college districts to engage in the following activities:

1. Meet the protections and prohibitions contained in section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) and its implementing regulations (28 C.F.R. § 35 et seq.) in providing its programs and activities where state law does not provide stronger protections and prohibitions. (Gov. Code, § 11135, subd. (b) (Stats. 2001, ch. 708).)
2. Comply with the accessibility requirements of section 508 of the Rehabilitation Act (29 U.S.C. § 794d), and its implementing regulations (36 C.F.R. § 1194 et seq.) in developing, procuring, maintaining, or using electronic or information technology. (Gov. Code, § 11135, subd. (d)(2) (Stats. 2002, ch. 1102), beginning January 1, 2003.)

The extent that these activities may or may not be federal mandates will be discussed below.

<u>District Responsibility and Investigation (Cal. Code Regs., tit. 5, § 59320)</u>

Title 5, section 59320, addresses a community college district's responsibility to insure that there is no unlawful discrimination within its programs and activities. Specifically, section 59320 provides:

> Each community college district has primary responsibility to insure that its programs and activities are available to all persons without regard to ethnic group identification, national origin, religion, age, race, sex, color, sexual orientation, ancestry, or physical or mental disability. Therefore, each community college district shall investigate complaints of unlawful discrimination in its programs or

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[396] Senate Rules Com., Office of Senate Floor Analyses, 3d reading analysis of SB 105 (2001-2002 Reg. Sess.) as amended July 18, 2002.

[397] Department of Finance Comments in response to draft staff analysis on 02-TC-46, dated February 8, 2011.

[398] *Hutnik v. U.S. Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn.7.

> activities, and seek to resolve those complaints in accordance with the provisions of this subchapter.[399]

Because community college districts have primary responsibility to make sure that its programs and activities are not provided in an unlawfully discriminatory manner, districts must engage in the activity of investigating complaints of unlawful discrimination. Thus, section 59320 requires community college districts to engage in the following activity:

> Investigate complaints of unlawful discrimination in district programs or activities and seek to resolve those complaints. (Cal. Code Regs., tit. 5, § 59320 (Register 2001, No. 6; and Register 2002, No. 13).)

District Policies (Cal. Code Regs., tit. 5, § 59322)

Title 5, section 59322, addresses the adoption of district policies consistent with title 5, sections 59320-59342, which address community college district discrimination complaint and enforcement procedures. Section 59322 requires community college districts to engage in the following activities:

1. Establish and adopt written policies consistent with California Code of Regulations, title 5, sections 59320-59342, which address community college district discrimination complaint and enforcement procedures. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13).)
2. Submit district policies, which address community college district discrimination complaint and enforcement procedures (adopted pursuant to Cal. Code Regs., tit. 5, § 59322) to the Chancellor for review and approval within 90 days of the effective date of adopting or amending the policies. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13).)

Responsible District Officer (Cal. Code Regs., tit. 5, § 59324)

Title 5, section 59324, addresses the identification of a district officer responsible for receiving and coordinating the investigation of complaints. In addition, section 59324 allows for the actual investigation of complaints to be assigned to other staff, or outside persons or organizations. Section 59324 requires community college districts to engage in the following activities:

1. Identify to the Chancellor and to the public a single person as the district officer responsible for receiving complaints filed pursuant to California Code of Regulations, title 5, section 59328 and coordinating their investigation. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13).)
2. Use other staff or outside persons or organizations under contract with the district whenever the officer designated to receive complaints is named in the complaint or is implicated by the allegations in the complaint. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13).)

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[399] California Code of Regulations, title 5, section 59320 (Register 2002, No. 13). The Register 2001, No. 6, version of section 59320 does not include the language ". . . in accordance with the provisions of this subchapter."

Notice to Students and Employees (Cal. Code Regs., tit. 5, § 59326)

Title 5, section 59326, requires community college districts to engage in the following activity:

> Notify students and employees of the provisions of California Code of Regulations, title 5, section 59300 et seq., which address the two levels of discrimination complaint procedures for community college districts (beginning at the community college district level and ending at the state level). (Cal. Code Regs., tit. 5, § 59326 (Register 2001, No. 6; and Register 2002, No. 13).)

Complaint Process (Cal. Code Regs., tit. 5, §§ 59327, 59328, 59329, 59330, 59332, 59334, 59336, 59338, 59339, 59340, 59342, 59350, 59351, 59352, 59354, 59356, 59358, 59360, and 59362)

Title 5 regulations in this section of the analysis set forth the discrimination complaint process for community college districts. The complaint process includes processes on both the district level (Cal. Code Regs., tit. 5, §§ 59327-59342) and the state (Chancellor's Office) level (Cal. Code Regs., tit. 5, §§ 59350-59362).

On the community college district level the complaint process (as set forth in Cal. Code Regs., tit. 5, §§ 59327-59342) involves an individual bringing charges of discrimination to the attention of the district officer, efforts at informal resolution of the charges by the district officer, notification to the complainant by the district officer of other remedies or complaint processes, filing of formal charges by the complainant with the Chancellor or the district officer, a district investigation, a determination of the existence of probable cause that the discrimination occurred, and the ability of a complainant to appeal a district decision to the Chancellor if the complainant is unsatisfied with the district's decision.

If a complainant appeals the decision to the Chancellor, the process on the Chancellor's Office level (as set forth in Cal. Code Regs., tit. 5, §§ 59350-59362) involves the Chancellor reviewing the district's decision, the materials that the decision was based upon, and the complainant's appeal in order to determine if there is reasonable cause to believe that the district violated California Code of Regulations, title 5, section 59300 et seq. If reasonable cause is found, the Chancellor must investigate to determine if there is probable cause to believe a violation has occurred. During the course of the investigation, attempts at informal resolution must be made. If probable cause is found and the district does not agree with this finding, the Chancellor must initiate a hearing to determine if a violation did occur. If it is determined that a violation has occurred, the Chancellor is authorized to use various means of effecting compliance. Finally, the district has the ability to seek judicial review of the Chancellor's decision. The Commission finds that the plain language of the discrimination complaint process on the Chancellor's Office level does not require community college districts to engage in any activities. Instead, title 5, sections 59350-59362, requires the Chancellor's Office engage in specific activities.

The claimants disagree with the finding that the appeal process on the Chancellor's Office level (as set forth in Cal. Code Regs., tit. 5, §§ 59350-59362) does not impose any activities on community college districts.[400] The claimants argue that districts have no control over an appeal to the Chancellor's Office, and as a result, the Chancellor's Office investigation requires

[400] Claimant Comments on Draft Staff Analysis, *supra*, p. 14.

community college districts to engage in the Chancellor's Office process.[401] However, there is no language in sections 59350-59362 that requires community college districts to engage in any activity. Absent language requiring specific action to be taken by community college districts, the Commission cannot read activities into sections 59350-59362.[402] Thus, based on the plain language of title 5, sections 59350-59362, do not impose any state-mandated activities on community college districts.

In contrast with the activities required of the Chancellor's Office, the discrimination complaint process at the community college district level (Cal. Code Regs., § tit. 5, §§ 59327-59342) does require community college districts to engage in activities. Before describing the activities that community college districts are required to engage in, it is necessary to note that the regulations were amended after the beginning of the reimbursement period on July 1, 2001. Substantive amendments made after the beginning of the reimbursement period will be identified in the below description of the required activities by a start date other than July1, 2001. California Code of Regulations, title 5, sections 59327-59342, require community college districts to engage in the following activities:

1. The district officer shall undertake efforts to informally resolve the charges whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(1) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
2. The district officer shall advise the complainant that he or she need not participate in informal resolution whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(2) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
3. As part of the informal resolution process, the district officer shall notify the person bringing the charges of the right to file a formal complaint, as defined by California Code of Regulations, title 5, section 59311, and the procedure for filing a formal complaint pursuant to California Code of Regulations, title 5, section 59328 whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(3) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
4. As part of the informal resolution process, the district officer shall advise the complainant that he or she may file his or her non-employment based complaint with the Office of Civil Rights of the U.S. Department of Education (OCR) where such a complaint is within that agency's jurisdiction whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(4) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
5. As part of the informal resolution process, the district officer shall advise the complainant that he or she may file his or her employment-based complaint with the U.S. Equal Employment Opportunity Commission (EEOC) or the California Department of Fair Employment and Housing (DFEH) where the complaint is within the jurisdiction of those

[401] *Ibid*.

[402] *Estate of Griswold*, *supra*, 25 Cal.4th at pgs. 910-911.

agencies. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(5) (Register 2002, No. 13), beginning April 19, 2002.)

6. Include investigation in efforts at informal resolution if the responsible district officer determines that an investigation is warranted by the seriousness of the charges. (Cal. Code Regs., tit. 5, § 59327, subd. (b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
7. After a formal complaint is filed the formal investigation conducted pursuant to California Code of Regulations, title 5, section 59334 must be completed unless the matter is informally resolved and the complainant dismisses the formal complaint. (Cal. Code of Regs., tit. 5, § 59327, subd. (c) (Register 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)
8. After a complaint is filed the formal investigation conducted pursuant to California Code of Regulations, title 5, section 59334 must be completed unless the matter is informally resolved and the complainant dismisses the formal complaint or the complainant files with the Department of Fair Employment and Housing and the Chancellor elects not to require further investigation pursuant to California Code of Regulations, title 5, section 59328, subd. (f)(2). (Cal. Code of Regs., tit. 5, § 59327, subd. (c) (Register 2002, No. 13), beginning April 19, 2002.)
9. As part of the formal complaint process, advise any complainant alleging discrimination in employment that he or she may file his or her complaint with the U.S. Equal Employment Opportunity Commission (EEOC) or Department of Fair Employment and Housing where the complaint is within the jurisdiction of those agencies. (Cal. Code Regs., tit. 5, § 59328, subd. (f)(1) (Register 2002, No. 13), beginning April 19, 2002.)
10. As part of the formal complaint process, for any complaint alleging discrimination in employment, forward a copy of any filing by the complainant with the Department of Fair Employment and Housing to the Chancellor's Office for a determination of whether the issues presented require an independent investigation of the matter under the provisions of the discrimination complaint procedure regulations (Cal. Code Regs., tit. 5, § 53000 et seq.). (Cal. Code Regs., tit. 5, § 59328, subd. (f)(2) (Register 2002, No. 13), beginning April 19, 2002.)
11. Forward a copy of the formal complaint to the Chancellor immediately upon receiving a formal complaint filed in accordance with California Code of Regulations, title 5, section 59328. (Cal. Code Regs., tit. 5, § 59330 (Register 2001, No. 6; and Register 2002, No. 13.), beginning July 1, 2001.)
12. Immediately notify the complainant that his or her formal complaint does not meet the requirements of California Code of Regulations, title 5, section 59328, and specify in what way the complaint is defective, if the district receives a complaint that does not meet the requirements of section 59328. (Cal. Code Regs., tit. 5, § 59332 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
13. Commence an impartial fact-finding investigation of a properly filed formal complaint and notify the complainant and Chancellor that the district is doing so upon receiving a formal complaint which is properly filed. (Cal. Code Regs., tit. 5, § 59334 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

14. Set forth the results of the investigation conducted in the formal complaint process in a written report that includes at least all of the following:

    a. A description of the circumstances giving rise to the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

    b. A summary of the testimony provided by each witness, including the complainant and any witnesses identified by the complainant in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (b) (Register 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)

    c. A summary of the testimony provided by each viable witness, including the complainant and any witnesses identified by the complainant in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (b) (Register 2002, No. 13), beginning April 19, 2002.)

    d. An analysis of any relevant data or other evidence collected during the course of the investigation. (Cal. Code Regs., tit. 5, § 59334, subd. (c) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

    e. A specific finding as to whether the discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (d) (Register 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)

    f. A specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (d) (Register 2002, No. 13), beginning April 19, 2002.)

    g. Any other information deemed appropriate by the district. (Cal. Code Regs., tit. 5, § 59334, subd. (e) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

15. Complete the district investigation conducted during the formal complaint process and forward a copy of the investigative report required pursuant to California Code of Regulations, title 5, section 59334 to the Chancellor, a copy or summary of the report to the complainant, and written notice setting forth all of the following to both the complainant and the Chancellor:

    a. The determination of the chief executive officer or his/her designee as to whether discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59336, subd. (a) (Register 20 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)

    b. The determination of the chief executive officer or his/her designee as to whether there is probable cause to believe discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59336, subd. (a) (Register 2002, No. 13), beginning April 19, 2002.)

    c. A description of the actions taken, if any, to prevent similar problems from occurring in the future. (Cal. Code Regs., tit. 5, § 59336, sub. (b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

d. The proposed resolution of the complaint. (Cal. Code Regs., tit. 5, § 59336, subd. (c) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

e. The complainant's right to appeal to the district governing board and the Chancellor pursuant to California Code of Regulations, title 5, sections 59338 and 59339. (Cal. Code Regs., tit. 5, § 59336, subd. (d) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

16. Forward to the complainant and the Chancellor a copy of the final district decision rendered by the governing board that includes a complainant's right to appeal the district's decision to the Chancellor pursuant to California Code of Regulations, title 5, section 59339. Administrative determinations are made final by the district issuing a decision or by taking no action 45 days after an appeal to the district governing board by complainant not satisfied by the administrative determination (Cal. Code Regs., tit. 5, § 59338, subd. (a) and (c). (Cal. Code Regs., tit. 5, § 59338 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

17. Forward the following to the Chancellor within 150 days of receiving a formal complaint:

    a. A copy of the final district decision rendered by the governing board or a statement indicating the date on which the administrative determination became final pursuant to California Code of Regulations, title 5, section 59338, subdivision (a). (Cal. Code Regs., tit. 5, § 59340, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

    b. A copy of the notice to the complainant required pursuant to California Code of Regulations, title 5, section 59338, subdivision (a). (Cal. Code Regs., tit. 5, § 59340, subd. (b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

    c. Such other information as the Chancellor may require. (Cal. Code Regs., tit. 5, § 59340, subd. (c) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

18. File a written request that the Chancellor grant an extension of the 90 day or 150 day deadline to forward the investigative report to the Chancellor or to forward the final district decision to the Chancellor (specified in Cal. Code Regs., tit. 5, §§ 59336 or 59340), 10 days before the expiration of the deadline, if for reasons beyond the district's control the district is unable to comply with the deadline. (Cal. Code Regs., tit. 5, § 59342, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

19. Provide the reasons for the request for an extension of the 90-day or 150-day deadline to forward the investigative report to the Chancellor or to forward the final district decision to the Chancellor, and the date by which the district expects to be able to submit the required materials in the request. (Cal. Code Regs., tit. 5 § 59342, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

c. Some of the requirements imposed by Government Code section 11135 and California Code of Regulations, title 5, sections 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, and 59342, constitute federal mandates, and therefore, are not subject to article XIII B, section 6 of the California Constitution

Article XIII B places spending limits on both the state and local governments; however, costs mandated by courts or federal law are expressly excluded from these spending limits. Article XIII B, section 9, subdivision (b), of the California Constitution excludes from either the state or local spending limit any "[a]ppropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly."

When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not required a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[403] Also, the court in *San Diego Unified School Dist*. found that "for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the underlying federal mandate."[404] However, the court in *Hayes* also found when federal law imposes a mandate on the state, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[405]

Finance argues that the claimants fail "to distinguish any State statutory or regulatory requirements from those requirements existing at the federal level."[406] The following discussion will address whether the activities required by the test claim statutes and regulations are mandated by federal law. This will be done first by analyzing what federal law requires as relevant to the "discrimination complaint procedures" section of this analysis. Then the discussion will analyze whether the activities required by the code section and regulations are required by or exceed federal law.

(i) Federal Requirements

Finance argues that the following federal laws preclude reimbursement of investigation activities under Article XIII B: (1) Title IV of the Civil Rights Act of 1964; (2) Title VI of the Civil Rights Act of 1964; (3) the Age Discrimination Act of 1975; (4) Title IX of the Education Amendments of 1972 and its implementing regulations (34 C.F.R. § 106); (5) section 504 of the

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[403] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593 citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; see also, Government Code section 17513.

[404] *San Diego Unified School Dist*., *supra*, 33 Cal.4th 859, 890.

[405] *Hayes*, *supra*, 11 Cal.App.4th at p. 1594.

[406] Department of Finance Comments on 02-TC-46, dated March 23, 2004.

Rehabilitation Act of 1973 and its implementing regulations (34 C.F.R. § 104); and (6) the Americans with Disabilities Act of 1990 (ADA).[407]

Title IV of the Civil Rights Act of 1964 (42 U.S.C. § 2000c et seq.)

Title IV of the Civil Rights Act of 1964 (Title IV) (codified at 42 U.S.C. § 2000c et seq.) addresses the desegregation of public schools. As relevant to community college districts, Title IV authorizes the Attorney General to institute a civil action for an individual alleging that he/she has been denied admission to or not been permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin, and the Attorney General believes such action will materially further the orderly achievement of desegregation in public education.[408]

Although Title IV authorizes a civil action against a community college district for engaging in specific activities, as relevant to the discussion in this test claim, Title IV does not require community college districts to engage in any of the activities required by the test claim statutes and regulations in the "discrimination complaint procedures" section of this analysis. Thus, the Commission finds that Title IV of the Civil Rights Act of 1964 does not constitute a federal mandate.

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

Title VI of the Civil Rights Act of 1964 (Title VI) (codified at 42 U.S.C. § 2000d et seq.) and its implementing regulations (34 C.F.R. § 100 et seq.) prohibit discrimination on the basis of race, color, or national origin with respect to "any program or activity receiving Federal financial assistance."[409] However, as relevant to the discussion in this test claim, Title VI does not require community college districts to engage in any of the activities required by the test claim statutes and regulations in the "discrimination complaint procedures" section of this analysis.

Age Discrimination Act of 1975 (42 U.S.C. § 6101 et seq.)

For the reasons discussed above in the "equal employment opportunity" and the "student equity" sections of this analysis, the Age Discrimination Act, like Title VI above, constitutes a federal mandate on community college districts except in the area of employment. However, as relevant to this section of the test claim, the Age Discrimination Act, does not require community college districts to engage in any of the activities required by the test claim statutes or regulations in the "discrimination compliant procedures" section of this analysis.

Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.)

Title IX of Education Amendments of 1972 (Title IX) (codified at 20 U.S.C. § 1681 et seq.) and its implementing regulations (34 C.F.R. § 106 et seq.) prohibit discrimination on the basis of sex under any education program or activity receiving federal financial assistance. Courts and the Office for Civil Rights (OCR) of the United States Department States Department of Education have recognized claims of sexual harassment as part of Title IX's prohibition against gender

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[407] *Ibid.*

[408] Title 42 United States Code section 2000c-6.

[409] Title 42 United States Code section 2000d (Pub.L.No. 88-352 (July 2, 1964).

discrimination.[410] For the reasons discussed in the "equal employment opportunity" and the "student equity" sections above, Title IX and its implementing regulations (34 C.F.R. § 106 et seq.) constitute a federal mandate.

As relevant to the "Discrimination Complaint Procedures" section of this analysis, Title IX requires:

1. Designate at least one employee to coordinate efforts to comply with and carry out the responsibilities under 34 Code of Federal Regulations part 106, including the investigation of any complaint communicated to the community college district alleging its noncompliance with part 106 or alleging any action that would be prohibited by part 106. (34 C.F.R. § 106.8, subd. (a) (May 9, 1980).)
2. Notify all students and employees of the name, office address and telephone number of the employee or employees appointed to coordinate community college district efforts to comply with and carry out district responsibilities under 34 Code of Federal Regulations part 106 et seq., including any investigation of any complaint communicated to the district alleging noncompliance or any act that would be prohibited by 34 Code of Federal Regulations part 106 et seq. (34 C.F.R. § 106.8, subd. (a) (May 9, 1980).)
3. Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by 34 Code of Federal Regulations part 106 et seq. (34 C.F.R. § 106.8, subd. (b) (May 9, 1980).)
4. Implement specific and continuing steps to notify applicants for admission and employment, employees, that it does not discriminate on the basis of sex and that it is required by Title IX and 34 Code of Federal Regulations part 106 et seq. not to discriminate in such a manner, and that inquiries concerning the application of title IX and part 106 et seq. to the community college may be referred to the employee designated to coordinate efforts to comply and carry out the responsibilities of part 106 et seq. (34 C.F.R. § 106.9, subd. (a) (Nov. 13, 2000).)

It must be noted that the OCR interprets Title IX and its implementing regulations as prohibiting sexual harassment based on sexual orientation in certain situations. Specifically, OCR states:

> Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX … .[411]

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[410] *Davis v. Monroe County Bd. of Educ.*, *supra*, 526 U.S. at 650; *Franklin v. Gwinnet County Public Schools*, *supra*, 503 U.S. at 75; and Office for Civil Rights of the United States Department of Education, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Title IX, (Jan. 2001), pgs. 3-4.

[411] Office for Civil Rights of the United States Department of Education, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Title IX, *supra*, at pg. 12. See also, *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 874-875, in which the court overturned its finding in *DeSantis v.*

Thus, the prohibition and associated requirements regarding discrimination on the basis of sex includes sexual harassment on the basis of sexual orientation in certain instances.

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794)

The Rehabilitation Act of 1973, section 504 (Section 504) (29 U.S.C. § 794) and its implementing regulations (34 C.F.R. § 104 et seq.) prohibit discrimination on the basis of physical or mental disability with respect to "any program or activity receiving federal financial assistance." For the same reasons discussed in the "equal employment opportunity" and the "student equity" sections of this analysis, Section 504 constitutes a federal mandate. As relevant to section, Section 504 requires:

1. Adopt grievance procedures for employees and students that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by 34 Code of Federal Regulations part 104 (which implements section 504 of the Rehabilitation Act), if employing 15 people or more. (34 C.F.R. § 104.7, subd. (b) (May 9, 1980).)
2. Take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees of community college district programs or activities, and unions or professional organizations holding collective bargaining or professional agreements with the community college district of the identification of the employee responsible for coordinating the districts efforts to comply with 34 Code of Federal Regulations part 104, which prohibits discrimination based on disability. (34 C.F.R. § 104.8, subd. (a) (Nov. 13, 2000).)

The Americans with Disabilities Act (42 U.S.C. § 12131-12134)

For the same reasons discussed in the "student equity" section of this analysis, Title II of the ADA (42 U.S.C. § 12131-12134) and its implementing regulations (28 C.F.R. § 35 et seq.) constitute a federal mandate. However, as discussed above, it is important to note that Title II and its implementing regulations do not apply to employment discrimination.[412] As relevant to this discussion, Title II of the ADA (42 U.S.C. § 12131-12134) and its implementing regulations (28 C.F.R. § 35 et seq.) impose the following activities on community college districts:

1. Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under 28 Code of Federal Regulations part 35 et seq., including any investigation of any [non-employment related] complaint communicated to it alleging non compliance with part 35 or alleging any actions that would be prohibited by part 35. (28 C.F.R. § 35.107, subd. (a) (July 26, 1991).)
2. Make available to all interested individuals the name, office address, and telephone number of the employee or employees responsible for the community college districts

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Pacific Telephone & Telegraph Co., Inc. (9th Cir. 1979) 608 F.2d 327, that discrimination based on a stereotype that a man "should have a virile rather than an effeminate appearance" does not fall within Title VII's purview. See *OONA, R.-S v. McCaffrey* (9th Cir. 1998) 143 F.3d 473, 476-477, finding that Title VII standards apply to hostile environment claims under Title IX.

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

efforts to comply with and carry out the responsibilities under 28 Code of Federal Regulations part 35 et seq. (28 C.F.R. § 35.107, subd. (a) (July 26, 1991).)

3. Adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by 28 Code of Federal Regulations part 35 et seq., if employing 50 or more persons. (28 C.F.R. § 35.107, subd. (b) (July 26, 1991).)

(ii) The Activities Required by the Discrimination Complaint Procedure Code Sections and Regulations that are also Mandated by Federal Law are not Subject to Reimbursement Under Article XIII B, Section 6 of the California Constitution.

The following will discuss whether activities required by the state are mandated by the federal laws described above. If the activities required by the title 5 regulations pled in the "equal employment opportunity" section of this analysis are required by federal law they do not constitute state-mandated activities.

Prohibition Against Discrimination (Gov. Code, § 11135)

Government Code section 11135 requires community college districts to engage in the following activities:

1. Meet the protections and prohibitions contained in section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) and its implementing regulations (28 C.F.R. § 35 et seq.) in providing district programs and activities where state law does not provide stronger protections and prohibitions. (Gov. Code, § 11135, subd. (b) (Stats. 2001, ch. 708).)
2. Comply with the accessibility requirements of section 508 of the Rehabilitation Act (29 U.S.C. § 794d), and its implementing regulations (36 C.F.R. § 1194 et seq.) in developing, procuring, maintaining, or using electronic or information technology. (Gov. Code, § 11135, subd. (d)(2) (Stats. 2002, ch. 1102), beginning January 1, 2003.)

The activity required by Government Code section 11135, subdivision (b), applies to all programs or activities provided by community college districts, including employment. As discussed above in the "Student Equity" section of this analysis, Title II of the ADA (42 U.S.C. § 12131-12134) and its implementing regulations (28 C.F.R. § 35 et seq.) constitute a federal mandate on community college districts for non-employment programs and activities. Thus, the requirement to meet the protections and prohibitions of Section 202 of the ADA (42 U.S.C. § 12132), which is part of Title II of the ADA, for *non-employment* programs and activities within community college districts constitutes a federal mandate, and therefore is not subject to reimbursement under article XIII B, section 6 of the California Constitution.

However, the 9th Circuit Court of Appeals in the case, *Zimmerman v Oregon Dept. of Justice*, found that Title II of the ADA (42 U.S.C. §§ 12131-12134) unambiguously does not apply to employment discrimination.[413] As noted above, however, Government Code section 11135 requires that community college districts meet the protections and prohibitions of Section 202 of the ADA (42 U.S.C. § 12132) and its implementing rules and regulations in any of its programs

[413] *Zimmerman v Oregon Dept. of Justice*, *supra*, 170 F.3d 1169.

and activities, including employment. Thus, the requirement of Government Code section 11135 for community college districts to meet the protections and prohibitions contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) and its implementing regulations (28 C.F.R. § 35 et seq.) in *employment* within community college districts exceeds the requirements of federal law and as a result do not constitute a federal mandate.

Similarly, Government Code section 11135, subdivision (d)(2), imposes a requirement on community college districts that is not required by federal law. Subdivision (d)(2) requires community college districts to comply with Section 508 of the Rehabilitation Act (29 U.S.C. § 794d), and its implementing regulations (36 C.F.R. § 1194 et seq.). However, the plain language of Section 508 of the Rehabilitation Act and its implementing regulations indicates that Section 508 and its implementing regulations apply only to *federal* agencies. Thus, absent Government Code section 11135, subdivision (d)(2), community college districts are not required to comply with the provisions of Section 508 and its implementing regulations.

As a result, the following activities do not constitute activities mandated by federal law:

1. Meet the protections contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) and its implementing regulations (28 C.F.R. § 35 et seq.) in employment within community college districts where state law does not provide stronger protections and prohibitions. (Gov. Code, § 11135, subd. (b) (Stats. 2001, ch. 708).)
2. Comply with the accessibility requirements of Section 508 of the Rehabilitation Act (29 U.S.C. § 794d), and its implementing regulations (36 C.F.R. § 1194 et seq.) in developing, procuring, maintaining, or using electronic or information technology. (Gov. Code, § 11135, subd. (d)(2) (Stats. 2002, ch. 1102), beginning January 1, 2003.)

<u>Investigation of Complaints (Cal. Code Regs., tit. 5, §§ 59320 and 59334)</u>

Title 5, sections 59320 and 59334, require community college districts to engage in the following activities:

1. Investigate complaints of unlawful discrimination in district programs or activities and seek to resolve those complaints. (Cal. Code Regs., tit. 5, § 59320 (Register 2001, No. 6; and Register 2002, No. 13).)
2. Commence an impartial fact-finding investigation of a properly filed formal complaint and notify the complainant and Chancellor that the district is doing so upon receiving a formal complaint which is properly filed. (Cal. Code Regs., tit. 5, § 59334 (Register 2001, No. 6; and Register 2002, No. 13).)

The implementing regulations of Title IX require community college districts to engage in the following activities:

1. Notify all students and employees of the name, office address and telephone number of the employee or employees appointed to coordinate community college district efforts to comply with and carry out district responsibilities under 34 Code of Federal Regulations part 106 et seq., including any investigation of any complaint communicated to the district alleging noncompliance or any act that would be prohibited by 34 Code of Federal Regulations part 106 et seq. (34 C.F.R. § 106.8, subd. (a) (May 9, 1980).)

2. Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by 34 Code of Federal Regulations part 106 et seq. (34 C.F.R. § 106.8, subd. (b) (May 9, 1980).)

As noted above, Title IX and its implementing regulations have been interpreted as prohibiting sexual harassment, including sexual harassment on the basis of sexual orientation that is sufficiently serious to limit or deny an individual's ability to participate in or benefit from the community college's programs.

Like the requirements of Title IX's implementing regulations, the implementing regulations of Title II of the ADA require community college districts to engage in the following activities:

1. Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under 28 Code of Federal Regulations part 35 et seq., including any investigation of any [non-employment related] complaint communicated to it alleging non compliance with part 35 or alleging any actions that would be prohibited by part 35. (28 C.F.R. § 35.107 (July 26, 1991).)
2. Adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by 28 Code of Federal Regulations part 35 et seq., if employing 50 or more persons. (28 C.F.R. § 35.107, subd. (b) (July 26, 1991).)

As shown by the language above, the implementing regulations of Title IX, which prohibits discrimination on the basis of gender, and Title II of the ADA, which prohibits discrimination on the basis of disability, require community college districts to investigate complaints of discrimination on the basis of gender (Title IX)[414] and complaints of non-employment discrimination on the basis of disability (Title II of the ADA) and to resolve these complaints. However, it is important to note that under California Code of Regulations, title 5, section 59320 et seq., the ability to file a complaint is not limited to students and employees, as is the requirement in Title IX. In addition, the requirements of Title IX and Title II of the ADA do not require community college districts to notify the complainant or the Chancellor that an investigation has been initiated. Thus, the requirement to investigate and resolve complaints of gender discrimination by students and employees and complaints of non-employment discrimination based on disability constitutes a federal mandate.

The claimants argue, "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."[415] The claimants do not identify a specific instance where this has occurred within the analysis. However, to the extent that the claimants are referring to the above analysis, the regulations of Title IX and Title II of the ADA specifically require districts to appoint at least one employee to coordinate efforts to comply with and carry out district responsibilities including investigations of complaints of violations of Title IX and Title II of the ADA. Thus,

[414] Including sexual harassment on the basis of sexual orientation.

[415] Claimant Comments on Draft Staff Analysis, p. 7.

implementation of the grievance procedures discussed above is mandated by the regulations implementing Title IX and Title II of the ADA.

However, the following activities required by California Code of Regulations, title 5, sections 59320 and 59334 *do not* constitute federal mandates:

1. Investigate complaints of unlawful discrimination (i.e. discrimination on the basis of ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation) in district programs or activities and seek to resolve those complaints. This does not include complaints of gender discrimination, including complaints of sexual harassment on the basis of sexual orientation, by employees and students, and complaints of non-employment discrimination on the basis of disability. (Cal. Code Regs., tit. 5, § 59320 (Register 2001, No. 6; and Register 2002, No. 13).)
2. Notify the complainant and the Chancellor that the district has commenced an investigation of a properly filed formal complaint. (Cal. Code Regs., tit. 5, § 59334 (Register 2001, No. 6; and Register 2002, No. 13).)

District Policies (Cal. Code Regs., tit. 5, § 59322):

Title 5, section 59322, requires community college districts to engage in the following activity:

> Establish and adopt written policies consistent with California Code of Regulations, title 5, sections 59320-59342. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13).)

California Code of Regulations, title 5, sections 59320-59342, set forth the discrimination grievance/complaint procedures for community college districts. As a result, section 59322 requires community college districts to establish and adopt policies for discrimination complaint procedures.

When construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it its plainly erroneous or inconsistent with the regulation.[416] The Chancellor's Office issued legal advisories in 2004 and 2006, suggesting that no distinction exists between the words "policies," "procedures," or "policies and procedures" when interpreting the above requirement of section 59322.[417] This interpretation of section 59322 is not plainly erroneous or inconsistent with the section, and thus, section 59322

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[416] *U.S. v Larionoff* (1977) 431 U.S. 864, 872.

[417] Nondiscrimination Complaint Processing, Legal Advisory 04-04, (September 15, 2004), in which the Chancellor's Office entitles the section discussing title 5, section 59322 as "Policies and Procedures." In addition, although the language of section 59322 provides that districts are to establish and adopt written "policies," the Chancellor identifies problems districts have in complying with the requirements of section 59322, including: (1) districts failing to send the Chancellor's Office their "current policies and procedures;" (2) districts have not sent "subsequently amended policies and/or procedures to the Chancellor's Office;" and (3) districts having "outdated policies and procedures." See also, Changes to Nondiscrimination Regulations, Legal Advisory A 06-01, (May 18, 2006), in which the Chancellor's Office states "title 5, section 59322 requires that the most current version of the district's unlawful discrimination complaint policies and procedures be filed with this office."

requires the establishment and adoption of written policies or procedures for community college district discrimination complaint procedures.

The implementing regulations of Title IX require community college districts to engage in the following activities:

> Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by 34 Code of Federal Regulations part 106 et seq. (34 C.F.R. § 106.8, subd. (b) (May 9, 1980).)

Similarly the implementing regulations of Title II of the ADA require community college districts to engage in the following activity:

> Adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by 28 Code of Federal Regulations part 35 et seq., if employing 50 or more persons. (28 C.F.R. § 35.107, subd. (b) (July 26, 1991).)

In addition, the implementing regulations of Section 504 require community college districts to engage in the following activity:

> Adopt grievance procedures for employees and students that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by 34 Code of Federal Regulations part 104 (which implements section 504 of the Rehabilitation Act), if employing 15 people or more. (34 C.F.R. § 104.7, subd. (b) (May 9, 1980).)

As shown by the language above, the implementing regulation of Title IX, which prohibits discrimination on the basis of gender, and Title II of the ADA and Section 504, which prohibits discrimination on the basis of disability, require community college districts to adopt and publish grievance procedures for complaints of gender discrimination and disability discrimination. However, it is necessary to note that the requirement for the adoption of complaint procedures under California Code of Regulations, title 5, section 59322 is not limited to employees and students as it is under Title IX and Section 504, which prohibit discrimination on the basis of gender and disability. Nor does the requirement of California Code of Regulations, title 5, section 59322 exclude complaints of employment discrimination on the basis of disability like Title II of the ADA does.

Thus, the requirement to establish and adopt policies for discrimination complaint procedures for employees and students alleging gender and disability discrimination and for individuals alleging non-employment discrimination on the basis of disability constitutes a federal mandate. However, the following activity required by California Code of Regulations, title 5, section 59322, *does not* constitute a federal mandate:

> Establish and adopt written policies consistent with the regulations addressing district discrimination complaint procedures for complaints of discrimination on the basis of ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation (Cal. Code Regs., tit. 5, §§ 59320-59342).
>
> This activity does not include complaint procedures for: (1) employees and students alleging gender discrimination (including sexual harassment) and

> disability discrimination; (2) employees and students alleging sexual harassment on the basis of sexual orientation; and (3) for individuals alleging non-employment discrimination on the basis of disability. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13).)

Responsible District Officer (Cal. Code Regs., tit. 5, § 59324)

Title 5, section 59324, requires community college districts to engage in the following activity:

> Identify to the Chancellor and to the public a single person as the district officer responsible for receiving complaints filed pursuant to California Code of Regulations, title 5, section 59328 and coordinating their investigation. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13).)

The implementing regulations of Title IX require community college districts to engage in the following activities:

1. Notify all students and employees of the name, office address and telephone number of the employee or employees appointed to coordinate community college district efforts to comply with and carry out district responsibilities under 34 Code of Federal Regulations part 106 et seq., including any investigation of any complaint communicated to the district alleging noncompliance or any act that would be prohibited by 34 Code of Federal Regulations part 106 et seq. (34 C.F.R. § 106.8, subd. (a) (May 9, 1980).)
2. Implement specific and continuing steps to notify applicants for admission and employment, employees, that it does not discriminate on the basis of sex and that it is required by Title IX and 34 Code of Federal Regulations part 106 et seq. not to discriminate in such a manner, and that inquiries concerning the application of title IX and part 106 et seq. to the community college may be referred to the employee designated to coordinate efforts to comply and carry out the responsibilities of part 106 et seq. (34 C.F.R. § 106.9, subd. (a) (Nov. 13, 2000).)

The above federal mandates imposed on community college districts by Title IX's implementing regulations require districts to identify to students, employees, student applicants, and applicants for employment the district officer responsible for receiving complaints of discrimination on the basis of gender. However, this federal mandate does not include identifying the district officer to the Chancellor or to the public (excluding student, employees, student applicants, and applicants for employment), and is limited to the district officer's responsibilities as it applies to discrimination based on gender.

The implementing regulations of Section 504 require community college districts to engage in the following activity:

> Take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees of community college district programs or activities, and unions or professional organizations holding collective bargaining or professional agreements with the community college district of the identification of the employee responsible for coordinating the districts efforts to comply with 34 Code of Federal Regulations part 104, which prohibits discrimination based on disability. (34 C.F.R. § 104.8, subd. (a) (Nov. 13, 2000).)

The implementing regulations of Section 504 mandate community college districts to identify the district officer responsible for receiving complaints of discrimination on the basis of disability to participants, beneficiaries, applicants, and employees of the district's programs or activities, and unions or professional organizations holding collective bargaining or professional agreements with the community college district. Although this federal mandate notifies a broader range of individuals than the mandate of Title IX, it also does not include the Chancellor or the broad group of individuals encompassed in the term "the public." In addition, the federal mandate is limited to the district officer's responsibilities as it applies to discrimination based on disability.

The implementing regulations of Title II of the ADA require community college districts to engage in the following activity:

> Make available to all interested individuals the name, office address, and telephone number of the employee or employees responsible for the community college districts efforts to comply with and carry out the responsibilities under 28 Code of Federal Regulations part 35 et seq. (28 C.F.R. § 35.107, subd. (a) (July 26, 1991).)

The federal mandate imposed by the implementing regulations of Title II of the ADA requires a community college district to identify the district officer responsible for receiving non-employment complaints of discrimination based on disability to all interested individuals. The broad term "all interested individuals" is inclusive of not only the Chancellor but also the public. However, the federal mandate is limited to the district officer's responsibilities as it applies to non-employment discrimination based on disability.

Based on the above discussion, a portion of the activity required by California Code of Regulations, title 5, section 59324, constitutes a federal mandate. However, the following activity required by section 59324 exceeds what is mandated by federal law and as a result *does not* constitute a federal mandate:

> Identify to the Chancellor and to the public a single person as the district officer responsible for receiving discrimination complaints based on ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation (filed pursuant to Cal. Code Regs., tit. 5, § 59328) and coordinating their investigation.
>
> This does not include the identification of the district officer responsible for receiving complaints of discrimination on the basis of gender to students, employees, student applicants, and applicants for employment. This also does not include the identification of the district officer responsible for receiving complaints of discrimination on the basis of disability to participants, beneficiaries, applicants, and employees of the district's programs or activities, and unions or professional organizations holding collective bargaining or professional agreements with the community college district. In addition, this does not include the identification of the district officer for receiving complaints of non-employment discrimination on the basis of disability to the Chancellor and the public. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13).)

If the requirements of a test claim statute or regulation exceed the requirements of federal law, those activities are *not* federal mandates and *may* be subject to article XIII B, section 6. For example, in *Long Beach Unified School Dist. v. State of California*, federal law required school districts to take reasonable steps to alleviate racial and ethnic segregation, and the federal courts suggested certain approaches to comply.[418] State law was enacted to require specific action of school districts to alleviate segregation. The court found that the state law requirements went beyond federal constitutional and case law requirements or suggestions and mandated a higher level of service.[419] In this case, there are several activities that exceed the requirements of federal law and are, thus, not mandated by federal law. In addition, none of the excess activities are downstream activities triggered by a discretionary decision of a community college district, and as a result, the excess activities are mandated by the state.

(iii) Summary of State-Mandated Activities that Exceed the Requirements of Federal Law:

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

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

3. Investigate complaints of unlawful discrimination (i.e. discrimination on the basis of ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation) in district programs or activities and seek to resolve those complaints. This does not include complaints of gender discrimination, including complaints of sexual harassment on the basis of sexual orientation, by employees and students, and complaints of non-employment discrimination on the basis of disability. (Cal. Code Regs., tit. 5, § 59320 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

4. Establish and adopt written policies consistent with the regulations addressing district discrimination complaint procedures for complaints of discrimination on the basis of ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation (Cal. Code Regs., tit. 5, §§ 59320-59342).

   This activity does not include complaint procedures for: (1) employees and students alleging gender discrimination (including sexual harassment) and disability discrimination; (2) employees and students alleging sexual harassment on the basis of sexual orientation; and (3) for individuals alleging non-employment discrimination on the basis of disability. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

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[418] *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

[419] *Id.* at p. 173.

5. Submit district policies, which address community college district discrimination complaint and enforcement procedures (adopted pursuant to Cal. Code Regs., tit. 5, § 59322), to the Chancellor for review and approval within 90 days of the effective date of adopting or amending the policies. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

6. Identify to the Chancellor and to the public a single person as the district officer responsible for receiving discrimination complaints based on ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation (filed pursuant to Cal. Code Regs., tit. 5, § 59328) and coordinating their investigation.

   This does not include the identification of the district officer responsible for receiving complaints of discrimination on the basis of gender to students, employees, student applicants, and applicants for employment. This also does not include the identification of the district officer responsible for receiving complaints of discrimination on the basis of disability to participants, beneficiaries, applicants, and employees of the district's programs or activities, and unions or professional organizations holding collective bargaining or professional agreements with the community college district. In addition, this does not include the identification of the district officer for receiving complaints of non-employment discrimination on the basis of disability to the Chancellor and the public. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

7. Use other staff or outside persons or organizations under contract with the district whenever the officer designated to receive complaints is named in the complaint or is implicated by the allegations in the complaint. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

8. Notify students and employees of the provisions of California Code of Regulations, title 5, section 59300 et seq., which address the two levels of discrimination complaint procedures for community college districts (beginning at the community college district level and ending at the state level). (Cal. Code Regs., tit. 5, § 59326 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

9. The district officer shall undertake efforts to informally resolve the charges whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(1) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

10. The district officer shall advise the complainant that he or she need not participate in informal resolution whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(2) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

11. As part of the informal resolution process, the district officer shall notify the person bringing the charges of the right to file a formal complaint, as defined by California Code of Regulations, title 5, section 59311, and the procedure for filing a formal complaint pursuant to California Code of Regulations, title 5, section 59328 whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal.

Code Regs., tit. 5, § 59327, subd. (a)(3) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

12. As part of the informal resolution process, the district officer shall advise the complainant that he or she may file his or her non-employment based complaint with the Office of Civil Rights of the U.S. Department of Education (OCR) where such a complaint is within that agency's jurisdiction whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(4) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
13. As part of the informal resolution process, the district officer shall advise the complainant that he or she may file his or her employment-based complaint with the U.S. Equal Employment Opportunity Commission (EEOC) or the California Department of Fair Employment and Housing (DFEH) where the complaint is within the jurisdiction of those agencies. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(5) (Register 2002, No. 13), beginning April 19, 2002.)
14. Include investigation in efforts at informal resolution if the responsible district officer determines that an investigation is warranted by the seriousness of the charges. (Cal. Code Regs., tit. 5, § 59327, subd. (b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
15. After a formal complaint is filed the formal investigation conducted pursuant to California Code of Regulations, title 5, section 59334 must be completed unless the matter is informally resolved and the complainant dismisses the formal complaint. (Cal. Code of Regs., tit. 5, § 59327, subd. (c) (Register 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)
16. After a complaint is filed the formal investigation conducted pursuant to California Code of Regulations, title 5, section 59334 must be completed unless the matter is informally resolved and the complainant dismisses the formal complaint or the complainant files with the Department of Fair Employment and Housing and the Chancellor elects not to require further investigation pursuant to California Code of Regulations, title 5, section 59328, subd. (f)(2). (Cal. Code of Regs., tit. 5, § 59327, subd. (c) (Register 2002, No. 13), beginning April 19, 2002.)
17. As part of the formal complaint process, advise any complainant alleging discrimination in employment that he or she may file his or her complaint with the U.S. Equal Employment Opportunity Commission (EEOC) or Department of Fair Employment and Housing where the complaint is within the jurisdiction of those agencies. (Cal. Code Regs., tit. 5, § 59328, subd. (f)(1) (Register 2002, No. 13), beginning April 19, 2002.)
18. As part of the formal complaint process, for any complaint alleging discrimination in employment, forward a copy of any filing by the complainant with the Department of Fair Employment and Housing to the Chancellor's Office for a determination of whether the issues presented require an independent investigation of the matter under the provisions of the discrimination complaint procedure regulations (Cal. Code Regs., tit. 5, § 53000 et seq.). (Cal. Code Regs., tit. 5, § 59328, subd. (f)(2) (Register 2002, No. 13), beginning April 19, 2002.)

19. Forward a copy of the formal complaint to the Chancellor immediately upon receiving a formal complaint filed in accordance with California Code of Regulations, title 5, section 59328. (Cal. Code Regs., tit. 5, § 59330 (Register 2001, No. 6; and Register 2002, No. 13.), beginning July 1, 2001.)
20. Immediately notify the complainant that his or her formal complaint does not meet the requirements of California Code of Regulations, title 5, section 59328, and specify in what way the complaint is defective, if the district receives a complaint that does not meet the requirements of section 59328. (Cal. Code Regs., tit. 5, § 59332 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
21. Notify the complainant and the Chancellor that the district has commenced an investigation of a properly filed formal complaint. (Cal. Code Regs., tit. 5, § 59334 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
22. Set forth the results of the investigation conducted in the formal complaint process in a written report that includes at least all of the following:
    a. A description of the circumstances giving rise to the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
    b. A summary of the testimony provided by each witness, including the complainant and any witnesses identified by the complainant in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (b) (Register 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)
    c. A summary of the testimony provided by each viable witness, including the complainant and any witnesses identified by the complainant in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (b) (Register 2002, No. 13), beginning April 19, 2002.)
    d. An analysis of any relevant data or other evidence collected during the course of the investigation. (Cal. Code Regs., tit. 5, § 59334, subd. (c) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
    e. A specific finding as to whether the discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (d) (Register 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)
    f. A specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (d) (Register 2002, No. 13), beginning April 19, 2002.)
    g. Any other information deemed appropriate by the district. (Cal. Code Regs., tit. 5, § 59334, subd. (e) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
23. Complete the district investigation conducted during the formal complaint process and forward a copy of the investigative report required pursuant to California Code of Regulations, title 5, section 59334 to the Chancellor, a copy or summary of the report to

the complainant, and written notice setting forth all of the following to both the complainant and the Chancellor:

a. The determination of the chief executive officer or his/her designee as to whether discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59336, subd. (a) (Register 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)

b. The determination of the chief executive officer or his/her designee as to whether there is probable cause to believe discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59336, subd. (a) (Register 2002, No. 13), beginning April 19, 2002.)

c. A description of the actions taken, if any, to prevent similar problems from occurring in the future. (Cal. Code Regs., tit. 5, § 59336, sub. (b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

d. The proposed resolution of the complaint. (Cal. Code Regs., tit. 5, § 59336, subd. (c) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

e. The complainant’s right to appeal to the district governing board and the Chancellor pursuant to California Code of Regulations, title 5, sections 59338 and 59339. (Cal. Code Regs., tit. 5, § 59336, subd. (d) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

24. Forward to the complainant and the Chancellor a copy of the final district decision rendered by the governing board that includes a complainant's right to appeal the district's decision to the Chancellor pursuant to California Code of Regulations, title 5, section 59339. Administrative determinations are made final by the district issuing a decision or by taking no action 45 days after an appeal to the district governing board by complainant not satisfied by the administrative determination (Cal. Code Regs., tit. 5, § 59338, subd. (a) and (c). (Cal. Code Regs., tit. 5, § 59338 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

25. Forward the following to the Chancellor within 150 days of receiving a formal complaint:

a. A copy of the final district decision rendered by the governing board or a statement indicating the date on which the administrative determination became final pursuant to California Code of Regulations, title 5, section 59338, subdivision (a). (Cal. Code Regs., tit. 5, § 59340, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

b. A copy of the notice to the complainant required pursuant to California Code of Regulations, title 5, section 59338, subdivision (a). (Cal. Code Regs., tit. 5, § 59340, subd. (b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

c. Such other information as the Chancellor may require. (Cal. Code Regs., tit. 5, § 59340, subd. (c) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

26. File a written request that the Chancellor grant an extension of the 90-day or 150-day deadline to forward the investigative report to the Chancellor or to forward the final district decision to the Chancellor (specified in Cal. Code Regs., tit. 5, §§ 59336 or 59340), 10 days before the expiration of the deadline, if for reasons beyond the district's control the district is unable to comply with the deadline. (Cal. Code Regs., tit. 5, § 59342, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

27. Provide the reasons for the request for an extension of the 90-day or 150-day deadline to forward the investigative report to the Chancellor or to forward the final district decision to the Chancellor, and the date by which the district expects to be able to submit the required materials in the request. (Cal. Code Regs., tit. 5 § 59342, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

    d. <u>The state-mandated activities imposed by Education Code section 11135; and California Code of Regulations, title 5, sections 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, and 59342 constitute a new program or higher level of service</u>

To constitute a "new program or higher level of service" the activities must carry out the governmental function of providing a service to the public, or impose unique requirements on local governments that do not apply to all residents and entities in the state in order to implement a state policy.[420] In addition, the requirements must be new in comparison with the pre-existing scheme and must be intended to provide an enhanced service to the public.[421] To make this determination, the requirements must initially be compared with the legal requirements in effect immediately prior to its enactment.[422]

<u>Prohibition Against Discrimination (Gov. Code, § 11135, subds. (b) and (d)(2))</u>

The claimants have pled Government Code section 11135, as first added in 1977, last amended in 2002, and every amendment in between.[423] Section 11135, subdivisions (b) and (d)(2), mandate community college districts to engage in the following activities:

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

2. Comply with the accessibility requirements of Section 508 of the Rehabilitation Act (29 U.S.C. § 794d), and its implementing regulations (36 C.F.R. § 1194 et seq.) in

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[420] *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56.

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

[422] *Ibid*.

[423] Statutes 1977, chapter 972; Statutes 1992, chapter 913; Statutes 1994, chapter 146; Statutes 2001, chapter 708; and Statutes 2002, chapters 300 and 1102.

developing, procuring, maintaining, or using electronic or information technology. (Gov. Code, § 11135, subd. (d)(2) (Stats. 2002, ch. 1102), beginning January 1, 2003.)

The above activities constitute a "program" under article XIII B, section 6 of the California Constitution, by carrying out the governmental function of prohibiting the use of public funds for unlawfully discriminatory purposes in the peculiarly government function of providing education.[424] Prior to 1992, community college districts were not required to meet the protections and prohibitions contained in Section 202 of the Rehabilitation Act in employment within community college districts. In addition, prior to 2002, community college districts were not required to comply with the accessibility requirements of Section 508 of the Rehabilitation Act in developing, procuring, maintaining, or using electronic or information technology. Keeping in mind that these activities are also not mandated on community college districts by federal law, the activities mandated by subdivisions (b) and (d)(2) are new as compared with the legal requirements in effect immediately prior to their enactment.

Thus, the Commission finds that the following state-mandated activities imposed by Government Code section 11135, subdivisions (b) and (d)(2), constitute a new program or higher level of service:

1. Meet the protections contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) and its implementing regulations (28 C.F.R. § 35 et seq.) in employment within community college districts where state law does not provide stronger protections and prohibitions. (Gov. Code, § 11135, subd. (b) (Stats. 2001, ch. 708).)
2. Comply with the accessibility requirements of Section 508 of the Rehabilitation Act (29 U.S.C. § 794d), and its implementing regulations (36 C.F.R. § 1194 et seq.) in developing, procuring, maintaining, or using electronic or information technology. (Gov. Code, § 11135, subd. (d)(2) (Stats. 2002, ch. 1102), beginning January 1, 2003.)

<u>District Investigation, Policies, Officer, Complaint Process (Cal. Code Regs., tit. 5, §§ 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, and 59342)</u>

The claimants have pled title 5, sections 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, and 59342, as added in 1981,[425] and all subsequent amendments and additions through 2002.[426] Prior to 1981, community college districts were not required to engage in any of the activities mandated by sections 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, and 59342. Thus, the activities mandated by sections 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, and 59342 are new as compared to the regulatory scheme existing prior to the addition and amendments to the regulation sections.

In addition, like the activities mandated by Government Code section 11135, the state-mandated activities imposed by California Code of Regulations, title 5, sections 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, and 59342 constitute a "program"

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[424] *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d at 172.

[425] Register 81, number 16.

[426] Register 2002, number 23.

under article XIII B, section 6 of the California Constitution, by carrying out the governmental function of prohibiting the use of public funds for unlawfully discriminatory purposes in the peculiarly government function of providing education.[427] Thus, the Commission finds that the activities mandated by California Code of Regulations, title 5, sections 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, and 59342, constitute a state-mandated new program or higher level of service.

(i) Summary of State-Mandated New Program or Higher Level of Service

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

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

3. Investigate complaints of unlawful discrimination (i.e. discrimination on the basis of ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation) in district programs or activities and seek to resolve those complaints. This does not include complaints of gender discrimination, including complaints of sexual harassment on the basis of sexual orientation, by employees and students, and complaints of non-employment discrimination on the basis of disability. (Cal. Code Regs., tit. 5, § 59320 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

4. Establish and adopt written policies consistent with the regulations addressing district discrimination complaint procedures for complaints of discrimination on the basis of ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation (Cal. Code Regs., tit. 5, §§ 59320-59342).

   This does not include complaint procedures for: (1) employees and students alleging gender discrimination (including sexual harassment) and disability discrimination; (2) employees and students alleging sexual harassment on the basis of sexual orientation; and (3) for individuals alleging non-employment discrimination on the basis of disability. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

5. Submit district policies, which address community college district discrimination complaint and enforcement procedures (adopted pursuant to Cal. Code Regs., tit. 5, § 59322) to the Chancellor for review and approval within 90 days of the effective date of adopting or amending the policies. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

6. Identify to the Chancellor and to the public a single person as the district officer responsible for receiving discrimination complaints based on ethnic group identification,

[427] *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d at 172.

national origin, religion, age, race, color, ancestry, and sexual orientation (filed pursuant to Cal. Code Regs., tit. 5, § 59328) and coordinating their investigation.

This does not include the identification of the district officer responsible for receiving complaints of discrimination on the basis of gender to students, employees, student applicants, and applicants for employment. This also does not include the identification of the district officer responsible for receiving complaints of discrimination on the basis of disability to participants, beneficiaries, applicants, and employees of the district's programs or activities, and unions or professional organizations holding collective bargaining or professional agreements with the community college district. In addition, this does not include the identification of the district officer for receiving complaints of non-employment discrimination on the basis of disability to the Chancellor and the public. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

7. Use other staff or outside persons or organizations under contract with the district whenever the officer designated to receive complaints is named in the complaint or is implicated by the allegations in the complaint. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

8. Notify students and employees of the provisions of California Code of Regulations, title 5, section 59300 et seq., which address the two levels of discrimination complaint procedures for community college districts (beginning at the community college district level and ending at the state level). (Cal. Code Regs., tit. 5, § 59326 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

9. The district officer shall undertake efforts to informally resolve the charges whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(1) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

10. The district officer shall advise the complainant that he or she need not participate in informal resolution whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(2) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

11. As part of the informal resolution process, the district officer shall notify the person bringing the charges of the right to file a formal complaint, as defined by California Code of Regulations, title 5, section 59311, and the procedure for filing a formal complaint pursuant to California Code of Regulations, title 5, section 59328 whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(3) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

12. As part of the informal resolution process, the district officer shall advise the complainant that he or she may file his or her non-employment based complaint with the Office of Civil Rights of the U.S. Department of Education (OCR) where such a complaint is within that agency's jurisdiction whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(4) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

13. As part of the informal resolution process, the district officer shall advise the complainant that he or she may file his or her employment-based complaint with the U.S. Equal Employment Opportunity Commission (EEOC) or the California Department of Fair Employment and Housing (DFEH) where the complaint is within the jurisdiction of those agencies. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(5) (Register 2002, No. 13), beginning April 19, 2002.)
14. Include investigation in efforts at informal resolution if the responsible district officer determines that an investigation is warranted by the seriousness of the charges. (Cal. Code Regs., tit. 5, § 59327, subd. (b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
15. After a formal complaint is filed the formal investigation conducted pursuant to California Code of Regulations, title 5, section 59334 must be completed unless the matter is informally resolved and the complainant dismisses the formal complaint. (Cal. Code of Regs., tit. 5, § 59327, subd. (c) (Register 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)
16. After a complaint is filed the formal investigation conducted pursuant to California Code of Regulations, title 5, section 59334 must be completed unless the matter is informally resolved and the complainant dismisses the formal complaint or the complainant files with the Department of Fair Employment and Housing and the Chancellor elects not to require further investigation pursuant to California Code of Regulations, title 5, section 59328, subd. (f)(2). (Cal. Code of Regs., tit. 5, § 59327, subd. (c) (Register 2002, No. 13), beginning April 19, 2002.)
17. As part of the formal complaint process, advise any complainant alleging discrimination in employment that he or she may file his or her complaint with the U.S. Equal Employment Opportunity Commission (EEOC) or Department of Fair Employment and Housing where the complaint is within the jurisdiction of those agencies. (Cal. Code Regs., tit. 5, § 59328, subd. (f)(1) (Register 2002, No. 13), beginning April 19, 2002.)
18. As part of the formal complaint process, for any complaint alleging discrimination in employment, forward a copy of any filing by the complainant with the Department of Fair Employment and Housing to the Chancellor's Office for a determination of whether the issues presented require an independent investigation of the matter under the provisions of the discrimination complaint procedure regulations (Cal. Code Regs., tit. 5, § 53000 et seq.). (Cal. Code Regs., tit. 5, § 59328, subd. (f)(2) (Register 2002, No. 13), beginning April 19, 2002.)
19. Forward a copy of the formal complaint to the Chancellor immediately upon receiving a formal complaint filed in accordance with California Code of Regulations, title 5, section 59328. (Cal. Code Regs., tit. 5, § 59330 (Register 2001, No. 6; and Register 2002, No. 13.), beginning July 1, 2001.)
20. Immediately notify the complainant that his or her formal complaint does not meet the requirements of California Code of Regulations, title 5, section 59328, and specify in what way the complaint is defective, if the district receives a complaint that does not meet the requirements of section 59328. (Cal. Code Regs., tit. 5, § 59332 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

21. Notify the complainant and the Chancellor that the district has commenced an investigation of a properly filed formal complaint. (Cal. Code Regs., tit. 5, § 59334 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

22. Set forth the results of the investigation conducted in the formal complaint process in a written report that includes at least all of the following:

    a. A description of the circumstances giving rise to the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

    b. A summary of the testimony provided by each witness, including the complainant and any witnesses identified by the complainant in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (b) (Register 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)

    c. A summary of the testimony provided by each viable witness, including the complainant and any witnesses identified by the complainant in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (b) (Register 2002, No. 13), beginning April 19, 2002.)

    d. An analysis of any relevant data or other evidence collected during the course of the investigation. (Cal. Code Regs., tit. 5, § 59334, subd. (c) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

    e. A specific finding as to whether the discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (d) (Register 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)

    f. A specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (d) (Register 2002, No. 13), beginning April 19, 2002.)

    g. Any other information deemed appropriate by the district. (Cal. Code Regs., tit. 5, § 59334, subd. (e) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

23. Complete the district investigation conducted during the formal complaint process and forward a copy of the investigative report required pursuant to California Code of Regulations, title 5, section 59334 to the Chancellor, a copy or summary of the report to the complainant, and written notice setting forth all of the following to both the complainant and the Chancellor:

    a. The determination of the chief executive officer or his/her designee as to whether discrimination did or did not occur with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59336, subd. (a) (Register 20 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)

    b. The determination of the chief executive officer or his/her designee as to whether there is probable cause to believe discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59336, subd. (a) (Register 2002, No. 13), beginning April 19, 2002.)

c. A description of the actions taken, if any, to prevent similar problems from occurring in the future. (Cal. Code Regs., tit. 5, § 59336, sub. (b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

d. The proposed resolution of the complaint. (Cal. Code Regs., tit. 5, § 59336, subd. (c) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

e. The complainant's right to appeal to the district governing board and the Chancellor pursuant to California Code of Regulations, title 5, sections 59338 and 59339. (Cal. Code Regs., tit. 5, § 59336, subd. (d) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

24. Forward to the complainant and the Chancellor a copy of the final district decision rendered by the governing board that includes a complainant's right to appeal the district's decision to the Chancellor pursuant to California Code of Regulations, title 5, section 59339. Administrative determinations are made final by the district issuing a decision or by taking no action 45 days after an appeal to the district governing board by complainant not satisfied by the administrative determination (Cal. Code Regs., tit. 5, § 59338, subd. (a) and (c). (Cal. Code Regs., tit. 5, § 59338 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

25. Forward the following to the Chancellor within 150 days of receiving a formal complaint:

a. A copy of the final district decision rendered by the governing board or a statement indicating the date on which the administrative determination became final pursuant to California Code of Regulations, title 5, section 59338, subdivision (a). (Cal. Code Regs., tit. 5, § 59340, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

b. A copy of the notice to the complainant required pursuant to California Code of Regulations, title 5, section 59338, subdivision (a). (Cal. Code Regs., tit. 5, § 59340, subd. (b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

c. Such other information as the Chancellor may require. (Cal. Code Regs., tit. 5, § 59340, subd. (c) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

26. File a written request that the Chancellor grant an extension of the 90-day or 150-day deadline to forward the investigative report to the Chancellor or to forward the final district decision to the Chancellor (specified in Cal. Code Regs., tit. 5, §§ 59336 or 59340), 10 days before the expiration of the deadline, if for reasons beyond the districts control the district is unable to comply with the deadline. (Cal. Code Regs., tit. 5, § 59342, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

27. Provide the reasons for the request for an extension of the 90-day or 150-day deadline to forward the investigative report to the Chancellor or to forward the final district decision to the Chancellor, and the date by which the district expects to be able to submit the required materials in the request. (Cal. Code Regs., tit. 5 § 59342, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

C. The state-mandated new program or higher level of service imposes costs mandated by the state on community college districts within the meaning of article XIII B, section 6, and Government Code sections 17514 and 17556

In order for the test claim statutes to impose a reimbursable state-mandated program under the California Constitution, the test claim statutes must impose costs mandated by the state.[428] Government Code section 17514 defines "cost mandated by the state" as follows:

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

The claimants estimate that more than $1,000 in staffing and other costs in excess of any funding provided to districts was incurred between July 1, 2001 through June 30, 2002 to implement all the duties alleged by the claimants to be mandated by the state.[429] Thus, the claimants have met the minimum burden of showing costs necessary to file a test claim pursuant to Government Code section 17564.

However, pursuant to Government Code section 17556, subdivisions (e) and (f), the Chancellor's Office and Finance argue that the claimants are not entitled to reimbursement for state-mandated activities associated with the code sections and title 5 regulations pled in the "equal employment opportunity" section of this analysis (Ed. Code, §§ 87101 and 87102; Cal. Code Regs., tit. 5, § 53001 et seq.), and the code sections and title 5 regulations pled in the "discrimination complaint procedures" section of this analysis (Govt. Code, § 11135, subd.. (b) and (d)(2); and Cal. Code Regs., tit. 5, §§ 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, and 59342), because the activities mandated by the code sections and title 5 regulations are either fully funded or necessary to implement a ballot measure approved by voters.

(1) The Commission is not prohibited by Government Code section 17556, subdivisions (e) and (f), from finding costs mandated by the state, as defined by Government Code section 17514 for the state-mandated new programs or higher levels of service imposed by the test claim statutes and regulations pled in the "equal employment opportunity" and "discrimination complaint procedures" sections of this analysis

The following discussion will address whether the Commission is prohibited from finding costs mandated by the state resulting from the test claim statutes and regulations pled in the "equal employment opportunity" and the "discrimination complaint procedures" sections of this analysis pursuant to Government Code section 17556, subdivisions (e) and (f). Because two versions of the test claim statutes and regulations pled in the "equal employment opportunity"

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[428] *Lucia Mar*, *supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[429] *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Test Claim Filing and Attachments for 02-TC-31," Exhibit 1, Declaration of Piedad F. Robertson, President of Santa Monica Community College District. Also, Test Claim 02-TC-46, Exhibit 1, Declaration of Thomas J. Donner, Executive Vice President of Santa Monica Community College District.

section existed after the start of the reimbursement period (July 1, 2001), each version will be addressed separately below.

a. Equal Employment Opportunity: (Ed. Code, §§ 87101 and 87102; Cal. Code Regs., tit. 5, § 53001 et seq.)

Government Code section 17556, subdivision (e), prohibits a finding of costs mandated by the state if additional revenue specifically intended to fund the costs of the state mandate in an amount sufficient to fund the state-mandated new program or higher level of service has been provided in the statute, executive order, or an appropriation in a Budget Act or other bill. In regard to the code sections and regulations discussed in the "equal employment opportunity" section of this analysis, the Chancellor's Office argues:

> Claimant raises issues under Education Code section 87100, et seq. Section 87102 provides that the activities described in the article are conditions to receipt of funds that are provided by the Equal Employment Opportunity Fund that is described in section 87107. Therefore, Claimant is not entitled to reimbursement for the activities described in section 87100 et seq. for two reasons.
>
> [¶] … [¶]
>
> Second, the Employment Opportunity Fund is available for the payment of any documented costs, and reimbursement under this process would be double recovery.[430]

Before addressing the Chancellor's arguments, it is necessary to repeat two issues previously discussed in the "equal employment opportunity" section of this analysis. First, two versions of Education Code sections 87101 and 87102 existed after the start of the reimbursement period (July 1, 2001) as a result of Education Code section 87100 et seq. being found unconstitutional by the court in *Connerly v. State Personnel Bd.* on September 4, 2001.[431] Second, the pre-September 4, 2001 version of Education Code section 87100 et seq. was specifically implemented by California Code of Regulations, title 5, section 53001 et seq. However, after the September 4, 2001, decision in *Connerly v. State Personnel Bd*. Education Code sections 87100 et seq. and California Code of Regulations, title 5, section 53001 et seq. were amended as separate efforts to address the same issue of equal employment opportunity. Thus, California Code of Regulations, title 5, section 53001 et seq., no longer implements Education Code sections 87101 and 87102, but acts as a separate directive on community college districts.

The following discussion will address the application of Government Code section 17556, subdivision (e), to Education Code sections 87101 and 87102, and California Code of Regulations, title 5, section 53001 et seq., as they existed: (1) after the *Connerly v. State Personnel Bd*. decision; and (2) before the *Connerly v. State Personnel Bd*. decision.

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[430] See *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31), "Chancellor's Office Comments on 02-TC-31, dated March 11, 2004," pgs. 10-12.

[431] *Connerly v. State Personnel Bd., supra,* 92 Cal.App. 4th at pgs. 57-61.

(i) Equal Employment Opportunity Title 5 Regulations After the *Connerly v. Personnel Bd.* Decision

Because Education Code sections 87101 and 87102, as amended by Statutes 2002, chapter 1169, do not impose any state-mandated activities on community college districts, the below analysis will discuss the use of Equal Employment Opportunity Funds for purposes of the activities mandated by title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034, as amended by Register 2002, number 35.

The Chancellor's Office reference to the "Equal Employment Opportunity Fund" as established by Education Code section 87107, indicates that the Chancellor's arguments are directed only at Education Code sections 87101 and 87102, as repealed and replaced by Statutes 2002, chapter 1169 (post *Connerly v. State Personnel Bd.*).[432] During this period the "Equal Employment Opportunity Fund" was established in 2002 as a source of funds conditioned on compliance with Education Code section 87100 et seq.

As established in 2002, the Equal Employment Opportunity Fund" is intended to be used for the "purpose of promoting equal employment opportunities in hiring and promotion at community college districts."[433] Education Code section 87108 specifies that the Board of Governors of the California Community Colleges shall adopt regulations for the use of the fund, of which at least 75 percent may be used for: (1) Activities designed to encourage community college students to become qualified for, and seek, employment as community college faculty or administrators; (2) outreach and recruitment; (3) In-service training on equal employment opportunities; (4) accommodations for applicants and employees with disabilities; and (5) activities to promote equal employment opportunities and implement the requirements of Education Code section 87100 et seq.

The Board of Governors' regulations limit the use of the 75 percent of the Equal Employment Opportunity Funds to: (1) outreach and recruitment; (2) in-service training on equal employment opportunity; (3) accommodations for applicants and employees with disabilities; and (4) other activities to promote equal employment opportunity.[434] All of the activities mandated by the title 5 regulations pled in the equal employment opportunity section of this analysis promote or are intended to promote equal employment opportunity, and thus, fall within the permitted uses of the Equal Employment Opportunity funds.

However, the title 5 regulations addressing equal employment opportunity (Cal. Code Regs., tit. 5, section 53001 et seq.), act as a separate directive on community college districts, and as a result, districts are required to engage in these activities whether or not the district chooses to receive funds from the "Equal Employment Opportunity Fund" established by Education Code

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[432] Prior to the Statutes 2002, chapter 1169, version of Education Code section 87100 et seq., section 87107 established the "Faculty and Staff Diversity Fund," which was used to reimburse community college districts for certain costs mandated by Education Code section 87100 et seq. and its implementing regulations.

[433] Education Code section 87107, as added by Statutes 2002, chapter 1169.

[434] California Code of Regulations, title 5, section 53030, subdivision (c) (Register 2002, No. 35).

section 87107. Although funds from the "Equal Employment Opportunity Fund" can be spent by community college districts on the activities mandated by the title 5 regulations addressing equal employment opportunity, as discussed above, community college districts are not required to receive funds from the "Equal Employment Opportunity Fund" nor is there evidence in the record that districts have received these funds. In addition, there is no evidence in the record indicating that the districts have used any funds received from the "Equal Employment Opportunity Fund" for the state-mandated activities, or that the amount received was sufficient to fully fund the costs of the state-mandated activities. Thus, community college districts are entitled to reimbursement for the costs resulting from the state-mandated new program or higher level of service imposed by California Code of Regulations, title 5, section 53001 et seq., as amended in 2002 in response to the *Connerly v. State Personnel Bd.* decision, summarized below.

To the extent that community college districts choose to receive funds from the "Equal Employment Opportunity Fund," and to the extent these funds are used for the state-mandated new program or higher level of service imposed by California Code of Regulations, title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034, as amended in by Register 2002, number 35, then these funds would constitute offsetting revenue and will be identified in the parameters and guidelines.[435]

(ii) Equal Employment Opportunity Code Section and Title 5 Regulations Before the *Connerly v. State Personnel Bd*. Decision

In regard to Education Code section 87102, as amended by Statutes 1988, chapter 973, and California Code of Regulations, title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53026, and 53034, as amended in Register 96, number 23, the "Faculty and Staff Diversity Fund" was established by Education Code section 87107 to pay for costs on the state and district level associated with the state-mandated activities imposed by these code sections and regulations, which seek to promote faculty and staff diversity. Specifically, Education Code section 87107, subdivisions (c) and (d), as added by Statutes 1988, chapter 973, provide:

> (c) The board of governors shall utilize up to 25 percent of the fund to do all of the following:
>
> (1) Reimburse districts for the costs of publishing, distributing, and reporting affirmative action success rates as provided in [Education Code] Section 87102.
>
> (2) Reimburse districts for the costs of preparing and updating affirmative action plans.
>
> (3) Carry out the assistance, service, monitoring, and compliance functions specified in [Education Code] Section 87104.
>
> (d) The remainder of the fund shall be allocated to districts, in accordance with regulations of the board of governors, to provide for extended outreach and recruitment of underrepresented groups, for incentives to hire members of

[435] In the Budget Act of 2003 (Stats. 2003, ch. 157) for the 2003-2004 fiscal year (starting July 1, 2003), $1,747,000 was scheduled for the Equal Employment Opportunity Fund. See line item 6870-101-0001, schedule 14.

> underrepresented groups, for in-service training and for other related staff diversity programs.

The Board of Governors' regulations adopted to allocate the remaining 75 percent of the Faculty and Staff Diversity Fund (Cal. Code Regs., tit. 5, § 53030 (Register 96, No. 23), provides that the 25 percent of the funds described in Education Code section 87107, subdivision (c), shall first be used to pay for the State costs of providing technical assistance, service, monitoring, and compliance functions. Any remainder of the funds shall be used for the purposes described in Education Code section 87107, subdivision (c)(1) and (2), on a basis of full-time equivalent students of each district as a portion of the total full-time students for all districts. The remaining 75 percent of the "Faculty and Staff Diversity Fund," could be allocated in three ways: (1) in 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; or (3) an amount related to the success in promoting diversity.

Although, as described above, districts will receive, at minimum, 75 percent of the "Faculty Staff Diversity Fund," and that amount was to be used for the state-mandated activities imposed by the code sections and regulations, as they existed prior to the amendments in response to the *Connerly v. State Personnel Bd.* decision, there is no evidence in the record to suggest that this amount was sufficient to cover all of the costs of the state-mandated activities. Thus, Government Code section 17556, subdivision (e), does not prohibit a finding of costs mandated by the state. However, any funds received by community college districts from the "Staff Diversity Fund," may be offsetting revenues for the state-mandated new program or higher level of service imposed by Education Code section 87102, as amended by Statutes 1988, chapter 973, and California Code of Regulations, title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53026, and 53034, as amended in Register 96, number 23 and will be identified in the parameters and guidelines.[436]

The claimants' appear to agree with the above analysis, stating:

> 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 are consistently available, and to the extent that 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 [p. 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.[437]

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[436] In the Budget Act of 2001 (Stats. 2001, ch. 106) for the 2001-2002 fiscal year (starting July 1, 2001), and the Budget Act of 2002 (Stats. 2002, ch. 379) for the 2002-2003 fiscal year (starting July 1, 2002), $1,859,000 was scheduled for the Faculty and Staff Diversity Fund. See line item 6870-101-0001, schedule 14.

[437] Claimant Comments on Draft Staff Analysis, *supra*, p. 12, original italics.

b. Discrimination Complaint Procedures: (Govt. Code, § 11135, subd.. (b) and (d)(2); and Cal. Code Regs., tit. 5, §§ 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, and 59342)

Government Code section 17556, subdivision (f), prohibits a finding of costs mandated by the state for duties that are necessary to implement or expressly included in a ballot measure approved by the voters in a state-wide or local election.[438] The court in *California School Boards Association v. State of California*, found that duties imposed by a test claim statute or executive order that are not expressly included in a ballot measure approved by the voters in a statewide or local election are "necessary to implement" the ballot measure pursuant to Government Code section 17556, subdivision (f), when the additional requirements imposed by the state are intended to implement the ballot measure mandate, and the costs are, in context, de minimis such that the requirements are considered part and parcel of the underlying ballot measure mandate.[439]

In regard to the code sections and regulations discussed in the "discrimination complaint procedures" section of this analysis, Finance argues:

> Section 31 of Article I of the California Constitution, enacted by the voters in 1996, prohibits discrimination against anyone on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, or public contracting. While the claimant mentions Section 31 of Article I of the California Constitution (adopted by initiative measure in 1996) in its claim, the claimant has failed to discuss how State statutes and regulations included in the test claim relate to this Section.[440]

Article I, section 31 was added to the California Constitution by Proposition 209 of the 1996 general election. Although article I, section 31 of the California Constitution prohibits community college districts from discriminating against or giving preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin, none of the state-mandated requirements of Government Code section 11135 or the title 5 regulations are expressly included in the ballot measure.[441]

In addition, the state mandates imposed by the code section and regulations are not necessary to implement the general prohibition found in article I, section 31 of the California Constitution (and adopted by the passage of Proposition 209) because the code section and the regulations were not intended to implement Proposition 209. The intent of Proposition 209 was to eliminate

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[438] Government Code section 17556, subdivision (f). See *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, finding that the language, "reasonably within the scope of," to be violative of the California Constitution.

[439] *California School Boards Association v. State of California*, *supra*, 171 Cal.App. 4th at p. 1217.

[440] Department of Finance Comments on 02-TC-46, dated March 23, 2004.

[441] See Government Code section 11135; and California Code of Regulations, title 5, sections 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, and 59342.

voluntary state and local government affirmative action programs targeting race, sex, color, ethnicity, or national origin, in various areas including education.[442]

Government Code section 11135, subdivisions (b) and (d)(2), require community college districts to comply with Title II of the ADA as applicable to employment and Section 508 of the Rehabilitation Act. Title II of the ADA and Section 508 generally address discrimination on the basis of disability. Thus, Government Code section 11135, subdivisions (b) and (d)(2), were not meant to implement Proposition 209, which does not address discrimination against or preferential treatment to persons with disabilities.

The title 5 regulations, which mandate activities associated with community college districts' discrimination complaint procedures (e.g. investigations, attempts at resolution of the complaint, and reports of the results to the Chancellor's Office) are intended to implement various state and federal antidiscrimination laws. Specifically, title 5, section 59300, which sets forth the purpose of the discrimination complaint procedure regulations, provides:

> The purpose of this subchapter[, (Cal. Code Regs., tit. 5, § 59300 et seq.), which make up the discrimination complaint procedure regulations,] is to implement the provisions of California Government Code sections 11135 through 11139.5, the Sex Equity in Education Act (Ed. Code, § 66250 et seq.), Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), title IX of the Education Amendments of 1972 (20 U.S.C. § 1681), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Americans with Disabilities Act (42 U.S.C. § 12100 et seq.) and the Age Discrimination Act (42 U.S.C. § 6101), to the end that no person in the State of California shall, on the basis of ethnic group identification, national origin, religion, age, sex race, color, ancestry, sexual orientation, or physical or mental disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under any program or activity that is administered by, funded directly by, or that receives any financial assistance from, the Chancellor or Board of Governors of the California Community Colleges.[443]

As shown by the above language, the discrimination complaint procedure regulations were not adopted to implement article I, section 31 of the California Constitution, which was adopted by California voters with the approval of Proposition 209.

Thus, the Commission finds that Government Code section 17556, subdivision (f), does not preclude the Commission from finding costs mandated by the state for the new program or higher level of service imposed by Government Code section 11135; and California Code of Regulations, title 5, sections 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, and 59342.

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[442] "Legislative Analyst's Analysis of Proposition 209 for the 1996 General Election" at <http://library.uchastings.edu/cgibin/starfinder/0?path=calprop.txt&id=webber&pass=webber&OK=OK> [as of August 24, 2010].

[443] California Code of Regulations, title 5, section 59300 (Register 2002, No. 13).

(2) The Test Claim Statutes and Regulations that Constitute a State-Mandated New Program or Higher Level of Service Impose Costs Mandated by the State on Community College Districts Within the Meaning of Article XIII B, Section 6, and Government Code Sections 17514 and 17556

For the reasons discussed above, the Commission finds that the test claim statutes and regulations addressing "equal employment opportunity," "student equity," and "discrimination complaint procedures" that constitute a state-mandated new program or higher level of service[444] impose costs mandated by the state on community college districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

CONCLUSION

For the reasons discussed above, the Commission finds that the following activities constitute a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514:

Equal Employment Opportunity (Ed Code, § 87102; and Cal. Code Regs., tit. 5, §§ 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034):

1. Periodically submit to the Board of Governors of the California Community Colleges an affirmation of compliance with the provisions of Education Code sections 87100-87107, which address affirmative action hiring (as existing prior to September 4, 2001). (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)
2. Include steps in the faculty and staff diversity plan that the district will take in meeting and improving hiring goals for both full-time faculty and part-time faculty pursuant to Education Code section 87482.6 (Stats. 1988, ch. 973), and the development of the plan shall be a condition for receipt of allowances pursuant to Education Code section 87482.6. (Ed. Code, § 87102, subd. (a) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)
3. Publish and distribute a record of the success rate of the measurable progress, with respect to the district's goals and timetables, in hiring employees through its affirmative

[444] Specifically, portions of the following test claim statutes and regulations regarding "equal employment opportunity" constitute a state-mandated new program or higher level of service: Education Code section 87102; and California Code of Regulations, title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034. Similarly portions of the following test claim statutes regarding "student equity" constitute a state-mandated new program or higher level of service: Education Code sections 66010.2 and 66010.7. Finally, portions of the following test claim statutes and regulations regarding "discrimination complaint procedures" constitute a state-mandated new program or higher level of service: Education Code sections 66010.2 and 66010.7; and Government Code section 11135, and California Code of Regulations, title 5, sections 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, 59340 and 59342.

action employment program. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

Make this publication a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code), and include data and information specified by the Board of Governors. (Ed. Code, § 87102, subd. (b) (Stats. 1988, ch. 973), beginning July 1, 2001 through September 3, 2001.)

4. Review the faculty and staff diversity plan/equal employment opportunity plans, excluding goals and timetables, at least every three years and if necessary revise the plan and submit it to the Chancellor's Office for approval. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

5. Include in the faculty and staff diversity plan/equal employment opportunity plan the following:

    a. Goals and timetables, as appropriate, for hiring and promotion of persons with disabilities developed pursuant to California Code of Regulations, title 5, section 53006 for each college in the district and for the district as a whole. (Cal. Code Regs., tit. 5, § 53003, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. A process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of California Code of Regulations, title 5, section 53000 et seq., which addresses affirmative action/equal employment opportunity programs (Register 96, No. 23; Register 2002, No. 35) and of state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(4) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53003, subdivision (c)(4) (Register 2002, No. 35), beginning July 1, 2001.)

    c. A process for providing annual written notice to professional organizations concerning the district's equal employment opportunity plan and the need for assistance from the organizations in identifying qualified applicants. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(5) (Register 2002, No. 35), beginning August 11, 2002.)

    d. An analysis of the number of persons with disabilities who are employed in the district's work force and the number of historically underrepresented groups (including persons with disabilities) who have applied for employment in the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance. (listed in Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(6) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

    e. An analysis of the number of ethnic majority, men, and persons with disabilities who are employed in the district's work force and the number of persons from

monitored groups who have applied for employment in each of the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35)). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(6) (Register 2002, No. 35), beginning August 11, 2002.)

f. An analysis of the degree to which persons with disabilities are underrepresented in comparison to the numbers of disabled persons whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation for women, ethnic minorities, or persons with disabilities is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

g. An analysis of the degree to which persons within the ethnic majority, men, and persons with disabilities are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category and whether or not the underrepresentation is significant. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(7) (Register 2002, No. 35), beginning August 11, 2002.)

h. The steps the district will take to achieve diversity in its workforce. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(8) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

i. Goals for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003, subdivision (c)(7) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(9) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

j. Methods for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003, subdivision (c)(7). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(8) (Register 2002, No. 35), beginning August 11, 2002.)

k. Additional steps consistent with California Code of Regulations, title 5, section 53006, to remedy any significant underrepresentation identified in the plan. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(9) (Register 2002, No. 35), beginning August 11, 2002.)

l. A plan for corrective action consistent with California Code of Regulations, title 5, section 53006 (Register 96, No. 23), including goals and timetables for hiring and promotion, if necessary, to remedy any significant underrepresentation identified in the faculty and staff diversity plan by achieving expected representation for all historically underrepresented groups in all job categories listed in California Code of Regulations, title 5, § 53004, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53003, subd. (c)(10) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

m. Any other measures necessary to further equal employment opportunity throughout the district. (Cal. Code Regs., tit. 5, § 53003, subd. (c)(10) (Register 2002, No. 35), beginning August 11, 2002.)

n. Any goals for hiring persons with disabilities that are required by California Code of Regulations, title 5, section 53025. (Cal. Code Regs., tit. 5, § 53003, subd. (d) (Register 2002, No. 35), beginning August 11, 2002.)

6. Monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing the faculty and staff diversity plan/equal employment opportunity plan and to provide data needed for the analyses required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

7. In the report to the Chancellor's Office of the results of the employee survey, report each employee so that they 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. (Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

8. Afford each applicant or employee the opportunity to identify his or her gender, ethnicity and, if applicable, his or her disability for purposes of the survey and report required by California Code of Regulations, title 5, section 53004, subdivision (a) (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

   a. Count a person in only one ethnic group for reporting purposes if that person designates multiple ethnic groups with which he or she identifies. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

   b. Count and report Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians as part of the Asian/Pacific Islander group as well as in separate subcategories. (Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53004, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

9. If a community college district has existing goals:

   a. Update goals established prior to June 30, 1996 and set a new target date for achieving expected representation for a group in a job category if significant underrepresentation still exists. (Cal. Code Regs., tit. 5, § 53006, subd. (a) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

   b. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group while updating goals and setting new target

dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

c. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

d. Comply with California Code of Regulations, title 5, section 53006, subdivision (c) (Register 96, No. 23) while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006, subdivision (a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

10. If a community college district has no existing goals:

a. Take corrective action if, pursuant to California Code of Regulations, title 5, section 53003, subdivision (c)(7), the district determines that a particular group is significantly underrepresented with respect to one or more job categories and no goal has previously been set. (Cal. Code Regs., tit. 5, § 53006, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

b. The district shall take, at a minimum, the following corrective action:

i. Review district recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(1) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

ii. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

iii. Determine whether the group is still significantly underrepresented in the job categories in question after the measures described in California Code of Regulations, title 5, section 53006, subdivision (b)(1) and (2) (Register 96, No. 23) have been in place a reasonable period of time. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(3) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

iv. Set a goal with a target date for achieving expected representation for the significantly underrepresented group in each job category where significant underrepresentation persists, if it persists. (Cal. Code Regs., tit.

5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

v. Monitor on an ongoing basis the staffing rate for the significantly underrepresented groups in the specified job categories. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

vi. Discontinue the use of goals when expected representation has been achieved for that group in the job categories in question. (Cal. Code Regs., tit. 5, § 53006, subd. (b)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

11. Additional measures to be taken if a goal has been set and after a reasonable period of time significant underrepresentation persists:

    a. Establish a specific timetable to project the levels of annual hiring of persons from the significantly underrepresented group which will be necessary to meet the existing goal by the target date. (Cal. Code Regs., tit. 5, § 53006, subd. (c) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. Implement the following additional corrective measures until expected representation has been achieved for that group in the job category in question: Consider, as one factor in the final selection process, the fact that a candidate is a member of a significantly underrepresented group, provided that the qualifications of the candidates under consideration are reasonably considered to be equivalent. (Cal. Code Regs., tit. 5, § 53006, subd. (c)(2) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

12. If a community college district has no existing goals for women or persons with disabilities implement the measures required in California Code of Regulations, title 5, section 53006, subdivision (b)(1) and (2) (Register 96, No. 23) concurrently with setting a goal with a target date for achieving expected representation for women or persons with disabilities in each job category in which they are found to be significantly underrepresented. (Cal. Code Regs., tit. 5, § 53006, subd. (d) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    a. Goals shall remain in effect only until expected representation has been achieved for the group in the job category or categories in which significant underrepresentation is found. (Cal. Code Regs., tit. 5, § 53006, subd. (d) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

    b. An aggregate labor force availability rate shall be utilized for setting goals for hiring persons with disabilities with respect to the total district work force until the Chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, § 53006, subd. (d), beginning July 1, 2001 through August 10, 2002.)

13. Take additional steps if a district determines that a particular monitored group is significantly underrepresented with respect to one or more categories, including at minimum:

a. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(1) (Register 2002, No. 35), beginning August 11, 2002.)

b. 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. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(2) (Register 2002, No. 35), beginning August 11, 2002.)

c. Determine whether the group is still significantly underrepresented in the categories in question after the measures described in subdivisions (a)(1) and (2) of California Code of Regulations, title 5, section 53006, have been in place a reasonable period of time (three years or longer). (Cal. Code Regs., tit. 5, § 53006, subd. (a)(3) (Register 2002, No. 35), beginning August 11, 2002.)

d. Monitor the staffing rate for the significantly underrepresented group in the specified job categories in question on an ongoing basis until the projected representation has been achieved for that group if significant underrepresentation persists. (Cal. Code Regs., tit. 5, § 53006, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)

14. Be ultimately responsible for making measurable progress toward the goals established in the district's faculty and staff diversity plan or measurable progress toward equal employment opportunity by methods described in the district's equal employment opportunity plan. (Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

15. Design the administrative structure created by any delegation of authority to the affirmative action officer/equal employment officer or others in such a manner so as to ensure prompt and effective implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23) beginning July 1, 2001.)

16. Designate in the faculty and staff diversity plan/equal employment opportunity plan a single officer, who may be the affirmative action officer/equal employment opportunity officer, for ensuring complaints of violations of the equal employment opportunity program regulations (excluding those based on disability or gender), filed pursuant to California Code of Regulations, title 5, section 53026, are promptly and impartially investigated, and ensuring that selection procedures and the applicant pool are properly monitored (excluding ensuring that the selection procedure is based solely on job-related criteria and monitoring for adverse impact) as required by California Code of Regulations, title 5, sections 53023 and 53024. (Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53020, subd. (b) (Register 2002, No. 23), beginning July 1, 2001.)

17. Actively recruit from both within and outside the district work force to attract qualified applicants for all new openings except as provided by California Code of Regulations,

title 5, section 53021, subdivision (b). (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

a. Active recruitment shall include focused outreach to historically underrepresented groups. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

b. Active recruitment shall include outreach to ensure all persons, including persons from monitored groups, are provided the opportunity to seek employment with the district. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning August 11, 2002.)

c. Open recruitment applies 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. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

18. Recruit at least statewide for full-time faculty and educational administrator positions, and at a minimum, seek qualified applicants listed in the California Community Colleges Faculty and Staff Diversity Registry/Equal Employment Opportunity Registry. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

19. Recruit part-time faculty positions separately for each new opening or by annually establishing a pool of eligible candidates. In either case, full and open recruitment is required consistent with California Code of Regulations, title 5, section 53021. (Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)

20. Notify the Faculty and Staff Diversity Advisory Committee/Equal Employment Opportunity Advisory Committee established pursuant to California Code of Regulations, title 5, section 53005 and the Chancellor, at least ten working days prior to offering the position to a candidate, if the district believes justification exists for use of any of the exceptions listed in section 53021, subdivision(b). (Cal. Code Regs., tit. 5, § 53021, subd. (c) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)

21. Comply with the district's established hiring procedures and afford all qualified district employees the opportunity to apply even where in-house or promotional only recruitment is permitted under California Code of Regulations, title 5, section 53005, subdivision (b). (Cal. Code Regs., tit. 5, § 53021, subd. (d) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53021, subd. (d) (Register 2002, No. 35), beginning July 1, 2001.)

22. Include sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students in job requirements for faculty and administrative positions. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)

23. Review job specifications, excluding any “required,” “desired,” or “preferred” qualifications beyond the state minimum qualifications (set forth in Subchapter 4 of Cal. Code Regs., tit. 5, commencing with § 53400) which the district wishes to utilize, before the position is announced to ensure conformity with the requirements of California Code of Regulations, title 5, section 53000 et seq., and state and federal nondiscrimination laws, excluding section 504 of the Rehabilitation Act, and Title IX of Education Amendments of 1972. (Cal. Code Regs., tit. 5, § 53022 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53022 (Register 2002, No. 35), beginning July 1, 2001.)
24. Afford each applicant an opportunity to voluntarily identify his or her gender, ethnicity and, if applicable, his or her disability, in the district’s application for employment. (Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)
25. Keep information regarding an applicant’s gender, ethnicity, and/or disability provided in an application for employment confidential. (Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (a) (Register 2002, No. 35), beginning July 1, 2001.)
26. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that expected representation has been achieved for historically underrepresented groups. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)
27. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that any failure to obtain projected representation for any group defined in terms of ethnicity is not due to discriminatory recruitment procedures. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)
28. Extend the application deadline and conduct additional focused recruitment for historically underrepresented groups for which expected representation has not been achieved, if necessary. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)
29. Extend the application deadline and conduct additional recruitment, which eliminates discriminatory recruitment procedures and ensures that recruitment efforts provide a full and fair opportunity for participation to a wide diversity of potential applicants, if necessary. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)
30. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when the expected representation of historically underrepresented groups is achieved, or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)
31. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when recruitment efforts have offered an opportunity for participation to a wide diversity of potential applicants or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

32. Analyze the composition of the qualified applicant pool to ensure that no group defined in terms of ethnicity is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (m) (Register 96, No. 23).

    This analysis occurs after the analysis to ensure that expected representation has been achieved for groups defined in terms of ethnicity (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23) beginning July 1, 2001 through August 10, 2002.)

33. Analyze the composition of the qualified applicant pool to ensure that no ethnic group is adversely impacted as defined by California Code of Regulations, title 5, section 53001, subdivision (a) (Register 2002, No. 35).

    This analysis occurs after the analysis done to ensure that any failure to obtain projected representation for any group defined in terms of ethnicity is not due to discriminatory recruitment procedures (see Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 2002, No. 35)) and before the selection process continues. (Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

34. Take effective steps to address adverse impact on any group defined in terms of ethnicity found in the district's applicant pool before the selection process is continued. (Cal. Code Regs., tit. 5, § 53023, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53023, subd. (c) (Register 2002, No. 35), beginning July 1, 2001.)

35. Provide all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to the Chancellor upon request. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(1) (Register 2002, No. 35), beginning July 1, 2001.)

36. Design all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole, 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. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (a)(2) (Register 2002, No. 35), beginning July 1, 2001.)

37. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to ensure that they do not have an adverse impact, as defined by California Code of Regulations, title 5, section 53001, subdivision (m), on any group defined in terms of ethnicity. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 96, No. 23), beginning July 1, 2001 through August 10, 2002.)

38. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to avoid an adverse impact as defined in California Code of Regulations, title 5, section 53001, subdivision (a) on any group defined in terms of ethnicity, and to detect and address any adverse impact on any group defined in terms of ethnicity which does occur. (Cal. Code Regs., tit. 5, § 53024, subd. (a)(4) (Register 2002, No. 35), beginning August 11, 2002.)

39. Suspend the selection process and take timely and effective steps to remedy adverse impact on any group defined in terms of ethnicity before the selection process resumes if monitoring under California Code of Regulations, title 5, section 53024, subdivision (a)(4) reveals that any selection technique or procedure has adversely impacted such ethnic group. (Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53024, subd. (b) (Register 2002, No. 35), beginning July 1, 2001.)

40. Update a goal established prior to July 12, 2002 for persons with disabilities, set a new target date for achieving projected representation in a job category or categories, and concurrently comply with California Code of Regulations, title 5, section 53006, subdivisions (a)(1), (a)(2), and (b) with respect to persons with disability, if significant underrepresentation still exists in the job category or categories. (Cal. Code Regs., tit. 5, § 53025, subd. (b) (Register 2002, No. 35), beginning August 11, 2002.)

41. Implement California Code of Regulations, title 5, section 53006, subdivisions (a)(1) and (a)(2) concurrently with setting a goal with a target date for achieving projected representation for persons with a disability in each job category where underrepresentation was found to exist. Goals are to remain in effect only until projected representation has been achieved for that group in the category or categories in question. (Cal. Code Regs., tit. 5, § 53025, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

42. Utilize an aggregate labor force availability rate for setting goals for hiring persons with disabilities with respect to the total district work force, until the Chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, § 53025, subd. (c) (Register 2002, No. 35), beginning August 11, 2002.)

43. Establish a process permitting any person (excluding employees and applicants for employment) to file a complaint alleging that the requirements of the affirmative action/equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) have been violated. This excludes the establishment of a process permitting an employee to file a complaint alleging a violation of the equal employment opportunity program regulations on the basis of disability or gender (i.e. failure to designate a person to coordinate efforts to comply Section 504 and Title IX (see Cal. Code Regs., tit. 5, § 53020); failure to provide reasonable accommodations (see Cal. Code Regs., tit. 5, § 53020); and employment discrimination on the basis of disability and gender in district employee selection procedures). (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

44. Forward immediately to the Chancellor a copy of the complaint. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

45. Provide a written investigative report within 90 days if required by the Chancellor. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)

46. Process complaints which also allege discrimination prohibited by Government Code Section 11135 et seq. according to the procedures set forth in California Code of Regulations, title 5, section 59300 et seq. (Cal. Code Regs., tit. 5, § 53026 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53026 (Register 2002, No. 35), beginning July 1, 2001.)
47. Submit a report on the use of Faculty and Staff Diversity funds to the Chancellor's Office no later than September 30 of the fiscal year following the use of the funds. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23) beginning July 1, 2001 and ending on August 10, 2002.)
48. Report the staffing rate of persons with disabilities by a separate survey as directed by the Chancellor's Office, until a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by California Code of Regulations, title 5, section 53004. (Cal. Code Regs., tit. 5, § 53034 (Register 96, No. 23); Cal. Code Regs., tit. 5, § 53034 (Register 2002, No. 35), beginning July 1, 2001. There is no evidence in the record indicating whether a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by title 5, section 53004. As a result, the Commission cannot determine an end date for this activity.)

Student Equity (Ed. Code, §§ 66010.2 and 66010.7):

1. Provide all students the opportunity to address issues, including ethical issues that are central to their full development as responsible citizens, in community college programs. (Ed. Code, § 66010.2, subd. (b) (Stats. 1991, ch. 1198), beginning July 1, 2001.)
2. Undertake intersegmental collaboration and coordination (with the University of California and California State University) particularly when it can do either of the following: (1) facilitate achievement of the goals of educational equity; (2) facilitate student progress from one segment to another, particularly with regard to preparation of students for higher education as well as the transfer from the California Community Colleges to four-year institutions.

   This activity excludes instances in which cooperation can: (1) enhance the achievement of the institutional missions shared by the segments; (2) enable public and private postsecondary education to more effectively meet the educational needs of a geographical region; and (3) provide more effective planning of postsecondary education on a statewide basis. (Ed. Code, § 66010.7, subd. (b) (Stats. 1991, ch. 1198) beginning July 1, 2001.)
3. Work together with other leaders responsible for public (University of California and California State University) and independent institutions of higher education and the Superintendent of Public Instruction to promote and facilitate the development of intersegmental programs and other cooperative efforts aimed at improving the progress of students through the educational systems and at strengthening the teaching profession at all levels. (Ed. Code, § 66010.7, subd. (c) (Stats. 1991, ch. 1198), beginning July 1, 2001.)

Discrimination Complaint Procedures (Gov. Code, § 11135; and Cal. Code Regs., tit. 5, §§ 59320, 59322, 59324, 59326, 59327, 59328, 59330, 59332, 59334, 59336, 59338, 59340 and 59342):

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

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

3. Investigate complaints of unlawful discrimination (i.e. discrimination on the basis of ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation) in district programs or activities and seek to resolve those complaints. This does not include complaints of gender discrimination, including complaints of sexual harassment on the basis of sexual orientation, by employees and students, and complaints of non-employment discrimination on the basis of disability. (Cal. Code Regs., tit. 5, § 59320 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

4. Establish and adopt written policies consistent with the regulations addressing district discrimination complaint procedures for complaints of discrimination on the basis of ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation (Cal. Code Regs., tit. 5, §§ 59320-59342).

   This does not include complaint procedures for: (1) employees and students alleging gender discrimination (including sexual harassment) and disability discrimination; (2) employees and students alleging sexual harassment on the basis of sexual orientation; and (3) for individuals alleging non-employment discrimination on the basis of disability. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

5. Submit district policies, which address community college district discrimination complaint and enforcement procedures (adopted pursuant to Cal. Code Regs., tit. 5, § 59322) to the Chancellor for review and approval within 90 days of the effective date of adopting or amending the policies. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

6. Identify to the Chancellor and to the public a single person as the district officer responsible for receiving discrimination complaints based on ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation (filed pursuant to Cal. Code Regs., tit. 5, § 59328) and coordinating their investigation.

   This does not include the identification of the district officer responsible for receiving complaints of discrimination on the basis of gender to students, employees, student applicants, and applicants for employment. This also does not include the identification of the district officer responsible for receiving complaints of discrimination on the basis of disability to participants, beneficiaries, applicants, and employees of the district's

programs or activities, and unions or professional organizations holding collective bargaining or professional agreements with the community college district. In addition, this does not include the identification of the district officer for receiving complaints of non-employment discrimination on the basis of disability to the Chancellor and the public. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

7. Use other staff or outside persons or organizations under contract with the district whenever the officer designated to receive complaints is named in the complaint or is implicated by the allegations in the complaint. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
8. Notify students and employees of the provisions of California Code of Regulations, title 5, section 59300 et seq., which address the two levels of discrimination complaint procedures for community college districts (beginning at the community college district level and ending at the state level). (Cal. Code Regs., tit. 5, § 59326 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
9. The district officer shall undertake efforts to informally resolve the charges whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(1) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
10. The district officer shall advise the complainant that he or she need not participate in informal resolution whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(2) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
11. As part of the informal resolution process, the district officer shall notify the person bringing the charges of the right to file a formal complaint, as defined by California Code of Regulations, title 5, section 59311, and the procedure for filing a formal complaint pursuant to California Code of Regulations, title 5, section 59328 whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(3) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
12. As part of the informal resolution process, the district officer shall advise the complainant that he or she may file his or her non-employment based complaint with the Office of Civil Rights of the U.S. Department of Education (OCR) where such a complaint is within that agency's jurisdiction whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(4) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
13. As part of the informal resolution process, the district officer shall advise the complainant that he or she may file his or her employment-based complaint with the U.S. Equal Employment Opportunity Commission (EEOC) or the California Department of Fair Employment and Housing (DFEH) where the complaint is within the jurisdiction of those agencies. (Cal. Code Regs., tit. 5, § 59327, subd. (a)(5) (Register 2002, No. 13), beginning April 19, 2002.)

14. Include investigation in efforts at informal resolution if the responsible district officer determines that an investigation is warranted by the seriousness of the charges. (Cal. Code Regs., tit. 5, § 59327, subd. (b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
15. After a formal complaint is filed the formal investigation conducted pursuant to California Code of Regulations, title 5, section 59334 must be completed unless the matter is informally resolved and the complainant dismisses the formal complaint. (Cal. Code of Regs., tit. 5, § 59327, subd. (c) (Register 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)
16. After a complaint is filed the formal investigation conducted pursuant to California Code of Regulations, title 5, section 59334 must be completed unless the matter is informally resolved and the complainant dismisses the formal complaint or the complainant files with the Department of Fair Employment and Housing and the Chancellor elects not to require further investigation pursuant to California Code of Regulations, title 5, section 59328, subd. (f)(2). (Cal. Code of Regs., tit. 5, § 59327, subd. (c) (Register 2002, No. 13), beginning April 19, 2002.)
17. As part of the formal complaint process, advise any complainant alleging discrimination in employment that he or she may file his or her complaint with the U.S. Equal Employment Opportunity Commission (EEOC) or Department of Fair Employment and Housing where the complaint is within the jurisdiction of those agencies. (Cal. Code Regs., tit. 5, § 59328, subd. (f)(1) (Register 2002, No. 13), beginning April 19, 2002.)
18. As part of the formal complaint process, for any complaint alleging discrimination in employment, forward a copy of any filing by the complainant with the Department of Fair Employment and Housing to the Chancellor's Office for a determination of whether the issues presented require an independent investigation of the matter under the provisions of the discrimination complaint procedure regulations (Cal. Code Regs., tit. 5, § 53000 et seq.). (Cal. Code Regs., tit. 5, § 59328, subd. (f)(2) (Register 2002, No. 13), beginning April 19, 2002.)
19. Forward a copy of the formal complaint to the Chancellor immediately upon receiving a formal complaint filed in accordance with California Code of Regulations, title 5, section 59328. (Cal. Code Regs., tit. 5, § 59330 (Register 2001, No. 6; and Register 2002, No. 13.), beginning July 1, 2001.)
20. Immediately notify the complainant that his or her formal complaint does not meet the requirements of California Code of Regulations, title 5, section 59328, and specify in what way the complaint is defective, if the district receives a complaint that does not meet the requirements of section 59328. (Cal. Code Regs., tit. 5, § 59332 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
21. Notify the complainant and the Chancellor that the district has commenced an investigation of a properly filed formal complaint. (Cal. Code Regs., tit. 5, § 59334 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)
22. Set forth the results of the investigation conducted in the formal complaint process in a written report that includes at least all of the following:

a. A description of the circumstances giving rise to the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

b. A summary of the testimony provided by each witness, including the complainant and any witnesses identified by the complainant in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (b) (Register 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)

c. A summary of the testimony provided by each viable witness, including the complainant and any witnesses identified by the complainant in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (b) (Register 2002, No. 13), beginning April 19, 2002.)

d. An analysis of any relevant data or other evidence collected during the course of the investigation. (Cal. Code Regs., tit. 5, § 59334, subd. (c) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

e. A specific finding as to whether the discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (d) (Register 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)

f. A specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59334, subd. (d) (Register 2002, No. 13), beginning April 19, 2002.)

g. Any other information deemed appropriate by the district. (Cal. Code Regs., tit. 5, § 59334, subd. (e) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

23. Complete the district investigation conducted during the formal complaint process and forward a copy of the investigative report required pursuant to California Code of Regulations, title 5, section 59334 to the Chancellor, a copy or summary of the report to the complainant, and written notice setting forth all of the following to both the complainant and the Chancellor:

a. The determination of the chief executive officer or his/her designee as to whether discrimination did or did not occur with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59336, subd. (a) (Register 20 2001, No. 6), beginning July 1, 2001 to April 18, 2002.)

b. The determination of the chief executive officer or his/her designee as to whether there is probable cause to believe discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59336, subd. (a) (Register 2002, No. 13), beginning April 19, 2002.)

c. A description of the actions taken, if any, to prevent similar problems from occurring in the future. (Cal. Code Regs., tit. 5, § 59336, sub. (b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

d. The proposed resolution of the complaint. (Cal. Code Regs., tit. 5, § 59336, subd. (c) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

e. The complainant's right to appeal to the district governing board and the Chancellor pursuant to California Code of Regulations, title 5, sections 59338 and 59339. (Cal. Code Regs., tit. 5, § 59336, subd. (d) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

24. Forward to the complainant and the Chancellor a copy of the final district decision rendered by the governing board that includes a complainant's right to appeal the district's decision to the Chancellor pursuant to California Code of Regulations, title 5, section 59339. Administrative determinations are made final by the district issuing a decision or by taking no action 45 days after an appeal to the district governing board by complainant not satisfied by the administrative determination (Cal. Code Regs., tit. 5, § 59338, subd. (a) and (c). (Cal. Code Regs., tit. 5, § 59338 (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

25. Forward the following to the Chancellor within 150 days of receiving a formal complaint:

    a. A copy of the final district decision rendered by the governing board or a statement indicating the date on which the administrative determination became final pursuant to California Code of Regulations, title 5, section 59338, subdivision (a). (Cal. Code Regs., tit. 5, § 59340, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

    b. A copy of the notice to the complainant required pursuant to California Code of Regulations, title 5, section 59338, subdivision (a). (Cal. Code Regs., tit. 5, § 59340, subd. (b) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

    c. Such other information as the Chancellor may require. (Cal. Code Regs., tit. 5, § 59340, subd. (c) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

26. File a written request that the Chancellor grant an extension of the 90-day or 150-day deadline to forward the investigative report to the Chancellor or to forward the final district decision to the Chancellor (specified in Cal. Code Regs., tit. 5, §§ 59336 or 59340), 10 days before the expiration of the deadline, if for reasons beyond the districts control the district is unable to comply with the deadline. (Cal. Code Regs., tit. 5, § 59342, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

27. Provide the reasons for the request for an extension of the 90-day or 150-day deadline to forward the investigative report to the Chancellor or to forward the final district decision to the Chancellor, and the date by which the district expects to be able to submit the required materials in the request. (Cal. Code Regs., tit. 5 § 59342, subd. (a) (Register 2001, No. 6; and Register 2002, No. 13), beginning July 1, 2001.)

In addition, for the reasons discussed above, the Commission finds that any funds received from the Equal Employment Opportunity Fund or the Faculty and Staff Diversity Fund constitute offsetting revenues if used for the reimbursable state-mandated activities imposed by the test

claim statute and title 5 regulations pled in the "equal employment opportunity" section of this analysis. In such instances, funds received from the Equal Employment Opportunity Fund would constitute offsetting revenue for the reimbursable state-mandated activities imposed by title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034, as amended by Register 2002, number 35. Funds received from the Faculty and Staff Diversity Fund would constitute offsetting revenue for the reimbursable state-mandated activities imposed by Education Code section 87102, as amended by Statutes 1988, chapter 973, and title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53026, and 53034, as amended in Register 96, number 23. In the Budget Act of 2003, $1,747,000 was appropriated for the Equal Employment Opportunity Fund.[445] In the Budget Act of 2001 and the Budget Act of 2002, $1,859,000 was appropriated for the Faculty and Staff Diversity Fund.[446]

Finally, the Commission finds that all other test claim statutes and regulations do not constitute a reimbursable state-mandated program because they either do not require any activities on community college districts, are mandated by federal law, are voluntary or are downstream of a voluntary activity, or are not new as compared to the legal requirements in effect immediately prior to their enactment.

[445] The Budget Act of 2003 (Stats. 2003, ch. 157) for the 2003-2004 fiscal year (starting July 1, 2003), scheduled $1,747,000 for the Equal Employment Opportunity Fund. See line item 6870-101-0001, schedule 14.

[446] The Budget Act of 2001 (Stats. 2001, ch. 106) for the 2001-2002 fiscal year (starting July 1, 2001), and the Budget Act of 2002 (Stats. 2002, ch. 379) for the 2002-2003 fiscal year (starting July 1, 2002), scheduled $1,859,000 for the Faculty and Staff Diversity Fund. See line item 6870-101-0001, schedule 14.

Exhibit B

Hearing: July 27, 2012
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PROPOSED PARAMETERS AND GUIDELINES

Education Code Section 87102

Statutes 1988, Chapters 973

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

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

Discrimination Complaint Procedures (Equal Employment Opportunity Program – Set One)

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

(Fiscal Year 2001-2002 only)

I. SUMMARY OF THE MANDATE

On March 24, 2011, the Commission on State Mandates (Commission) adopted a statement of decision for the *Discrimination Complaint Procedures* test claim finding that the test claim statute and regulations impose a partially reimbursable state-mandated program upon community college districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The Commission has adopted separate sets of parameters and guidelines for the *Discrimination Complaint Procedures* (02-TC-46) statement of decision as follows: (1) equal employment opportunity program; (2) federal rights for individuals with disabilities; and (3) discrimination complaint procedures. This set of parameters and guidelines addresses the Commission's findings regarding the equal employment opportunity program.

Because some of the activities approved in the statement of decision have a period of reimbursement that begins during the 2002-2003 fiscal year, and some of the activities are not reimbursable beyond the 2001-2002 fiscal year or the 2002-2003 fiscal year, the Commission has adopted three sets of parameters and guidelines for the equal employment opportunity program: (1) for costs incurred during the 2001-2002 fiscal year only; (2) for costs incurred during the 2002-2003 fiscal year only; and (3) for costs incurred in fiscal year 2003-2004 and subsequent fiscal years.

For the 2001-2002 fiscal year only, the activities approved in the equal employment opportunity program section of the statement of decision are contained in Education Code section 87102, as amended by Statutes 1988, chapter 973; and California Code of Regulations, title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034, as amended by Register 92, number 17; Register 96, number 23; and Register 2002, number 35. These activities address steps to achieve diversity or equal employment opportunity in a community college district's workforce, including, establishing hiring goals, monitoring the district workforce, reporting workforce data to the Chancellor's Office, and establishing a

process to address complaints of violations of the equal employment opportunity program regulations.

II. ELIGIBLE CLAIMANTS

Any community college district, which incurs increased costs as a result of this mandate, is eligible to claim reimbursement.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557(e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The claimants filed the test claim in the 2002-2003 fiscal year, establishing eligibility for reimbursement on or after July 1, 2001. Three sets of parameters and guidelines have been adopted, one for costs incurred *only* during the 2001-2002 fiscal year, one for costs incurred *only* during the 2002-2003 fiscal year, and one for costs incurred in or after the 2003-2004 fiscal year. These parameters and guidelines are for the 2001-2002 fiscal year only. Therefore, costs incurred pursuant to Education Code section 87102 and California Code of Regulations, title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034 as set forth in these parameters and guidelines are reimbursable only for the period of July 1, 2001 through June 30, 2002.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a school district may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. If revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a school district filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Government Code section 17560(b).)
5. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a).
6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Activities that require varying levels of efforts are not appropriate for time studies. Claimants wishing to use time studies to support salary and benefit costs are required to comply with the State Controller's Time-Study Guidelines before a time study is conducted. Time study usage is subject to the review and audit conducted by the State Controller's Office.

For each eligible claimant, the following activities are reimbursable:

A. <u>District Plan Contents and Review</u>

Education Code section 87102(a) and Title 5, Sections 53003 and 53020

1. Include steps in the faculty and staff diversity plan that the district will take in meeting and improving hiring goals for both full-time faculty and part-time faculty pursuant to Education Code section 87482.6 (Statutes 1988, Chapter 973). (Ed. Code, § 87102(a) (Statutes 1988, Chapter 973).) *This activity is reimbursable from July 1, 2001 through September 3, 2001*.
2. Review the faculty and staff diversity plan, excluding goals and timetables, at least every three years and if necessary revise the plan and submit it to the Chancellor's Office for approval. (Cal. Code Regs., title 5, §§ 53003(b) and 53020(a) (Register 96, No. 23).)
3. Include in the faculty and staff diversity plan the following information:
    a. Goals and timetables, as appropriate, for hiring and promotion of persons with disabilities developed pursuant to California Code of Regulations, title 5, section 53006 for each college in the district and for the district as a whole. (Cal. Code Regs., tit. 5, §§ 53003(b) and 53020(a) (Register 96, No. 23).)
    b. A process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of California Code of Regulations, title 5, section 53000 et seq., which addresses affirmative action/equal employment opportunity programs (Register 96, No. 23; Register 2002, No. 35) and of state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, §§ 53003(c)(4) and 53020(a) (Register 96, No. 23).)
    c. An analysis of the number of persons with disabilities who are employed in the district's work force and the number of historically underrepresented groups (including persons with disabilities) who have applied for employment in the following job categories: (1) executive/ administrative/ managerial; (2) faculty

and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004(a) (Register 96, No. 23)). (Cal. Code Regs., tit. 5, §§ 53003(c)(6) and 53020(a) (Register 96, No. 23).)

d. An analysis of the degree to which persons with disabilities are underrepresented in comparison to the numbers of disabled persons whom the Chancellor determines to be available and qualified to perform the work required for each job category. (Cal. Code Regs., tit. 5, §§ 53003(c)(7) and 53020(a) (Register 96, No. 23).)

e. The determination of whether or not the underrepresentation for women, ethnic minorities, or persons with disabilities is significant. *This activity does not include reimbursement for the inclusion of an analysis of the degree to which any group is underrepresented. This activity only requires the inclusion of the determination of whether any underrepresentation is significant*. (Cal. Code Regs., tit. 5, §§ 53003(c)(7) and 53020(a) (Register 96, No. 23).)

f. The steps the district will take to achieve diversity in its workforce. (Cal. Code Regs., tit. 5, §§ 53003(c)(8) and 53020(a) (Register 96, No. 23).)

g. Goals for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003(c)(7) (Register 96, No. 23). (Cal. Code Regs., tit. 5, §§ 53003(c)(9) and 53020(a) (Register 96, No. 23).)

h. A plan for corrective action consistent with California Code of Regulations, title 5, section 53006 (Register 96, No. 23), including goals and timetables for hiring and promotion, if necessary, to remedy any significant underrepresentation identified in the faculty and staff diversity plan by achieving expected representation for all historically underrepresented groups in all job categories listed in California Code of Regulations, title 5, section 53004(a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, §§ 53003(c)(10) and 53020(a) (Register 96, No. 23).)

B. <u>Delegation of Authority</u>

Title 5, Section 53020

1. Design the administrative structure created by any delegation of authority to the affirmative action officer or others in such a manner so as to ensure prompt and effective implementation of the requirements of the affirmative action regulations (Cal. Code Regs., tit. 5, § 53000 et seq.). (Cal. Code Regs., tit. 5, § 53020(a) and (b) (Register 96, No. 23).)

2. Designate in the faculty and staff diversity plan a single officer, who may be the affirmative action officer, for ensuring complaints of violations of the affirmative action regulations (excluding those based on disability or gender), filed pursuant to California Code of Regulations, *title 5, section 53026, are promptly and impartiall*y investigated, and ensuring that selection procedures and the applicant pool are properly monitored (excluding ensuring that the selection procedure is based solely on job-related criteria and monitoring for adverse impact) as required by California Code of Regulations, title 5,

sections 53023 and 53024. (Cal. Code Regs., tit. 5, § 53020(a) and (b) (Register 96, No. 23).)

C. Employee Survey

Title 5, Section 53004

1. In the report to the Chancellor's Office of the results of the employee survey, report each employee so that they 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. (Cal. Code Regs., tit. 5, §§ 53004(a) and 53020(a) (Register 96, No. 23).)
2. Afford each applicant or employee the opportunity to identify his or her gender, ethnicity and, if applicable, his or her disability for purposes of the survey and report required by California Code of Regulations, title 5, section 53004(a) (Register 96, No. 23. (Cal. Code Regs., tit. 5, §§ 53004(b) and 53020(a) (Register 96, No. 23).)
    a. Count and report Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians as part of the Asian/Pacific Islander group as well as in separate subcategories. (Cal. Code Regs., tit. 5, §§ 53004(b) and 53020(a) (Register 96, No. 23).)

D. Monitoring Recruitment

Title 5, Sections 53004 and 53006

1. Monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing the faculty and staff diversity plan and to provide data needed for the analyses required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23). (Cal. Code Regs., tit. 5, §§ 53004(a) and 53020(a) (Register 96, No. 23).)
2. If a community college district has existing goals:
    a. Update goals established prior to June 30, 1996 and set a new target date for achieving expected representation for a group in a job category if significant underrepresentation still exists. (Cal. Code Regs., tit. 5, §§ 53006(a) and 53020(a) (Register 96, No. 23).)
    b. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006(a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, §§ 53006(a)(1) and 53020(a) (Register 96, No. 23).)
    c. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective while updating goals and setting new target dates pursuant to California Code of

Regulations, title 5, section 53006(a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, §§ 53006(a)(2) and 53020(a) (Register 96, No. 23).)

d. Comply with California Code of Regulations, title 5, section 53006(c) (Register 96, No. 23) while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006(a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, §§ 53006(a)(3) and 53020(a) (Register 96, No. 23).)

3. If a community college district has no existing goals:

   a. Take corrective action if, pursuant to California Code of Regulations, title 5, section 53003(c)(7), the district determines that a particular group is significantly underrepresented with respect to one or more job categories and no goal has previously been set. (Cal. Code Regs., tit. 5, §§ 53006(b) and 53020(a) (Register 96, No. 23).)

   b. The district shall take, at a minimum, the following corrective action:

      i. Review district recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, §§ 53006(b)(1) and 53020(a) (Register 96, No. 23).)

      ii. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective. (Cal. Code Regs., tit. 5, §§ 53006(b)(2) and 53020(a) (Register 96, No. 23).)

      iii. Determine whether the group is still significantly underrepresented in the job categories in question after the measures described in California Code of Regulations, title 5, section 53006(b)(1) and (2) (Register 96, No. 23) have been in place a reasonable period of time. (Cal. Code Regs., tit. 5, §§ 53006(b)(3) and 53020(a) (Register 96, No. 23).)

      iv. Set a goal with a target date for achieving expected representation for the significantly underrepresented group in each job category where significant underrepresentation persists, if it persists. (Cal. Code Regs., tit. 5, §§ 53006(b)(4) and 53020(a) (Register 96, No. 23).)

      v. Monitor on an ongoing basis the staffing rate for the significantly underrepresented groups in the specified job categories. (Cal. Code Regs., tit. 5, §§ 53006(b)(4) and 53020(a) (Register 96, No. 23).)

      vi. Discontinue the use of goals when expected representation has been achieved for that group in the job categories in question. (Cal. Code Regs., tit. 5, §§ 53006(b)(4) and 53020(a) (Register 96, No. 23).)

4. The following additional measures to be are to be taken if a goal has been set and after a reasonable period of time significant underrepresentation persists:

   a. Establish a specific timetable to project the levels of annual hiring of persons from the significantly underrepresented group which will be necessary to meet the

existing goal by the target date. (Cal. Code Regs., tit. 5, §§ 53006(c) and 53020(a) (Register 96, No. 23).)

b. Implement the following additional corrective measures until expected representation has been achieved for that group in the job category in question: Consider, as one factor in the final selection process, the fact that a candidate is a member of a significantly underrepresented group, provided that the qualifications of the candidates under consideration are reasonably considered to be equivalent. (Cal. Code Regs., tit. 5, §§ 53006(c)(2) and 53020(a) (Register 96, No. 23).)

5. If a community college district has no existing goals for women or persons with disabilities implement the measures required in California Code of Regulations, title 5, section 53006(b)(1) and (2) (Register 96, No. 23) concurrently with setting a goal with a target date for achieving expected representation for women or persons with disabilities in each job category in which they are found to be significantly underrepresented. (Cal. Code Regs., tit. 5, §§ 53006(d) and 53020(a) (Register 96, No. 23).).

   a. Goals shall remain in effect only until expected representation has been achieved for the group in the job category or categories in which significant underrepresentation is found. (Cal. Code Regs., tit. 5, §§ 53006(d) and 53020(a) (Register 96, No. 23).)

   b. An aggregate labor force availability rate shall be utilized for setting goals for hiring persons with disabilities with respect to the total district work force until the Chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, §§ 53006(d) and 53020(a) (Register 96, No. 23).)

E. <u>Recruitment Procedures</u>

Title 5, Section 53021

1. Actively recruit from both within and outside the district work force to attract qualified applicants for all new openings except as provided by California Code of Regulations, title 5, section 53021(b). (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 96, No. 23).)

   a. Active recruitment shall include focused outreach to historically underrepresented groups. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 96, No. 23).)

   b. Open recruitment applies 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. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 96, No. 23).)

2. Recruit at least statewide for full-time faculty and educational administrator positions, and at a minimum, seek qualified applicants listed in the California Community Colleges Faculty and Staff Diversity Registry. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 96, No. 23).)

3. Recruit part-time faculty positions separately for each new opening or by annually establishing a pool of eligible candidates. In either case, full and open recruitment is

required consistent with California Code of Regulations, title 5, section 53021. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 96, No. 23).)

4. Notify the Faculty and Staff Diversity Advisory Committee established pursuant to California Code of Regulations, title 5, section 53005 and the Chancellor, at least ten working days prior to offering the position to a candidate, if the district believes justification exists for use of any of the exceptions listed in section 53021(b). (Cal. Code Regs., tit. 5, §§ 53021(c) and 53020(a) (Register 96, No. 23).)

5. Comply with the district's established hiring procedures and afford all qualified district employees the opportunity to apply even where in-house or promotional only recruitment is permitted under California Code of Regulations, title 5, section 53005(b). (Cal. Code Regs., tit. 5, §§ 53021(d) and 53020(a) (Register 96, No. 23).)

F. Job Announcements

Title 5, Section 53022

1. Include in the job requirements in announcements for faculty and administrative positions a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. (Cal. Code Regs., tit. 5, §§ 53022 and 53020(a) (Register 96, No. 23).)

2. Review job specifications, excluding any "required," "desired," or "preferred" qualifications beyond the state minimum qualifications (set forth in Subchapter 4 Cal. Code Regs., tit. 5, commencing with § 53400) which the district wishes to utilize, before the position is announced to ensure conformity with the requirements of California Code of Regulations, title 5, section 53000 et seq., and state and federal nondiscrimination laws, excluding section 504 of the Rehabilitation Act, and Title IX of Education Amendments of 1972. (Cal. Code Regs., tit. 5, §§ 53022 and 53020(a) (Register 96, No. 23).)

G. Applicant Pool

Title 5, Section 53023

1. Afford each applicant an opportunity to voluntarily identify his or her gender, ethnicity and, if applicable, his or her disability, in the district's application for employment. (Cal. Code Regs., tit. 5, §§ 53023(a) and 53020(a) (Register 96, No. 23).)

2. Keep information regarding an applicant's gender, ethnicity, and/or disability provided in an application for employment confidential. (Cal. Code Regs., tit. 5, §§ 53023(a) and 53020(a) (Register 96, No. 23).)

3. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that expected representation has been achieved for historically underrepresented groups. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 96, No. 23).)

4. Extend the application deadline and conduct additional focused recruitment for historically underrepresented groups for which expected representation has not been achieved, if necessary. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 96, No. 23).)

5. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when the expected representation of historically underrepresented groups is achieved, or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 96, No. 23).)

6. Analyze the composition of the qualified applicant pool to ensure that no group defined in terms of ethnicity is adversely impacted as defined by California Code of Regulations, title 5, section 53001(m) (Register 96, No. 23). (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 96, No. 23).)

7. Take effective steps to address adverse impact on any group defined in terms of ethnicity found in the district's applicant pool before the selection process is continued. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 96, No. 23).)

H. Screening and Selection Procedures

Title 5, Section 53024

1. Provide all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to the Chancellor upon request. (Cal. Code Regs., tit. 5, §§ 53024(a)(1) and 53020(a) (Register 96, No. 23).)

2. Design all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole, 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. (Cal. Code Regs., tit. 5, §§ 53024(a)(2) and 53020(a) (Register 96, No. 23).)

3. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to ensure that they do not have an adverse impact, as defined by California Code of Regulations, title 5, section 53001(m), on any group defined in terms of ethnicity. (Cal. Code Regs., tit. 5, §§ 53024(a)(4) and 53020(a) (Register 96, No. 23).)

4. Suspend the selection process and take timely and effective steps to remedy adverse impact on any group defined in terms of ethnicity before the selection process resumes if monitoring under California Code of Regulations, title 5, section 53024(a)(4) reveals that any selection technique or procedure has adversely impacted such ethnic group. (Cal. Code Regs., tit. 5, §§ 53024(b) and 53020(a) (Register 96, No. 23).)

I. Persons with Disabilities

Title 5, Section 53034

1. Report the staffing rate of persons with disabilities by a separate survey as directed by the Chancellor's Office, until a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by California Code of Regulations, title 5, section 53004. (Cal. Code Regs., tit. 5, §§ 53034 and 53020(a) (Register 96, No. 23).)

J. Complaint Procedures (Nonemployees and Nonapplicants)

Title 5, Sections 53020 and 53026

1. Establish a process permitting any person (excluding employees and applicants for employment) to file a complaint alleging that the requirements of the affirmative action regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) have been violated. This excludes the establishment of a process permitting an employee to file a complaint alleging a violation of the affirmative action regulations on the basis of disability or gender (i.e., failure to designate a person to coordinate efforts to comply Section 504 and Title IX (see Cal. Code Regs., tit. 5, § 53020); failure to provide reasonable accommodations (see Cal. Code Regs., tit. 5, § 53020); and employment discrimination on the basis of disability and gender in district employee selection procedures). (Cal. Code Regs., tit. 5, §§ 53026 and 53020(a) (Register 96, No. 23).)
2. Forward immediately to the Chancellor a copy of the complaint. (Cal. Code Regs., tit. 5, §§ 53026 and 53020(a) (Register 96, No. 23).)
3. Provide a written investigative report within 90 days if required by the Chancellor. (Cal. Code Regs., tit. 5, §§ 53026 and 53020(a) (Register 96, No. 23).)

K. Program Reports to the Public, Chancellor and Board of Governors

Education Code Section 87102 and Title 5, Section 53034

1. Submit to the Board of Governors of the California Community Colleges, an affirmation of compliance with the provisions of Education Code sections 87100-87107, which address affirmative action hiring (as existing prior to September 4, 2001). (Ed. Code, § 87102(a) (Statutes. 1988, Chapter 973).) *This activity is reimbursable from July 1, 2001 through September 3, 2001*.
2. Publish and distribute a record of the success rate of the measurable progress, with respect to the district's goals and timetables, in hiring employees through its affirmative action employment program. (Ed. Code, § 87102(b) (Statutes 1988, Chapter 973).) *This activity is reimbursable from July 1, 2001 through September 3, 2001*.

   Make this publication a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code), and include data and information specified by the Board of Governors. (Ed. Code, § 87102(b) (Statutes 1988, Chapter 973).) *This activity is reimbursable from July 1, 2001 through September 3, 2001*.
3. Submit a report on the use of Faculty and Staff Diversity funds to the Chancellor's Office no later than September 30 of the fiscal year following the use of the funds. (Code Regs., tit. 5, §§ 53034 and 53020(a) (Register 96, No. 23).)

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the dates when services were performed and itemize all costs for those services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs may include: (a) the indirect costs originating in each department or agency of the governmental unit carrying out state mandated programs; and (b) the costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

Community colleges have the option of using: (1) a federally approved rate, utilizing the cost accounting principles from the Office of Management and Budget Circular A-21, "Cost Principles of Educational Institutions"; (2) the rate calculated on State Controller's Form FAM-29C; or (3) a 7% indirect cost rate.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[1] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from the following source shall be identified and deducted from this claim as follows:

> Funds appropriated and received from the Faculty and Staff Diversity Fund and applied to the reimbursable state-mandated activities imposed by Education Code section 87102, as amended by Statutes 1988, chapter 973, and Title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53026, and 53034, as amended in Register 96, number 23. (State Budget Act of 2001, Item 6870-101-0001, schedule 14)

In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

[1] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

Pursuant to Government Code section 17561(d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The statements of decision adopted for the test claim and parameters and guidelines are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record. The administrative record is on file with the Commission.

Exhibit B

Hearing: July 27, 2012
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PROPOSED PARAMETERS AND GUIDELINES

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

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

Discrimination Complaint Procedures (Equal Employment Opportunity Program – Set Two)

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

(Fiscal Year 2002-2003 only)

I. SUMMARY OF THE MANDATE

On March 24, 2011, the Commission on State Mandates (Commission) adopted a statement of decision for the *Discrimination Complaint Procedures* test claim finding that the test claim regulations impose a partially reimbursable state-mandated program upon community college districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The Commission has adopted separate sets of parameters and guidelines for the *Discrimination Complaint Procedures* (02-TC-46) statement of decision as follows: (1) equal employment opportunity program; (2) federal rights for individuals with disabilities; and (3) discrimination complaint procedures. This set of parameters and guidelines addresses the Commission's findings regarding the equal employment opportunity program.

Because some of the activities approved in the statement of decision have a period of reimbursement that begins during the 2002-2003 fiscal year, and some of the activities are not reimbursable beyond the 2001-2002 fiscal year or the 2002-2003 fiscal year, the Commission has adopted three sets of parameters and guidelines for the equal employment opportunity program: (1) for costs incurred during the 2001-2002 fiscal year only; (2) for costs incurred during the fiscal year 2002-2003 only; and (3) for costs incurred in fiscal year 2003-2004 and subsequent fiscal years.

For costs incurred in fiscal year 2002-2003 and in subsequent fiscal years, the activities approved in the equal employment opportunity program section of the statement of decision are contained in California Code of Regulations, title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034, as amended by Register 92, number 17; Register 96, number 23; and Register 2002, number 35. These activities address steps to achieve diversity or equal employment opportunity in a community college district's workforce, including, establishing hiring goals, monitoring the district workforce, reporting workforce data to the Chancellor's Office, and establishing a process to address complaints of violations of the equal employment opportunity program regulations.

II. ELIGIBLE CLAIMANTS

Any community college district, which incurs increased costs as a result of this mandate, is eligible to claim reimbursement.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557(e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The claimants filed the test claim in the 2002-2003 fiscal year, establishing eligibility for reimbursement on or after July 1, 2001. Three sets of parameters and guidelines have been adopted, one for costs incurred *only* during the 2001-2002 fiscal year, one for costs incurred *only* during the 2002-2003 fiscal year, and one for costs incurred in or after the 2003-2004 fiscal year. These parameters and guidelines are for the 2002-2003 fiscal year only. Therefore, costs incurred pursuant to California Code of Regulations, title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034 as set forth in these parameters and guidelines are reimbursable only for the period of July 1, 2002 through June 30, 2003.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a school district may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. If revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a school district filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Government Code section 17560(b).)
5. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a)
6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, and declarations. Declarations must include a certification or declaration stating, “I certify (or declare) under

penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Activities that require varying levels of efforts are not appropriate for time studies. Claimants wishing to use time studies to support salary and benefit costs are required to comply with the State Controller's Time-Study Guidelines before a time study is conducted. Time study usage is subject to the review and audit conducted by the State Controller's Office.

For each eligible claimant, the following activities are reimbursable:

A. <u>District Plan Contents and Review</u>

Title 5, Sections 53003 and 53020

1. Review the faculty and staff diversity plan, excluding goals and timetables, at least every three years and if necessary revise the plan and submit it to the Chancellor's Office for approval. (Cal. Code Regs., tit. 5, §§ 53003(b) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53003(b) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable only until August 10, 2002.*

2. Review the equal employment opportunity plan, excluding goals and timetables, at least every three years and if necessary revise the plan and submit it to the Chancellor's Office for approval. (Cal. Code Regs., tit. 5, §§ 53003(b) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002.*

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

    a. Goals and timetables, as appropriate, for hiring and promotion of persons with disabilities developed pursuant to California Code of Regulations, title 5, section 53006 for each college in the district and for the district as a whole. (Cal. Code Regs., tit. 5, §§ 53003(b) and 53020(a) (Register 96, No. 23).)

    b. A process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of California Code of Regulations, title 5, section 53000 et seq., which addresses affirmative action/equal employment opportunity programs (Register 96, No. 23; Register 2002, No. 35) and of state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, §§ 53003(c)(4) and 53020(a) (Register 96, No. 23).)

    c. An analysis of the number of persons with disabilities who are employed in the district's work force and the number of historically underrepresented groups (including persons with disabilities) who have applied for employment in the following job categories: (1) executive/ administrative/ managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical;

(5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004(a) (Register 96, No. 23)). (Cal. Code Regs., tit. 5, §§ 53003(c)(6) and 53020(a) (Register 96, No. 23).)

d. An analysis of the degree to which persons with disabilities are underrepresented in comparison to the numbers of disabled persons whom the Chancellor determines to be available and qualified to perform the work required for each job category. (Cal. Code Regs., tit. 5, §§ 53003(c)(7) and 53020(a) (Register 96, No. 23).)

e. The determination of whether or not the underrepresentation for women, ethnic minorities, or persons with disabilities is significant. *This activity does not include reimbursement for the inclusion of an analysis of the degree to which any group is underrepresented. This activity only requires the inclusion of the determination of whether any underrepresentation is significant*. (Cal. Code Regs., tit. 5, §§ 53003(c)(7) and 53020(a) (Register 96, No. 23).)

f. The steps the district will take to achieve diversity in its workforce. (Cal. Code Regs., tit. 5, §§ 53003(c)(8) and 53020(a) (Register 96, No. 23).)

g. Goals for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003(c)(7) (Register 96, No. 23). (Cal. Code Regs., tit. 5, §§ 53003(c)(9) and 53020(a) (Register 96, No. 23).)

h. A plan for corrective action consistent with California Code of Regulations, title 5, section 53006 (Register 96, No. 23), including goals and timetables for hiring and promotion, if necessary, to remedy any significant underrepresentation identified in the faculty and staff diversity plan by achieving expected representation for all historically underrepresented groups in all job categories listed in California Code of Regulations, title 5, section 53004(a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, §§ 53003(c)(10) and 53020(a) (Register 96, No. 23).)

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

a. A process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of California Code of Regulations, title 5, section 53000 et seq., which addresses equal employment opportunity programs (Register 2002, No. 35) and of state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, §§ 53003(c)(4) and 53020(a) (Register 2002, No. 35).)

b. A process for providing annual written notice to professional organizations concerning the district's equal employment opportunity plan and the need for assistance from the organizations in identifying qualified applicants. (Cal. Code Regs., tit. 5, §§ 53003(c)(5) and 53020(a) (Register 2002, No. 35).)

c. An analysis of the number of ethnic majority, men, and persons with disabilities who are employed in the district's work force and the number of persons from monitored groups who have applied for employment in each of the following job

categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004(a) (Register 2002, No. 35)). (Cal. Code Regs., tit. 5, §§ 53003(c)(6) and 53020(a) (Register 2002, No. 35).)

d. An analysis of the degree to which persons within the ethnic majority, men, and persons with disabilities are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each job category. (Cal. Code Regs., tit. 5, §§ 53003(c)(7) and 53020(a) (Register 2002, No. 35).)

e. The determination of whether or not the underrepresentation for any group based on gender, ethnicity, or disability is significant. *This activity does not include reimbursement for the inclusion of an analysis of the degree to which any group is underrepresented. This activity only requires the inclusion of the determination of whether any underrepresentation is significant*. (Cal. Code Regs., tit. 5, §§ 53003(c)(7) and 53020(a) (Register 2002, No. 35).)

f. Methods for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003(c)(7). (Cal. Code Regs., tit. 5, §§ 53003(c)(8) and 53020(a) (Register 2002, No. 35).)

g. Additional steps consistent with California Code of Regulations, title 5, section 53006, to remedy any significant underrepresentation identified in the plan. (Cal. Code Regs., tit. 5, §§ 53003(c)(9) and 53020(a) (Register 2002, No. 35).)

h. Any other measures necessary to further equal employment opportunity throughout the district. (Cal. Code Regs., tit. 5, §§ 53003(c)(10) and 53020(a) (Register 2002, No. 35).)

i. Any goals for hiring persons with disabilities that are required by California Code of Regulations, title 5, section 53025. (Cal. Code Regs., tit. 5, §§ 53003(d) and 53020(a) (Register 2002, No. 35).)

B. <u>Delegation of Authority</u>

Title 5, Section 53020

1. Design the administrative structure created by any delegation of authority to the affirmative action officer or others in such a manner so as to ensure prompt and effective implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.). (Cal. Code Regs., tit. 5, §§ 53020(b) and 53020(a) (Register 96, No. 23).) *This activity is reimbursable only until August 10, 2002.*

2. Design the administrative structure created by any delegation of authority to the equal employment officer or others in such a manner so as to ensure prompt and effective implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.). (Cal. Code Regs., tit. 5,

§§ 53020(b) and 53020(a) (Register 2002, No. 23).) *This activity is reimbursable beginning August 11, 2002.*

3. Designate in the faculty and staff diversity plan a single officer, who may be the affirmative action officer, for ensuring complaints of violations of the equal employment opportunity program regulations (excluding those based on disability or gender), filed pursuant to California Code of Regulations, title 5, section 53026, are promptly and impartially investigated, and ensuring that selection procedures and the applicant pool are properly monitored (excluding ensuring that the selection procedure is based solely on job-related criteria and monitoring for adverse impact) as required by California Code of Regulations, title 5, sections 53023 and 53024. (Cal. Code Regs., tit. 5, §§ 53020(b) and 53020(a) (Register 2002, No. 23).) *This activity is reimbursable only until August 10, 2002.*

4. Designate in the equal employment opportunity plan a single officer, who may be the equal employment opportunity officer, for ensuring complaints of violations of the equal employment opportunity program regulations (excluding those based on disability or gender), filed pursuant to California Code of Regulations, title 5, section 53026, are promptly and impartially investigated, and ensuring that selection procedures and the applicant pool are properly monitored (excluding ensuring that the selection procedure is based solely on job-related criteria and monitoring for adverse impact) as required by California Code of Regulations, title 5, sections 53023 and 53024. (Cal. Code Regs., tit. 5, §§ 53020(b) and 53020(a) (Register 2002, No. 23).) *This activity is reimbursable beginning August 11, 2002.*

C. <u>Employee Survey</u>

Title 5, Section 53004

1. In the report to the Chancellor's Office of the results of the employee survey, report each employee so that they 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. (Cal. Code Regs., tit. 5, §§ 53004(a) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53004(a) and 53020(a) (Register 2002, No. 35).)

2. Afford each applicant or employee the opportunity to identify his or her gender, ethnicity and, if applicable, his or her disability for purposes of the survey and report required by California Code of Regulations, title 5, section 53004(a) (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, §§ 53004(b) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53004(b) and 53020(a) (Register 2002, No. 35).)

    a. Beginning August 11, 2002, count a person in only one ethnic group for reporting purposes if that person designates multiple ethnic groups with which he or she identifies. (Cal. Code Regs., tit. 5, §§ 53004(b) and 53020(a) (Register 2002, No. 35).)

    b. Count and report Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians as part of the Asian/Pacific Islander group as well as in separate subcategories. (Cal. Code

Regs., tit. 5, §§ 53004(b) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53004(b) and 53020(a) (Register 2002, No. 35).)

D. Monitoring Recruitment

Title 5, Sections 53004 and 53006

1. Monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing the faculty and staff diversity plan and to provide data needed for the analyses required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, §§ 53004(a) and 53020(a) (Register 96, No. 23).) *This activity is reimbursable only until August 10, 2002.*

2. Monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing the equal employment opportunity plan and to provide data needed for the analyses required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, §§ 53004(a) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002*.

3. If a community college district has existing goals, then the following activities are *reimbursable only until August 10, 2002*:

    a. Update goals established prior to June 30, 1996 and set a new target date for achieving expected representation for a group in a job category if significant underrepresentation still exists. (Cal. Code Regs., tit. 5, §§ 53006(a) and 53020(a) (Register 96, No. 23).)

    b. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006(a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, §§ 53006(a)(1) and 53020(a) (Register 96, No. 23).)

    c. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006(a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, §§ 53006(a)(2) and 53020(a) (Register 96, No. 23).)

    d. Comply with California Code of Regulations, title 5, section 53006(c) (Register 96, No. 23) while updating goals and setting new target dates pursuant to California Code of Regulations, title 5, section 53006(a) (Register 96, No. 23). (Cal. Code Regs., tit. 5, §§ 53006(a)(3) and 53020(a) (Register 96, No. 23).)

4. If a community college district has no existing goals, then the following activities are *reimbursable only until August 10, 2002*:

    a. Take corrective action if, pursuant to California Code of Regulations, title 5, section 53003(c)(7), the district determines that a particular group is significantly

underrepresented with respect to one or more job categories and no goal has previously been set. (Cal. Code Regs., tit. 5, §§ 53006(b) and 53020(a) (Register 96, No. 23).)

b. The district shall take, at a minimum, the following corrective action:

   i. Review district recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, §§ 53006(b)(1) and 53020(a) (Register 96, No. 23).)

   ii. Consider various other means of reducing the underrepresentation which do not involve taking underrepresented group status into account, and implement any such techniques which are determined to be feasible and potentially effective. (Cal. Code Regs., tit. 5, §§ 53006(b)(2) and 53020(a) (Register 96, No. 23).)

   iii. Determine whether the group is still significantly underrepresented in the job categories in question after the measures described in California Code of Regulations, title 5, section 53006(b)(1) and (2) (Register 96, No. 23) have been in place a reasonable period of time. (Cal. Code Regs., tit. 5, §§ 53006(b)(3) and 53020(a) (Register 96, No. 23).)

   iv. Set a goal with a target date for achieving expected representation for the significantly underrepresented group in each job category where significant underrepresentation persists, if it persists. (Cal. Code Regs., tit. 5, §§ 53006(b)(4) and 53020(a) (Register 96, No. 23).)

   v. Monitor on an ongoing basis the staffing rate for the significantly underrepresented groups in the specified job categories. (Cal. Code Regs., tit. 5, §§ 53006(b)(4) and 53020(a) (Register 96, No. 23).)

   vi. Discontinue the use of goals when expected representation has been achieved for that group in the job categories in question. (Cal. Code Regs., tit. 5, §§ 53006(b)(4) and 53020(a) (Register 96, No. 23).)

5. The following additional measures are to be taken if a goal has been set and after a reasonable period of time significant underrepresentation persists. *These activities are reimbursable only until August 10, 2002*:

   a. Establish a specific timetable to project the levels of annual hiring of persons from the significantly underrepresented group which will be necessary to meet the existing goal by the target date. (Cal. Code Regs., tit. 5, §§ 53006(c) and 53020(a) (Register 96, No. 23).)

   b. Implement the following additional corrective measures until expected representation has been achieved for that group in the job category in question: Consider, as one factor in the final selection process, the fact that a candidate is a member of a significantly underrepresented group, provided that the qualifications of the candidates under consideration are reasonably considered to be equivalent. (Cal. Code Regs., tit. 5, §§ 53006(c)(2) and 53020(a) (Register 96, No. 23).)

6. If a community college district has no existing goals for women or persons with disabilities, implement the measures required in California Code of Regulations, title 5, section 53006(b)(1) and (2) (Register 96, No. 23) concurrently with setting a goal with a target date for achieving expected representation for women or persons with disabilities in each job category in which they are found to be significantly underrepresented. (Cal. Code Regs., tit. 5, §§ 53006(d) and 53020(a) (Register 96, No. 23).) *This activity is reimbursable only until August 10, 2002*.

    a. Goals shall remain in effect only until expected representation has been achieved for the group in the job category or categories in which significant underrepresentation is found. (Cal. Code Regs., tit. 5, §§ 53006(d) and 53020(a) (Register 96, No. 23).)

    b. An aggregate labor force availability rate shall be utilized for setting goals for hiring persons with disabilities with respect to the total district work force until the Chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, §§ 53006(d) and 53020(a) (Register 96, No. 23).)

7. Take the following additional steps if a district determines that a particular monitored group is significantly underrepresented with respect to one or more categories. *These activities are reimbursable beginning August 11, 2002*.

    a. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, §§ 53006(a)(1) and 53020(a) (Register 2002, No. 35).)

    b. 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. (Cal. Code Regs., tit. 5, §§ 53006(a)(2) and 53020(a) (Register 2002, No. 35).)

    c. Determine whether the group is still significantly underrepresented in the categories in question after the measures described in subdivisions (a)(1) and (2) of California Code of Regulations, title 5, section 53006, have been in place a reasonable period of time (three years or longer). (Cal. Code Regs., tit. 5, §§ 53006(a)(3) and 53020(a) (Register 2002, No. 35).)

    d. Monitor the staffing rate for the significantly underrepresented group in the specified job categories in question on an ongoing basis until the projected representation has been achieved for that group if significant underrepresentation persists. (Cal. Code Regs., tit. 5, §§ 53006(a)(4) and 53020(a) (Register 2002, No. 35).)

E. <u>Recruitment Procedures</u>

Title 5, Section 53021

1. Actively recruit from both within and outside the district work force to attract qualified applicants for all new openings except as provided by California Code of Regulations,

title 5, section 53021(b). (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 2002, No. 35).)

a. Active recruitment shall include focused outreach to historically underrepresented groups. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 96, No. 23).) *This activity is reimbursable only until August 10, 2002*.

b. Active recruitment shall include outreach to ensure all persons, including persons from monitored groups, are provided the opportunity to seek employment with the district. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002*.

c. Open recruitment applies 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. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53021(a) (Register 2002, No. 35).)

2. Recruit at least statewide for full-time faculty and educational administrator positions, and at a minimum, seek qualified applicants listed in the California Community Colleges Faculty and Staff Diversity Registry. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 96, No. 23).) *This activity is reimbursable only until August 10, 2002.*

3. Recruit at least statewide for full-time faculty and educational administrator positions, and at a minimum, seek qualified applicants listed in the California Community Colleges Equal Employment Opportunity Registry. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002.*

4. Recruit part-time faculty positions separately for each new opening or by annually establishing a pool of eligible candidates. In either case, full and open recruitment is required consistent with California Code of Regulations, title 5, section 53021. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 2002, No. 35).).

5. Notify the Faculty and Staff Diversity Advisory Committee established pursuant to California Code of Regulations, title 5, section 53005 and the Chancellor, at least ten working days prior to offering the position to a candidate, if the district believes justification exists for use of any of the exceptions listed in section 53021(b). (Cal. Code Regs., tit. 5, §§ 53021(c) and 53020(a) (Register 96, No. 23).) *This activity is reimbursable only until August 10, 2002.*

6. Notify the Equal Employment Opportunity Advisory Committee established pursuant to California Code of Regulations, title 5, section 53005 and the Chancellor, at least ten working days prior to offering the position to a candidate, if the district believes justification exists for use of any of the exceptions listed in section 53021(b). (Cal. Code Regs., tit. 5, §§ 53021(c) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002.*

7. Comply with the district's established hiring procedures and afford all qualified district employees the opportunity to apply even where in-house or promotional only recruitment

is permitted under California Code of Regulations, title 5, section 53005(b). (Cal. Code Regs., tit. 5, §§ 53021(d) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53021(d) and 53020(a) (Register 2002, No. 35).)

F. Job Announcements

Title 5, Section 53022

1. Include in the job requirements in announcements for faculty and administrative positions a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. (Cal. Code Regs., tit. 5, §§ 53022 and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53022 and 53020(a) (Register 2002, No. 35).)

2. Review job specifications, excluding any "required," "desired," or "preferred" qualifications beyond the state minimum qualifications (set forth in Subchapter 4 Cal. Code Regs., tit. 5, commencing with § 53400) which the district wishes to utilize, before the position is announced to ensure conformity with the requirements of California Code of Regulations, title 5, section 53000 et seq., and state and federal nondiscrimination laws, excluding section 504 of the Rehabilitation Act, and Title IX of Education Amendments of 1972. (Cal. Code Regs., tit. 5, §§ 53022 and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53022 and 53020(a) (Register 2002, No. 35).)

G. Applicant Pool

Title 5, Section 53023

1. Afford each applicant an opportunity to voluntarily identify his or her gender, ethnicity and, if applicable, his or her disability, in the district's application for employment. (Cal. Code Regs., tit. 5, §§ 53023(a) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53023(a) and 53020(a) (Register 2002, No. 35).)

2. Keep information regarding an applicant's gender, ethnicity, and/or disability provided in an application for employment confidential. (Cal. Code Regs., tit. 5, §§ 53023(a) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53023(a) and 53020(a) (Register 2002, No. 35).)

3. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that expected representation has been achieved for historically underrepresented groups. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 96, No. 23).) *This activity is reimbursable only until August 10, 2002*.

4. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that any failure to obtain projected representation for any group defined in terms of ethnicity is not due to discriminatory recruitment procedures. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002*.

5. Extend the application deadline and conduct additional focused recruitment for historically underrepresented groups for which expected representation has not been achieved, if necessary. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 96, No. 23).) *This activity is reimbursable only until August 10, 2002*.

6. Extend the application deadline and conduct additional recruitment, which eliminates discriminatory recruitment procedures and ensures that recruitment efforts provide a full and fair opportunity for participation to a wide diversity of potential applicants, if necessary. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002.*
7. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when the expected representation of historically underrepresented groups is achieved, or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 96, No. 23).) *This activity is reimbursable only until August 10, 2002.*
8. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when recruitment efforts have offered an opportunity for participation to a wide diversity of potential applicants or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002.*
9. Analyze the composition of the qualified applicant pool to ensure that no group defined in terms of ethnicity is adversely impacted as defined by California Code of Regulations, title 5, section 53001(m) (Register 96, No. 23). (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 96, No. 23).) *This activity is reimbursable only until August 10, 2002.*
10. Analyze the composition of the qualified applicant pool to ensure that no ethnic group is adversely impacted as defined by California Code of Regulations, title 5, section 53001(a) (Register 2002, No. 35). (Cal. Code Regs., tit. 5, §§ 53023(c) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002.*
11. Take effective steps to address adverse impact on any group defined in terms of ethnicity found in the district's applicant pool before the selection process is continued. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53023(c) and 53020(a) (Register 2002, No. 35).)

H. <u>Screening and Selection Procedures</u>

Title 5, Section 53024

1. Provide all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to the Chancellor upon request. (Cal. Code Regs., tit. 5, §§ 53024(a)(1) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53024(a)(1) and 53020(a) (Register 2002, No. 35).)
2. Design all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole, 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. (Cal. Code Regs., tit. 5, §§ 53024(a)(2) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53024(a)(2) and 53020(a) (Register 2002, No. 35).)
3. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to ensure that they

do not have an adverse impact, as defined by California Code of Regulations, title 5, section 53001(m), on any group defined in terms of ethnicity. (Cal. Code Regs., tit. 5, §§ 53024(a)(4) and 53020(a) (Register 96, No. 23).) *This activity is reimbursable only until August 10, 2002*.

4. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to avoid an adverse impact as defined in California Code of Regulations, title 5, section 53001(a) on any group defined in terms of ethnicity, and to detect and address any adverse impact on any group defined in terms of ethnicity which does occur. (Cal. Code Regs., tit. 5, §§ 53024(a)(4) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002*.

5. Suspend the selection process and take timely and effective steps to remedy adverse impact on any group defined in terms of ethnicity before the selection process resumes if monitoring under California Code of Regulations, title 5, section 53024(a)(4) reveals that any selection technique or procedure has adversely impacted such ethnic group. (Cal. Code Regs., tit. 5, §§ 53024(b) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53024(b) and 53020(a) (Register 2002, No. 35).)

I. <u>Persons with Disabilities</u>

Title 5, Sections 53025 and 53034

1. Update a goal established prior to July 12, 2002 for persons with disabilities, set a new target date for achieving projected representation in a job category or categories, and concurrently comply with California Code of Regulations, title 5, section 53006, subdivisions (a)(1), (a)(2), and (b) with respect to persons with disability, if significant underrepresentation still exists in the job category or categories. (Cal. Code Regs., tit. 5, §§ 53025(b) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002*.

2. Implement California Code of Regulations, title 5, section 53006, subdivisions (a)(1) and (a)(2) concurrently with setting a goal with a target date for achieving projected representation for persons with a disability in each job category where underrepresentation was found to exist. Goals are to remain in effect only until projected representation has been achieved for that group in the category or categories in question. (Cal. Code Regs., tit. 5, §§ 53025(c) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002*.

3. Utilize an aggregate labor force availability rate for setting goals for hiring persons with disabilities with respect to the total district work force, until the Chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, §§ 53025(c) and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002*.

4. Report the staffing rate of persons with disabilities by a separate survey as directed by the Chancellor's Office, until a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by California Code of Regulations, title 5, section 53004. (Cal. Code Regs., tit. 5, §§ 53034 and 53020(a)

(Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53034 and 53020(a) (Register 2002, No. 35).)

J. Complaint Procedures (Nonemployees and Nonapplicants)

Title 5, Sections 53020 and 53026

1. Establish a process permitting any person (excluding employees and applicants for employment) to file a complaint alleging that the requirements of the affirmative action regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) have been violated. This excludes the establishment of a process permitting an employee to file a complaint alleging a violation of the affirmative action regulations on the basis of disability or gender (i.e., failure to designate a person to coordinate efforts to comply Section 504 and Title IX (see Cal. Code Regs., tit. 5, § 53020); failure to provide reasonable accommodations (see Cal. Code Regs., tit. 5, § 53020); and employment discrimination on the basis of disability and gender in district employee selection procedures). (Cal. Code Regs., tit. 5, §§ 53026 and 53020(a) (Register 96, No. 23).) *This activity is reimbursable only until August 10, 2002.*

2. Establish a process permitting any person (excluding employees and applicants for employment) to file a complaint alleging that the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) have been violated. This excludes the establishment of a process permitting an employee to file a complaint alleging a violation of the equal employment opportunity program regulations on the basis of disability or gender (i.e., failure to designate a person to coordinate efforts to comply Section 504 and Title IX (see Cal. Code Regs., tit. 5, § 53020); failure to provide reasonable accommodations (see Cal. Code Regs., tit. 5, § 53020); and employment discrimination on the basis of disability and gender in district employee selection procedures). (Cal. Code Regs., tit. 5, §§ 53026 and 53020(a) (Register 2002, No. 35).) *This activity is reimbursable beginning August 11, 2002.*

3. Forward immediately to the Chancellor a copy of the complaint. (Cal. Code Regs., tit. 5, §§ 53026 and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53026 (Register 2002, No. 35).)

4. Provide a written investigative report within 90 days if required by the Chancellor. (Cal. Code Regs., tit. 5, §§ 53026 and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53026 and 53020(a) (Register 2002, No. 35).)

K. Program Reports to the Public, Chancellor and Board of Governors

Title 5, Section 53034

1. Submit a report on the use of Faculty and Staff Diversity funds to the Chancellor's Office no later than September 30 of the fiscal year following the use of the funds. (Code Regs., tit. 5, §§ 53034 and 53020(a) (Register 96, No. 23).) *This activity is reimbursable only until August 10, 2002*.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the dates when services were performed and itemize all costs for those services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs may include: (a) the indirect costs originating in each department or agency of the governmental unit carrying out state mandated programs; and (b) the costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

Community colleges have the option of using: (1) a federally approved rate, utilizing the cost accounting principles from the Office of Management and Budget Circular A-21, "Cost Principles of Educational Institutions"; (2) the rate calculated on State Controller's Form FAM-29C; or (3) a 7% indirect cost rate.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[1] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from the following source shall be identified and deducted from this claim as follows:

1. Funds appropriated and received from the Faculty and Staff Diversity Fund and applied to the reimbursable state-mandated activities imposed by Education Code section 87102, as amended by Statutes 1988, chapter 973, and Title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53026, and 53034, as amended in Register 96, number 23. (State Budget Act of 2002, Item 6870-101-0001, schedule 14)

In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

[1] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

Pursuant to Government Code section 17561(d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The statements of decision adopted for the test claim and parameters and guidelines are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record. The administrative record is on file with the Commission.

Exhibit B

Hearing: July 27, 2012
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PROPOSED PARAMETERS AND GUIDELINES

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

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

Discrimination Complaint Procedures (Equal Employment Opportunity Program – Set Three)

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

(Beginning Fiscal Year 2003-2004)

I. SUMMARY OF THE MANDATE

On March 24, 2011, the Commission on State Mandates (Commission) adopted a statement of decision for the *Discrimination Complaint Procedures* test claim finding that the test claim regulations impose a partially reimbursable state-mandated program upon community college districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The Commission has adopted separate sets of parameters and guidelines for the *Discrimination Complaint Procedures* (02-TC-46) statement of decision as follows: (1) equal employment opportunity program; (2) federal rights for individuals with disabilities; and (3) discrimination complaint procedures. This set of parameters and guidelines addresses the Commission's findings regarding the equal employment opportunity program.

Because some of the activities approved in the statement of decision have a period of reimbursement that begins during the 2002-2003 fiscal year, and some of the activities are not reimbursable beyond the 2001-2002 fiscal year or the 2002-2003 fiscal year, the Commission has adopted three sets of parameters and guidelines for the equal employment opportunity program: (1) for costs incurred during the 2001-2002 fiscal year only; (2) for costs incurred during the fiscal year 2002-2003 only; and (3) for costs incurred in fiscal year 2003-2004 and subsequent fiscal years.

For costs incurred in fiscal year 2002-2003 and in subsequent fiscal years, the activities approved in the equal employment opportunity program section of the statement of decision are contained in California Code of Regulations, title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034, as amended by Register 92, number 17; Register 96, number 23; and Register 2002, number 35. These activities address steps to achieve diversity or equal employment opportunity in a community college district's workforce, including, establishing hiring goals, monitoring the district workforce, reporting workforce data to the Chancellor's Office, and establishing a process to address complaints of violations of the equal employment opportunity program regulations.

II. ELIGIBLE CLAIMANTS

Any community college district, which incurs increased costs as a result of this mandate, is eligible to claim reimbursement.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557(e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The claimants filed the test claim in the 2002-2003 fiscal year, establishing eligibility for reimbursement on or after July 1, 2001. Three sets of parameters and guidelines have been adopted, one for costs incurred *only* during the 2001-2002 fiscal year, one for costs incurred *only* during the 2002-2003 fiscal year, and one for costs incurred in or after the 2003-2004 fiscal year. These parameters and guidelines are for the period beginning in the 2003-2004 fiscal year and subsequent fiscal years. Therefore, costs incurred pursuant to California Code of Regulations, title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034 as set forth in these parameters and guidelines are reimbursable on or after July 1, 2003.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a school district may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. If revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a school district filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Government Code section 17560(b).)
5. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a).
6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, and declarations. Declarations must include a certification or declaration stating, “I certify (or declare) under

penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Activities that require varying levels of efforts are not appropriate for time studies. Claimants wishing to use time studies to support salary and benefit costs are required to comply with the State Controller's Time-Study Guidelines before a time study is conducted. Time study usage is subject to the review and audit conducted by the State Controller's Office.

For each eligible claimant, the following activities are reimbursable:

A. District Plan Contents and Review

Title 5, Sections 53003 and 53020

1. Review the equal employment opportunity plan, excluding goals and timetables, at least every three years and if necessary revise the plan and submit it to the Chancellor's Office for approval. (Cal. Code Regs., tit. 5, §§ 53003(b) and 53020(a) (Register 2002, No. 35).)
2. Include in the equal employment opportunity plan the following information:
    a. A process for ensuring that district employees who are to participate on screening or selection committees shall receive appropriate training on the requirements of California Code of Regulations, title 5, section 53000 et seq., which equal employment opportunity programs (Register 2002, No. 35) and of state and federal nondiscrimination laws. (Cal. Code Regs., tit. 5, §§ 53003(c)(4) and 53020(a) (Register 2002, No. 35).)
    b. A process for providing annual written notice to professional organizations concerning the district's equal employment opportunity plan and the need for assistance from the organizations in identifying qualified applicants. (Cal. Code Regs., tit. 5, §§ 53003(c)(5) and 53020(a) (Register 2002, No. 35).)
    c. An analysis of the number of ethnic majority, men, and persons with disabilities who are employed in the district's work force and the number of persons from monitored groups who have applied for employment in each of the following job categories: (1) executive/administrative/managerial; (2) faculty and other instructional staff; (3) professional nonfaculty; (4) secretarial/clerical; (5) technical and paraprofessional; (6) skilled crafts; and (7) service and maintenance (listed in Cal. Code Regs., tit. 5, § 53004(a) (Register 2002, No. 35)). (Cal. Code Regs., tit. 5, §§ 53003(c)(6) and 53020(a) (Register 2002, No. 35).)
    d. An analysis of the degree to which persons within the ethnic majority, men, and persons with disabilities are underrepresented in comparison to the numbers of persons from such groups whom the Chancellor determines to be available and

qualified to perform the work required for each job category. (Cal. Code Regs., tit. 5, §§ 53003(c)(7) and 53020(a) (Register 2002, No. 35).)

e. The determination of whether or not the underrepresentation for any group based on gender, ethnicity, or disability is significant. *This activity does not include reimbursement for the inclusion of an analysis of the degree to which any group is underrepresented. This activity only requires the inclusion of the determination of whether any underrepresentation is significant.* (Cal. Code Regs., tit. 5, §§ 53003(c)(7) and 53020(a) (Register 2002, No. 35).)

f. Methods for addressing any underrepresentation identified under the analysis required by California Code of Regulations, title 5, section 53003(c)(7). (Cal. Code Regs., tit. 5, §§ 53003(c)(8) and 53020(a) (Register 2002, No. 35).)

g. Additional steps consistent with California Code of Regulations, title 5, section 53006, to remedy any significant underrepresentation identified in the plan. (Cal. Code Regs., tit. 5, §§ 53003(c)(9) and 53020(a) (Register 2002, No. 35).)

h. Any other measures necessary to further equal employment opportunity throughout the district. (Cal. Code Regs., tit. 5, §§ 53003(c)(10) and 53020(a) (Register 2002, No. 35).)

i. Any goals for hiring persons with disabilities that are required by California Code of Regulations, title 5, section 53025. (Cal. Code Regs., tit. 5, §§ 53003(d) and 53020(a) (Register 2002, No. 35).)

B. <u>Delegation of Authority</u>

Title 5, Section 53020

1. Design the administrative structure created by any delegation of authority to the equal employment officer or others in such a manner so as to ensure prompt and effective implementation of the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.). (Cal. Code Regs., tit. 5, §§ 53020(b) and 53020(a) (Register 2002, No. 23).)

2. Designate in the equal employment opportunity plan a single officer, who may be the equal employment opportunity officer, for ensuring complaints of violations of the equal employment opportunity program regulations (excluding those based on disability or gender), filed pursuant to California Code of Regulations, title 5, section 53026, are promptly and impartially investigated, and ensuring that selection procedures and the applicant pool are properly monitored (excluding ensuring that the selection procedure is based solely on job-related criteria and monitoring for adverse impact) as required by California Code of Regulations, title 5, sections 53023 and 53024. (Cal. Code Regs., tit. 5, §§ 53020(b) and 53020(a) (Register 2002, No. 23).)

C. <u>Employee Survey</u>

Title 5, Section 53004

1. In the report to the Chancellor's Office of the results of the employee survey, report each employee so that they 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. (Cal. Code Regs., tit. 5, §§ 53004(a) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53004(a) and 53020(a) (Register 2002, No. 35).)

2. Afford each applicant or employee the opportunity to identify his or her gender, ethnicity and, if applicable, his or her disability for purposes of the survey and report required by California Code of Regulations, title 5, section 53004(a) (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, §§ 53004(b) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53004(b) and 53020(a) (Register 2002, No. 35).)

    a. Beginning August 11, 2002, count a person in only one ethnic group for reporting purposes if that person designates multiple ethnic groups with which he or she identifies. (Cal. Code Regs., tit. 5, §§ 53004(b) and 53020(a) (Register 2002, No. 35).)

    b. Count and report Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians as part of the Asian/Pacific Islander group as well as in separate subcategories. (Cal. Code Regs., tit. 5, §§ 53004(b) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53004(b) and 53020(a) (Register 2002, No. 35).)

D. <u>Monitoring Recruitment</u>

Title 5, Sections 53004 and 53006

1. Monitor applicants for employment on an ongoing basis in order to evaluate the progress in implementing the equal employment opportunity plan and to provide data needed for the analyses required by California Code of Regulations, title 5, sections 53003, 53006, 53023, and 53024 (Register 96, No. 23; Register 2002, No. 35). (Cal. Code Regs., tit. 5, §§ 53004(a) and 53020(a) (Register 2002, No. 35).)

2. Take the following additional steps if a district determines that a particular monitored group is significantly underrepresented with respect to one or more categories.

    a. Review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group. (Cal. Code Regs., tit. 5, §§ 53006(a)(1) and 53020(a) (Register 2002, No. 35).)

    b. 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. (Cal. Code Regs., tit. 5, §§ 53006(a)(2) and 53020(a) (Register 2002, No. 35).)

    c. Determine whether the group is still significantly underrepresented in the categories in question after the measures described in subdivisions (a)(1) and (2) of California Code of Regulations, title 5, section 53006, have been in place a reasonable period of time (three years or longer). (Cal. Code Regs., tit. 5, §§ 53006(a)(3) and 53020(a) (Register 2002, No. 35).)

d. Monitor the staffing rate for the significantly underrepresented group in the specified job categories in question on an ongoing basis until the projected representation has been achieved for that group if significant underrepresentation persists. (Cal. Code Regs., tit. 5, §§ 53006(a)(4) and 53020(a) (Register 2002, No. 35).)

E. Recruitment Procedures

Title 5, Section 53021

1. Actively recruit from both within and outside the district work force to attract qualified applicants for all new openings except as provided by California Code of Regulations, title 5, section 53021(b). (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 2002, No. 35).)

   a. Active recruitment shall include outreach to ensure all persons, including persons from monitored groups, are provided the opportunity to seek employment with the district. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 2002, No. 35).)

   b. Open recruitment applies 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. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53021(a) (Register 2002, No. 35).)

2. Recruit at least statewide for full-time faculty and educational administrator positions, and at a minimum, seek qualified applicants listed in the California Community Colleges Equal Employment Opportunity Registry. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 2002, No. 35).)

3. Recruit part-time faculty positions separately for each new opening or by annually establishing a pool of eligible candidates. In either case, full and open recruitment is required consistent with California Code of Regulations, title 5, section 53021. (Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53021(a) and 53020(a) (Register 2002, No. 35).).

4. Notify the Equal Employment Opportunity Advisory Committee established pursuant to California Code of Regulations, title 5, section 53005 and the Chancellor, at least ten working days prior to offering the position to a candidate, if the district believes justification exists for use of any of the exceptions listed in section 53021(b). (Cal. Code Regs., tit. 5, §§ 53021(c) and 53020(a) (Register 2002, No. 35).)

5. Comply with the district's established hiring procedures and afford all qualified district employees the opportunity to apply even where in-house or promotional only recruitment is permitted under California Code of Regulations, title 5, section 53005(b). (Cal. Code Regs., tit. 5, §§ 53021(d) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53021(d) and 53020(a) (Register 2002, No. 35).)

F. Job Announcements

Title 5, Section 53022

1. Include in the job requirements in announcements for faculty and administrative positions a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. (Cal. Code Regs., tit. 5, §§ 53022 and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53022 and 53020(a) (Register 2002, No. 35).)

2. Review job specifications, excluding any "required," "desired," or "preferred" qualifications beyond the state minimum qualifications (set forth in Subchapter 4 Cal. Code Regs., tit. 5, commencing with § 53400) which the district wishes to utilize, before the position is announced to ensure conformity with the requirements of California Code of Regulations, title 5, section 53000 et seq., and state and federal nondiscrimination laws, excluding section 504 of the Rehabilitation Act, and Title IX of Education Amendments of 1972. (Cal. Code Regs., tit. 5, §§ 53022 and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53022 and 53020(a) (Register 2002, No. 35).)

G. Applicant Pool

Title 5, Section 53023

1. Afford each applicant an opportunity to voluntarily identify his or her gender, ethnicity and, if applicable, his or her disability, in the district's application for employment. (Cal. Code Regs., tit. 5, §§ 53023(a) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53023(a) and 53020(a) (Register 2002, No. 35).)

2. Keep information regarding an applicant's gender, ethnicity, and/or disability provided in an application for employment confidential. (Cal. Code Regs., tit. 5, §§ 53023(a) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53023(a) and 53020(a) (Register 2002, No. 35).)

3. Analyze the composition of the initial applicant pool after the application deadline has passed to ensure that any failure to obtain projected representation for any group defined in terms of ethnicity is not due to discriminatory recruitment procedures. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 2002, No. 35).)

4. Extend the application deadline and conduct additional recruitment, which eliminates discriminatory recruitment procedures and ensures that recruitment efforts provide a full and fair opportunity for participation to a wide diversity of potential applicants, if necessary. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 2002, No. 35).)

5. Screen applications to determine which candidates satisfy job specifications set forth in the job announcement when recruitment efforts have offered an opportunity for participation to a wide diversity of potential applicants or further recruitment efforts would be futile. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 2002, No. 35).)

6. Analyze the composition of the qualified applicant pool to ensure that no ethnic group is adversely impacted as defined by California Code of Regulations, title 5, section 53001(a) (Register 2002, No. 35). (Cal. Code Regs., tit. 5, §§ 53023(c) and 53020(a) (Register 2002, No. 35).)

7. Take effective steps to address adverse impact on any group defined in terms of ethnicity found in the district's applicant pool before the selection process is continued. (Cal. Code Regs., tit. 5, §§ 53023(b) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53023(c) and 53020(a) (Register 2002, No. 35).)

H. Screening and Selection Procedures

Title 5, Section 53024

1. Provide all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to the Chancellor upon request. (Cal. Code Regs., tit. 5, §§ 53024(a)(1) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53024(a)(1) and 53020(a) (Register 2002, No. 35).)
2. Design all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole, 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. (Cal. Code Regs., tit. 5, §§ 53024(a)(2) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53024(a)(2) and 53020(a) (Register 2002, No. 35).)
3. Design and monitor all screening or selection techniques, including the procedure for developing interview questions, and the selection process as a whole to avoid an adverse impact as defined in California Code of Regulations, title 5, section 53001(a) on any group defined in terms of ethnicity, and to detect and address any adverse impact on any group defined in terms of ethnicity which does occur. (Cal. Code Regs., tit. 5, §§ 53024(a)(4) and 53020(a) (Register 2002, No. 35).)
4. Suspend the selection process and take timely and effective steps to remedy adverse impact on any group defined in terms of ethnicity before the selection process resumes if monitoring under California Code of Regulations, title 5, section 53024(a)(4) reveals that any selection technique or procedure has adversely impacted such ethnic group. (Cal. Code Regs., tit. 5, §§ 53024(b) and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53024(b) and 53020(a) (Register 2002, No. 35).)

I. Persons with Disabilities

Title 5, Sections 53025 and 53034

1. Update a goal established prior to July 12, 2002 for persons with disabilities, set a new target date for achieving projected representation in a job category or categories, and concurrently comply with California Code of Regulations, title 5, section 53006, subdivisions (a)(1), (a)(2), and (b) with respect to persons with disability, if significant underrepresentation still exists in the job category or categories. (Cal. Code Regs., tit. 5, §§ 53025(b) and 53020(a) (Register 2002, No. 35).)
2. Implement California Code of Regulations, title 5, section 53006, subdivisions (a)(1) and (a)(2) concurrently with setting a goal with a target date for achieving projected representation for persons with a disability in each job category where underrepresentation was found to exist. Goals are to remain in effect only until projected

representation has been achieved for that group in the category or categories in question. (Cal. Code Regs., tit. 5, §§ 53025(c) and 53020(a) (Register 2002, No. 35).)

3. Utilize an aggregate labor force availability rate for setting goals for hiring persons with disabilities with respect to the total district work force, until the Chancellor's Office provides data regarding the availability of persons with disabilities by job category. (Cal. Code Regs., tit. 5, §§ 53025(c) and 53020(a) (Register 2002, No. 35).)

4. Report the staffing rate of persons with disabilities by a separate survey as directed by the Chancellor's Office, until a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required by California Code of Regulations, title 5, section 53004. (Cal. Code Regs., tit. 5, §§ 53034 and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53034 and 53020(a) (Register 2002, No. 35).)

J. Complaint Procedures (Nonemployees and Nonapplicants)

Title 5, Sections 53020 and 53026

1. Establish a process permitting any person (excluding employees and applicants for employment) to file a complaint alleging that the requirements of the equal employment opportunity program regulations (Cal. Code Regs., tit. 5, § 53000 et seq.) have been violated. This excludes the establishment of a process permitting an employee to file a complaint alleging a violation of the equal employment opportunity program regulations on the basis of disability or gender (i.e., failure to designate a person to coordinate efforts to comply Section 504 and Title IX (see Cal. Code Regs., tit. 5, § 53020); failure to provide reasonable accommodations (see Cal. Code Regs., tit. 5, § 53020); and employment discrimination on the basis of disability and gender in district employee selection procedures). (Cal. Code Regs., tit. 5, §§ 53026 and 53020(a) (Register 2002, No. 35).)

2. Forward immediately to the Chancellor a copy of the complaint. (Cal. Code Regs., tit. 5, §§ 53026 and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53026 (Register 2002, No. 35).)

3. Provide a written investigative report within 90 days if required by the Chancellor. (Cal. Code Regs., tit. 5, §§ 53026 and 53020(a) (Register 96, No. 23); Cal. Code Regs., tit. 5, §§ 53026 and 53020(a) (Register 2002, No. 35).)

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the dates when services were performed and itemize all costs for those services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs may include: (a) the indirect costs originating in each department or agency of the governmental unit carrying out state mandated programs; and (b) the costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

Community colleges have the option of using: (1) a federally approved rate, utilizing the cost accounting principles from the Office of Management and Budget Circular A-21, "Cost Principles of Educational Institutions"; (2) the rate calculated on State Controller's Form FAM-29C; or (3) a 7% indirect cost rate.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[1] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from the following source shall be identified and deducted from this claim as follows:

1. Funds received from the Equal Employment Opportunity Fund[2] and applied to the reimbursable state-mandated activities imposed by Title 5, sections 53003, 53004, 53006, 53020, 53021, 53022, 53023, 53024, 53025, 53026, and 53034, as amended by Register 2002, number 35. (State Budget Act, Item 6870-101-0001.)[3]

In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

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[1] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

[2] Reference to the “Equal Employment Opportunity Fund” includes any future source of funding for the same or similar purposes for which the Equal Employment Opportunity Fund was created, regardless of any change in the name of the funding source, or line item and schedule in the State Budget Act. In addition, appropriations for this fund have been appropriated for program 20.20.041-Equal Employment Opportunity pursuant to Ch. 1169, Stats. 2002.)

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

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The statements of decision adopted for the test claim and parameters and guidelines are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record. The administrative record is on file with the Commission.

Exhibit B

Hearing: July 27, 2012
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PROPOSED PARAMETERS AND GUIDELINES

Government Code Section 11135

Statutes 1992, Chapter 913; Statutes 1994, Chapter 146; and Statutes 2001, Chapter 708

Discrimination Complaint Procedures
(Federal Rights for Individuals with Disabilities for Employment – Set One)

02-TC-46
(and a portion of 02-TC-25 and 02-TC-31)

(Fiscal Year 2001-2002 only)

I. SUMMARY OF THE MANDATE

On March 24, 2011, the Commission on State Mandates (Commission) adopted a statement of decision for the *Discrimination Complaint Procedures* test claim finding that the test claim statutes impose a partially reimbursable state-mandated program upon community college districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The Commission has adopted separate sets of parameters and guidelines for the *Discrimination Complaint Procedures* (02-TC-46) program as follows: (1) equal employment opportunity program; (2) federal rights for individuals with disabilities; and (3) discrimination complaint procedures. This set of parameters and guidelines addresses the Commission's findings with respect to the costs incurred to comply with federal rights for individuals with disabilities for employment in fiscal year 2001-2002.

Because some of the activities approved in the statement of decision are not reimbursable beyond the 2001-2002 fiscal year, and the period of reimbursement for some of the activities begins during the 2002-2003 fiscal year, the Commission has adopted two sets of parameters and guidelines for the federal rights for individuals with disabilities activities: (1) for costs incurred during the 2001-2002 fiscal year only; and (2) for costs incurred in fiscal year 2002-2003 and in subsequent fiscal years.

The Commission found that section 11135(b) requires community college districts to:

> Meet the protections contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) and its implementing regulations (28 C.F.R. § 35 et seq.) in employment within community college districts. (Gov. Code, § 11135(b) (Statutes 2001, ch. 708).)
>
> This activity is limited to community college districts that have not engaged in the self-evaluation prior to the 2001-2002 fiscal year for the following one-time activities:
>
> 1. Evaluate the district's employment related services and the effects thereof, that do not or may not meet the requirements of 28 C.F.R. § 35 et seq., and to the extent that

modification of any such services is required, make the necessary modifications. (28 C.F.R. § 35.105)

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

II. ELIGIBLE CLAIMANTS

Any community college district, which incurs increased costs as a result of this mandate, is eligible to claim reimbursement.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557(e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The claimants filed the test claim in the 2002-2003 fiscal year, establishing eligibility for reimbursement on or after July 1, 2001. Two sets of parameters and guidelines have been adopted, one for costs incurred *only* during the 2001-2002 fiscal year, and one for costs incurred in or after the 2002-2003 fiscal year. These parameters and guidelines are for the 2001-2002 fiscal year only. Therefore, costs incurred pursuant to Government Code section 11135(b) as set forth in these parameters and guidelines are reimbursable only for the period of July 1, 2001 through June 30, 2002.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a school district may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. If revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a school district filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Government Code section 17560(b).)
5. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a).
6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A

source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Activities that require varying levels of efforts are not appropriate for time studies. Claimants wishing to use time studies to support salary and benefit costs are required to comply with the State Controller's Time-Study Guidelines before a time study is conducted. Time study usage is subject to the review and audit conducted by the State Controller's Office.

For each eligible claimant, the following activity is reimbursable:

> Meet the protections contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) and its implementing regulations (28 C.F.R. § 35 et seq.) in employment within community college districts. (Gov. Code, § 11135(b) (Statutes 2001, ch. 708).)
>
> This activity is limited to community college districts that have not engaged in the self-evaluation prior to the 2001-2002 fiscal year for the following one-time activities:
>
> 1. Evaluate the district's employment related services and the effects thereof, that do not or may not meet the requirements of 28 C.F.R. § 35 et seq., and to the extent that modification of any such services is required, make the necessary modifications. (28 C.F.R. § 35.105)
>
> 2. Evaluate the district's policies and practices related to employment, and the effects thereof, that do not or may not meet the requirements of 28 C.F.R. § 35 et seq. and that were not included in the district's self-evaluation required by Section 504 of the Rehabilitation Act. To the extent that modification of any such policies and practices is required, make the necessary modifications. (28 C.F.R § 35.105)

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the dates when services were performed and itemize all costs for those services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs may include: (a) the indirect costs originating in each department or agency of the governmental unit carrying out state mandated programs; and (b) the costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

Community colleges have the option of using: (1) a federally approved rate, utilizing the cost accounting principles from the Office of Management and Budget Circular A-21, "Cost Principles of Educational Institutions"; (2) the rate calculated on State Controller's Form FAM-29C; or (3) a 7% indirect cost rate.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[1] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER’S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and

[1] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The statements of decision adopted for the test claim and parameters and guidelines are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record. The administrative record is on file with the Commission.

Exhibit B

Hearing: July 27, 2012
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PROPOSED PARAMETERS AND GUIDELINES

Government Code Section 11135

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

Discrimination Complaint Procedures (Federal Rights for Individuals with Disabilities for Employment and Information Technology – Set Two)

02-TC-46
(and a portion of 02-TC-25 and 02-TC-31)

(Beginning Fiscal Year 2002-2003)

I. SUMMARY OF THE MANDATE

On March 24, 2011, the Commission on State Mandates (Commission) adopted a statement of decision for the *Discrimination Complaint Procedures* test claim finding that the test claim statutes impose a partially reimbursable state-mandated program upon community college districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The Commission has adopted separate sets of parameters and guidelines for the *Discrimination Complaint Procedures* (02-TC-46) program as follows: (1) equal employment opportunity program; (2) federal rights for individuals with disabilities; and (3) discrimination complaint procedures. This set of parameters and guidelines addresses the Commission's findings with respect to the costs incurred to comply with federal rights for individuals with disabilities for employment and information technology during fiscal year 2002-2003 and in subsequent fiscal years.

Because the some of the activities approved in the statement of decision are not reimbursable beyond the 2001-2002 fiscal year, and the period of reimbursement for some of the activities begins during the 2002-2003 fiscal year, the Commission has adopted two sets of parameters and guidelines for the federal rights for individuals with disabilities activities: (1) for costs incurred during the 2001-2002 fiscal year only; and (2) for costs incurred in fiscal year 2002-2003 and in subsequent fiscal years.

The Commission found that section 11135(b) requires community college districts to:

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

   This activity is limited to community college districts that have not engaged in the self-evaluation prior to the 2001-2002 fiscal year for the following one-time activities:

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

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

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

II. ELIGIBLE CLAIMANTS

Any community college district, which incurs increased costs as a result of this mandate, is eligible to claim reimbursement.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557(e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The claimants filed the test claim in the 2002-2003 fiscal year, establishing eligibility for reimbursement on or after July 1, 2001. Two sets of parameters and guidelines have been adopted, one for costs incurred *only* during the 2001-2002 fiscal year, and one for costs incurred in the 2002-2003 fiscal year and in subsequent fiscal years. These parameters and guidelines are for the period beginning in the 2002-2003 fiscal year. Therefore, costs incurred pursuant to Government Code section 11135(b) and (d)(2) are reimbursable on or after July 1, 2002.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a school district may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. If revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a school district filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Government Code section 17560(b).)
5. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a).

6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Activities that require varying levels of efforts are not appropriate for time studies. Claimants wishing to use time studies to support salary and benefit costs are required to comply with the State Controller's Time-Study Guidelines before a time study is conducted. Time study usage is subject to the review and audit conducted by the State Controller's Office.

For each eligible claimant, the following activity is reimbursable:

A. <u>Americans with Disabilities Act Access</u>

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

This activity is limited to community college districts that have not engaged in the self-evaluation prior to the 2001-2002 fiscal year for the following one-time activities:

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

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

policies and practices is required, make the necessary modifications. (28 C.F.R § 35.105)

B. Electronic and Information Technology Access

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

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the dates when services were performed and itemize all costs for those services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs may include: (a) the indirect costs originating in each department or agency of the governmental unit carrying out state mandated programs; and (b) the costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

Community colleges have the option of using: (1) a federally approved rate, utilizing the cost accounting principles from the Office of Management and Budget Circular A-21, "Cost Principles of Educational Institutions"; (2) the rate calculated on State Controller's Form FAM-29C; or (3) a 7% indirect cost rate.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[1] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

[1] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The statements of decision adopted for the test claim and parameters and guidelines are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record. The administrative record is on file with the Commission.

Exhibit B

Hearing: July 27, 2012
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PROPOSED PARAMETERS AND GUIDELINES

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

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

Discrimination Complaint Procedures (Set One)

02-TC-46
(and a portion of 02-TC-25 and 02-TC-31)

(Fiscal Year 2001-2002 only)

I. SUMMARY OF THE MANDATE

On March 24, 2011, the Commission on State Mandates (Commission) adopted a statement of decision for the *Discrimination Complaint Procedures* test claim finding that the test claim regulations impose a partially reimbursable state-mandated program upon community college districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The Commission has adopted separate parameters and guidelines for the *Discrimination Complaint Procedures* (02-TC-46) statement of decision as follows: (1) equal employment opportunity program; (2) federal rights for individuals with disabilities; and (3) discrimination complaint procedures. This set of parameters and guidelines addresses the Commission's findings regarding costs incurred to comply with the discrimination complaint procedures in fiscal year 2001-2002.

Because some of the activities approved in the statement of decision are not reimbursable beyond the 2001-2002 fiscal year, and the period of reimbursement for some of the activities begins during the 2002-2003 fiscal year, the Commission has adopted two sets of parameters and guidelines for the discrimination complaint procedures: (1) for costs incurred during the 2001-2002 fiscal year only; and (2) for costs incurred in fiscal year 2002-2003 and in subsequent fiscal years.

For the 2001-2002 fiscal year only, the approved activities related to discrimination complaint procedures are contained in California Code of Regulations, title 5, Sections 59320, 59322, 59324, 59326, 59327, 59328, 59330 , 59332, 59334, 59336, 59338, 59340, and 59342; as amended by Register 81, number 16; Register 92, number 17; Register 96, number 23; Register 2001, number 6; Register 2002, number 13; and Register 2002, number 35. The approved activities include the investigation of complaints of unlawful discrimination, the establishment of polices for investigating discrimination complaints, engaging in informal resolution of discrimination complaints, and forwarding copies of information regarding discrimination complaints to the Chancellor's Office.

II. ELIGIBLE CLAIMANTS

Any community college district, which incurs increased costs as a result of this mandate, is eligible to claim reimbursement.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557(e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The claimants filed the test claim in the 2002-2003 fiscal year, establishing eligibility for reimbursement on or after July 1, 2001. Two sets of parameters and guidelines have been adopted, one for costs incurred *only* during the 2001-2002 fiscal year, and one for costs incurred in or after the 2002-2003 fiscal year. These parameters and guidelines are for the 2001-2002 fiscal year only. Therefore, costs incurred pursuant to California Code of Regulations, title 5, Sections 59320, 59322, 59324, 59326, 59327, 59328, 59330 , 59332, 59334, 59336, 59338, 59340, and 59342 as set forth in these parameters and guidelines are reimbursable only for the period of July 1, 2001 through June 30, 2002.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a school district may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. If revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a school district filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Government Code section 17560(b).)
5. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a)
6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, and declarations. Declarations must include a certification or declaration stating, “I certify (or declare) under

penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Activities that require varying levels of efforts are not appropriate for time studies. Claimants wishing to use time studies to support salary and benefit costs are required to comply with the State Controller's Time-Study Guidelines before a time study is conducted. Time study usage is subject to the review and audit conducted by the State Controller's Office.

For each eligible claimant, the following activity is reimbursable:

1. Investigate and Process Complaints

   Title 5, Sections 53026 and 59320

   a. The district shall investigate complaints of unlawful discrimination (i.e., discrimination on the basis of ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation) in district programs or activities and seek to resolve those complaints. This does not include complaints of gender discrimination, including complaints of sexual harassment on the basis of sexual orientation, by employees and students, and complaints of non-employment discrimination on the basis of disability. (Cal. Code Regs., tit. 5, § 59320 (Register 2001, No. 6; and Register 2002, No. 13.)

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

2. District Policies and Procedures

   Title 5, Section 59322

   a. Establish, and adopt written policies consistent with the regulations addressing district discrimination complaint procedures for complaints of discrimination on the basis of ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation (Cal. Code Regs., tit. 5, §§ 59320-59342).

      This does not include complaint procedures for: (1) employees and students alleging gender discrimination (including sexual harassment) and disability discrimination; (2) employees and students alleging sexual harassment on the basis of sexual orientation; and (3) for individuals alleging non-employment discrimination on the basis of disability. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13).)

b. Submit district policies, which address community college district discrimination complaint and enforcement procedures (adopted pursuant to Cal. Code Regs., tit. 5, § 59322) to the Chancellor for review and approval within 90 days of the effective date of adopting or amending the policies. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13).)

3. Responsible District Officer

Title 5, Section 59324

Identify to the Chancellor and to the public a single person as the district officer responsible for receiving discrimination complaints based on ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation (filed pursuant to Cal. Code Regs., tit. 5, § 59328) and coordinating their investigation and overseeing the informal resolution process pursuant to Section 59327. This does not include the identification of the district officer responsible for receiving complaints of discrimination on the basis of gender to students, employees, student applicants, and applicants for employment. This also does not include the identification of the district officer responsible for receiving complaints of discrimination on the basis of disability to participants, beneficiaries, applicants, and employees of the district's programs or activities, and unions or professional organizations holding collective bargaining or professional agreements with the community college district. In addition, this does not include the identification of the district officer for receiving complaints of non-employment discrimination on the basis of disability to the Chancellor and the public. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13).)

Use other staff or outside persons or organizations under contract with the district whenever the officer designated to receive complaints is named in the complaint or is implicated by the allegations in the complaint. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13).)

4. Notice to Students and Employees

Title 5, Section 59326

Notify students and employees of the provisions of California Code of Regulations, title 5, sections 59300 et seq., which address the two levels of discrimination complaint procedures for community college districts (beginning at the community college district level and ending at the state level). (Cal. Code Regs., tit. 5, § 59326 (Register 2001, No. 6; and Register 2002, No. 13).)

5. Informal Complaint Resolution

Title 5, Section 59327

a. The district officer or his or her designee shall undertake efforts to informally resolve the charges whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327(a)(1) (Register 2001, No. 6; and Register 2002, No. 13).)

b. Include investigation in efforts at informal resolution if the responsible district officer determines that an investigation is warranted by the seriousness of the charges. (Cal. Code Regs., tit. 5, § 59327(b) (Register 2001, No. 6; and Register 2002, No. 13).)

c. The district officer or his or her designee shall advise the complainant that he or she need not participate in informal resolution whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327(a)(2) (Register 2001, No. 6; and Register 2002, No. 13).)

d. As part of the informal resolution process, the district officer or his or her designee shall notify the person bringing the charges of the right to file a formal complaint, as defined by California Code of Regulations, title 5, section 59311, and the procedure for filing a formal complaint pursuant to California Code of Regulations, title 5, section 59328 whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327(a)(3) (Register 2001, No. 6; and Register 2002, No. 13).)

e. As part of the informal resolution process, the district officer or his or her designee shall advise the complainant that he or she may file his or her non-employment based complaint with the Office of Civil Rights of the U.S. Department of Education (OCR) where such a complaint is within that agency's jurisdiction whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327(a)(4) (Register 2001, No. 6; and Register 2002, No. 13).)

f. As part of the informal resolution process, the district officer or his or her designee shall advise the complainant that he or she may file his or her employment-based complaint with the U.S. Equal Employment Opportunity Commission (EEOC) or the California Department of Fair Employment and Housing (DFEH) where the complaint is within the jurisdiction of those agencies. (Cal. Code Regs., tit. 5, § 59327(a)(5) (Register 2002, No. 13).) *This activity is reimbursable beginning April 19, 2002*.

6. <u>Formal Complaint Process</u>

a. <u>District Response</u>

Title 5, Sections 59328, 59330, and 59332

(1) Forward a copy of the formal complaint to the Chancellor immediately upon receiving a formal complaint filed in accordance with California Code of Regulations, title 5, section 59328. (Cal. Code Regs., tit. 5, § 59330 (Register 2001, No. 6; and Register 2002, No. 13).)

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

(3) As part of the formal complaint process, advise any complainant alleging discrimination in employment that he or she may file his or her complaint with the U.S. Equal Employment Opportunity Commission (EEOC) or Department of Fair Employment and Housing where the complaint is within the jurisdiction of those agencies. (Cal. Code Regs., tit. 5, § 59328(f)(1) (Register 2002, No. 13).) *This activity is reimbursable beginning April 19, 2002*.

(4) As part of the formal complaint process, for any complaint alleging discrimination in employment, forward a copy of any filing by the complainant with the Department of Fair Employment and Housing to the Chancellor's Office for a determination of whether the issues presented require an independent investigation of the matter under the provisions of the discrimination complaint procedure regulations (Cal. Code Regs., tit. 5, § 53000 et seq.). (Cal. Code Regs., tit. 5, § 59328 (f)(2) (Register 2002, No. 13).) *This activity is reimbursable beginning April 19, 2002*.

b. <u>District Investigation</u>

Title 5, Sections 59327 and 59334

(1) Notify the complainant and the Chancellor that the district has commenced an investigation of a properly filed formal complaint. (Cal. Code Regs., tit. 5, § 59334 (Register 2001, No. 6; and Register 2002, No. 13).)

(2) Set forth the results of the investigation conducted in the formal complaint process in a written report that includes at least all of the following:

(A) A description of the circumstances giving rise to the complaint. (Cal. Code Regs., tit. 5, § 59334(a) (Register 2001, No. 6; and Register 2002, No. 13).)

(B) A summary of the testimony provided by each witness, including the complainant and any witnesses identified by the complainant in the complaint. (Cal. Code Regs., tit. 5, § 59334(b) (Register 2001, No. 6).) *This activity is reimbursable from July 1, 2001 through April 18, 2002*.

(B) A summary of the testimony provided by each viable witness, including the complainant and any witnesses identified by the complainant in the complaint. (Cal. Code Regs., tit. 5, § 59334(b) (Register 2002, No. 13).) *This activity is reimbursable beginning April 19, 2002*.

(C) An analysis of any relevant data or other evidence collected during the course of the investigation. (Cal. Code Regs., tit. 5, § 59334(c) (Register 2001, No. 6; and Register 2002, No. 13).)

(D) A specific finding as to whether the discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59334(d) (Register 2001, No. 6).) *This activity is reimbursable from July 1, 2001 through April 18, 2002*.

(D) A specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59334(d) (Register 2002, No. 13).) *This activity is reimbursable beginning April 19, 2002*.

(E) Any other information deemed appropriate by the district. (Cal. Code Regs., tit. 5, § 59334(e) (Register 2001, No. 6; and Register 2002, No. 13).)

(3) After a formal complaint is filed the formal investigation conducted pursuant to California Code of Regulations, title 5, section 59334 must be completed unless the matter is informally resolved and the complainant dismisses the formal

complaint. (Cal. Code Regs., tit. 5, § 59327(c) (Register 2001, No. 6).) *This activity is reimbursable from July 1, 2001 through April 18, 2002*.

(3) After a complaint is filed the formal investigation conducted pursuant to California Code of Regulations, title 5, section 59334 must be completed unless the matter is informally resolved and the complainant dismisses the formal complaint or the complainant files with the Department of Fair Employment and Housing and the Chancellor elects not to require further investigation pursuant to California Code of Regulations, title 5, section 59328(f)(2). (Cal. Code Regs., tit. 5, § 59327(c) (Register 2002, No. 13).) *This activity is reimbursable beginning April 19, 2002*.

c. Administrative Determination

Title 5, Section 59336

Complete the district investigation conducted during the formal complaint process and forward a copy of the investigative report required pursuant to California Code of Regulations, title 5, section 59334 to the Chancellor, a copy or summary of the report to the complainant, and written notice setting forth all of the following to both the complainant and the Chancellor:

(1) The determination of the chief executive officer or his/her designee as to whether discrimination did or did not occur with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59336(a) (Register 20 2001, No. 6).) *This activity is reimbursable from July 1, 2001 through April 18, 2002*.

(1) The determination of the chief executive officer or his/her designee as to whether there is probable cause to believe discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59336(a) (Register 2002, No. 13).) *This activity is reimbursable beginning April 19, 2002*.

(2) A description of the actions taken, if any, to prevent similar problems from occurring in the future. (Cal. Code Regs., tit. 5, § 59336(b) (Register 2001, No. 6; and Register 2002, No. 13).)

(3) The proposed resolution of the complaint. (Cal. Code Regs., tit. 5, § 59336(c) (Register 2001, No. 6; and Register 2002, No. 13).)

(4) The complainant's right to appeal to the district governing board and the Chancellor pursuant to California Code of Regulations, title 5, sections 59338 and 59339. (Cal. Code Regs., tit. 5, § 59336(d) (Register 2001, No. 6; and Register 2002, No. 13).)

d. Formal Complaint-District Decision

Title 5, Section 59338

(1) Upon appeal by the complainant of the administrative determination rendered pursuant to section 59336, the governing board shall review the original complaint, the investigative report, the administrative determination, and the appeal and issue a final district decision in the matter within forty-five (45) days

after receiving the appeal. (Cal. Code Regs., tit. 5, § 59338(a) (Register 2001, No. 6; and Register 2002, No. 13).)

(2) Forward to the complainant and the Chancellor a copy of the final district decision rendered by the governing board that includes a complainant's right to appeal the district's decision to the Chancellor pursuant to California Code of Regulations, title 5, section 59339. Administrative determinations are made final by the district issuing a decision or by taking no action 45 days after an appeal to the district governing board by complainant not satisfied by the administrative determination (Cal. Code Regs., tit. 5, § 59338(a) and (c). (Cal. Code Regs., tit. 5, § 59338 (Register 2001, No. 6; and Register 2002, No. 13).)

e. Providing Information to the Chancellor

Title 5, Sections 59340 and 59342

(1) Forward the following to the Chancellor within 150 days of receiving a formal complaint:

(A) A copy of the final district decision rendered by the governing board or a statement indicating the date on which the administrative determination became final pursuant to California Code of Regulations, title 5, section 59338(a). (Cal. Code Regs., tit. 5, § 59340(a) (Register 2001, No. 6; and Register 2002, No. 13).)

(B) A copy of the notice to the complainant required pursuant to California Code of Regulations, title 5, section 59338(a). (Cal. Code Regs., tit. 5, § 59340(b) (Register 2001, No. 6; and Register 2002, No. 13).)

(C) Such other information as the Chancellor may require. (Cal. Code Regs., tit. 5, § 59340(c) (Register 2001, No. 6; and Register 2002, No. 13).)

(2) File a written request that the Chancellor grant an extension of the 90-day or 150-day deadline to forward the investigative report to the Chancellor or to forward the final district decision to the Chancellor (specified in Cal. Code Regs., tit. 5, § 59336 or 59340), 10 days before the expiration of the deadline, if for reasons beyond the districts control the district is unable to comply with the deadline. (Cal. Code Regs., tit. 5, § 59342(a) (Register 2001, No. 6; and Register 2002, No. 13).)

Provide the reasons for the request for an extension of the 90-day or 150-day deadline to forward the investigative report to the Chancellor or to forward the final district decision to the Chancellor, and the date by which the district expects to be able to submit the required materials in the request. (Cal. Code Regs., tit. 5, § 59342(a) (Register 2001, No. 6; and Register 2002, No. 13).)

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the dates when services were performed and itemize all costs for those services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs may include: (a) the indirect costs originating in each department or agency of the governmental unit carrying out state mandated programs; and (b) the costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

Community colleges have the option of using: (1) a federally approved rate, utilizing the cost accounting principles from the Office of Management and Budget Circular A-21, "Cost Principles of Educational Institutions"; (2) the rate calculated on State Controller's Form FAM-29C; or (3) a 7% indirect cost rate.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[1] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER’S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and

[1] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The statements of decision adopted for the test claim and parameters and guidelines are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record. The administrative record is on file with the Commission.

Exhibit B

Hearing: July 27, 2012
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PROPOSED PARAMETERS AND GUIDELINES

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

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

Discrimination Complaint Procedures (Set Two)

02-TC-46
(and a portion of 02-TC-25 and 02-TC-31)

(Beginning Fiscal Year 2002-2003)

I. SUMMARY OF THE MANDATE

On March 24, 2011, the Commission on State Mandates (Commission) adopted a statement of decision for the *Discrimination Complaint Procedures* test claim finding that the test claim regulations impose a partially reimbursable state-mandated program upon community college districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The Commission has adopted separate parameters and guidelines for the *Discrimination Complaint Procedures* (02-TC-46) statement of decision as follows: (1) equal employment opportunity program; (2) federal rights for individuals with disabilities; and (3) discrimination complaint procedures. This set of parameters and guidelines addresses the Commission's findings regarding costs incurred to comply with the discrimination complaint procedures beginning in fiscal year 2002-2003.

Because some of the activities approved in the statement of decision are not reimbursable beyond the 2001-2002 fiscal year, and the period of reimbursement for some of the activities begins during the 2002-2003 fiscal year, the Commission has adopted two sets of parameters and guidelines for the discrimination complaint procedures: (1) for costs incurred during the 2001-2002 fiscal year only; and (2) for costs incurred in fiscal year 2002-2003 and in subsequent fiscal years.

For costs incurred in fiscal year 2002-2003 and in subsequent fiscal years, the approved activities related to discrimination complaint procedures are contained in California Code of Regulations, title 5, Sections 59320, 59322, 59324, 59326, 59327, 59328, 59330 , 59332, 59334, 59336, 59338, 59340, and 59342; as amended by Register 81, number 16; Register 92, number 17; Register 96, number 23; Register 2001, number 6; Register 2002, number 13; and Register 2002, number 35. The approved activities include the investigation of complaints of unlawful discrimination, the establishment of polices for investigating discrimination complaints, engaging in informal resolution of discrimination complaints, and forwarding copies of information regarding discrimination complaints to the Chancellor's Office.

II. ELIGIBLE CLAIMANTS

Any community college district, which incurs increased costs as a result of this mandate, is eligible to claim reimbursement.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557(e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The claimants filed the test claim in the 2002-2003 fiscal year, establishing eligibility for reimbursement on or after July 1, 2001. Two sets of parameters and guidelines have been adopted, one for costs incurred *only* during the 2001-2002 fiscal year, and one for costs incurred in the 2002-2003 fiscal year and in subsequent fiscal years. These parameters and guidelines are for the period beginning in the 2002-2003 fiscal year. Therefore, costs incurred pursuant to California Code of Regulations, title 5, Sections 59320, 59322, 59324, 59326, 59327, 59328, 59330 , 59332, 59334, 59336, 59338, 59340, and 59342 are reimbursable on or after July 1, 2002.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a school district may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. If revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a school district filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Government Code section 17560(b).)
5. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a)
6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, and declarations. Declarations must include a certification or declaration stating, “I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct,”

and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Activities that require varying levels of efforts are not appropriate for time studies. Claimants wishing to use time studies to support salary and benefit costs are required to comply with the State Controller's Time-Study Guidelines before a time study is conducted. Time study usage is subject to the review and audit conducted by the State Controller's Office.

For each eligible claimant, the following activity is reimbursable:

1. Investigate and Process Complaints

   Title 5, Sections 53026 and 59320

   a. The district shall investigate complaints of unlawful discrimination (i.e., discrimination on the basis of ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation) in district programs or activities and seek to resolve those complaints. This does not include complaints of gender discrimination, including complaints of sexual harassment on the basis of sexual orientation, by employees and students, and complaints of non-employment discrimination on the basis of disability. (Cal. Code Regs., tit. 5, § 59320 (Register 2001, No. 6; and Register 2002, No. 13).)

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

2. District Policies and Procedures

   Title 5, Section 59322

   a. Establish, and adopt written policies consistent with the regulations addressing district discrimination complaint procedures for complaints of discrimination on the basis of ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation (Cal. Code Regs., tit. 5, §§ 59320-59342).

      This does not include complaint procedures for: (1) employees and students alleging gender discrimination (including sexual harassment) and disability discrimination; (2) employees and students alleging sexual harassment on the basis of sexual orientation; and (3) for individuals alleging non-employment discrimination on the basis of disability. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13).)

b. Submit district policies, which address community college district discrimination complaint and enforcement procedures (adopted pursuant to Title 5, CCR, ' 59322) to the Chancellor for review and approval within 90 days of the effective date of adopting or amending the policies. (Cal. Code Regs., tit. 5, § 59322 (Register 2001, No. 6; and Register 2002, No. 13).)

3. Responsible District Officer

Title 5, Section 59324

Identify to the Chancellor and to the public a single person as the district officer responsible for receiving discrimination complaints based on ethnic group identification, national origin, religion, age, race, color, ancestry, and sexual orientation (filed pursuant to Title 5, CCR, § 59328) and coordinating their investigation and overseeing the informal resolution process pursuant to Section 59327. This does not include the identification of the district officer responsible for receiving complaints of discrimination on the basis of gender to students, employees, student applicants, and applicants for employment. This also does not include the identification of the district officer responsible for receiving complaints of discrimination on the basis of disability to participants, beneficiaries, applicants, and employees of the district's programs or activities, and unions or professional organizations holding collective bargaining or professional agreements with the community college district. In addition, this does not include the identification of the district officer for receiving complaints of non-employment discrimination on the basis of disability to the Chancellor and the public. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13).)

Use other staff or outside persons or organizations under contract with the district whenever the officer designated to receive complaints is named in the complaint or is implicated by the allegations in the complaint. (Cal. Code Regs., tit. 5, § 59324 (Register 2001, No. 6; and Register 2002, No. 13).)

4. Notice to Students and Employees

Title 5, Section 59326

Notify students and employees of the provisions of California Code of Regulations, title 5, sections 59300 et seq., which address the two levels of discrimination complaint procedures for community college districts (beginning at the community college district level and ending at the state level). (Cal. Code Regs., tit. 5, § 59326 (Register 2001, No. 6; and Register 2002, No. 13).)

5. Informal Complaint Resolution

Title 5, Section 59327

a. The district officer or his or her designee shall undertake efforts to informally resolve the charges whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327(a)(1) (Register 2001, No. 6; and Register 2002, No. 13).)

b. Include investigation in efforts at informal resolution if the responsible district officer determines that an investigation is warranted by the seriousness of the charges. (Cal. Code Regs., tit. 5, § 59327(b) (Register 2001, No. 6; and Register 2002, No. 13).)

c. The district officer or his or her designee shall advise the complainant that he or she need not participate in informal resolution whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327(a)(2) (Register 2001, No. 6; and Register 2002, No. 13).)

d. As part of the informal resolution process, the district officer or his or her designee shall notify the person bringing the charges of the right to file a formal complaint, as defined by California Code of Regulations, title 5, section 59311, and the procedure for filing a formal complaint pursuant to California Code of Regulations, title 5, section 59328 whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327(a)(3) (Register 2001, No. 6; and Register 2002, No. 13).)

e. As part of the informal resolution process, the district officer or his or her designee shall advise the complainant that he or she may file his or her non-employment based complaint with the Office of Civil Rights of the U.S. Department of Education (OCR) where such a complaint is within that agency's jurisdiction whenever any person brings charges of unlawful discrimination to the attention of the district officer. (Cal. Code Regs., tit. 5, § 59327(a)(4) (Register 2001, No. 6; and Register 2002, No. 13).)

f. As part of the informal resolution process, the district officer or his or her designee shall advise the complainant that he or she may file his or her employment-based complaint with the U.S. Equal Employment Opportunity Commission (EEOC) or the California Department of Fair Employment and Housing (DFEH) where the complaint is within the jurisdiction of those agencies. (Cal. Code Regs., tit. 5, § 59327(a)(5) (Register 2002, No. 13).)

6. <u>Formal Complaint Process</u>

a. <u>District Response</u>

Title 5, Sections 59328, 59330, and 59332

(1) Forward a copy of the formal complaint to the Chancellor immediately upon receiving a formal complaint filed in accordance with California Code of Regulations, title 5, section 59328. (Cal. Code Regs., tit. 5, § 59330 (Register 2001, No. 6; and Register 2002, No. 13.).)

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

(3) As part of the formal complaint process, advise any complainant alleging discrimination in employment that he or she may file his or her complaint with the U.S. Equal Employment Opportunity Commission (EEOC) or Department of Fair Employment and Housing where the complaint is within the jurisdiction of those agencies. (Cal. Code Regs., tit. 5, § 59328(f)(1) (Register 2002, No. 13).)

(4) As part of the formal complaint process, for any complaint alleging discrimination in employment, forward a copy of any filing by the complainant with the

Department of Fair Employment and Housing to the Chancellor's Office for a determination of whether the issues presented require an independent investigation of the matter under the provisions of the discrimination complaint procedure regulations (Cal. Code Regs., tit. 5, § 53000 et seq.). (Cal. Code Regs., tit. 5, § 59328(f)(2) (Register 2002, No. 13).)

b. District Investigation

Title 5, Sections 59327 and 59334

(1) Notify the complainant and the Chancellor that the district has commenced an investigation of a properly filed formal complaint. (Cal. Code Regs., tit. 5, § 59334 (Register 2001, No. 6; and Register 2002, No. 13).)

(2) Set forth the results of the investigation conducted in the formal complaint process in a written report that includes at least all of the following:

(A) A description of the circumstances giving rise to the complaint. (Cal. Code Regs., tit. 5, § 59334(a) (Register 2001, No. 6; and Register 2002, No. 13).)

(B) A summary of the testimony provided by each viable witness, including the complainant and any witnesses identified by the complainant in the complaint. (Cal. Code Regs., tit. 5, § 59334(b) (Register 2002, No. 13).)

(C) An analysis of any relevant data or other evidence collected during the course of the investigation. (Cal. Code Regs., tit. 5, § 59334(c) (Register 2001, No. 6; and Register 2002, No. 13).)

(D) A specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59334(d) (Register 2002, No. 13).)

(E) Any other information deemed appropriate by the district. (Cal. Code Regs., tit. 5, § 59334(e) (Register 2001, No. 6; and Register 2002, No. 13).)

(3) After a complaint is filed the formal investigation conducted pursuant to California Code of Regulations, title 5, section 59334 must be completed unless the matter is informally resolved and the complainant dismisses the formal complaint or the complainant files with the Department of Fair Employment and Housing and the Chancellor elects not to require further investigation pursuant to California Code of Regulations, title 5, section 59328(f)(2). (Cal. Code Regs., tit. 5, § 59327(c) (Register 2002, No. 13).)

c. Administrative Determination

Title 5, Section 59336

Complete the district investigation conducted during the formal complaint process and forward a copy of the investigative report required pursuant to California Code of Regulations, title 5, section 59334 to the Chancellor, a copy or summary of the report to the complainant, and written notice setting forth all of the following to both the complainant and the Chancellor:

(1) The determination of the chief executive officer or his/her designee as to whether there is probable cause to believe discrimination occurred with respect to each allegation in the complaint. (Cal. Code Regs., tit. 5, § 59336(a) (Register 2002, No. 13).)

(2) A description of the actions taken, if any, to prevent similar problems from occurring in the future. (Cal. Code Regs., tit. 5, § 59336(b) (Register 2001, No. 6; and Register 2002, No. 13).)

(3) The proposed resolution of the complaint. (Cal. Code Regs., tit. 5, § 59336, (c) (Register 2001, No. 6; and Register 2002, No. 13).)

(4) The complainant's right to appeal to the district governing board and the Chancellor pursuant to California Code of Regulations, title 5, sections 59338 and 59339. (Cal. Code Regs., tit. 5, § 59336(d) (Register 2001, No. 6; and Register 2002, No. 13).)

d. Formal Complaint-District Decision

Title 5, Section 59338

(1) Upon appeal by the complainant of the administrative determination rendered pursuant to section 59336, the governing board shall review the original complaint, the investigative report, the administrative determination, and the appeal and issue a final district decision in the matter within forty-five (45) days after receiving the appeal. (Cal. Code Regs., tit. 5, § 59338(a) (Register 2001, No. 6; and Register 2002, No. 13).)

(2) Forward to the complainant and the Chancellor a copy of the final district decision rendered by the governing board that includes a complainant's right to appeal the district's decision to the Chancellor pursuant to California Code of Regulations, title 5, section 59339. Administrative determinations are made final by the district issuing a decision or by taking no action 45 days after an appeal to the district governing board by complainant not satisfied by the administrative determination (Cal. Code Regs., tit. 5, § 59338(a) and (c). (Cal. Code Regs., tit. 5, § 59338 (Register 2001, No. 6; and Register 2002, No. 13).)

e. Providing Information to the Chancellor

Title 5, Sections 59340 and 59342

(1) Forward the following to the Chancellor within 150 days of receiving a formal complaint:

(A) A copy of the final district decision rendered by the governing board or a statement indicating the date on which the administrative determination became final pursuant to California Code of Regulations, title 5, section 59338(a). (Cal. Code Regs., tit. 5, § 59340(a) (Register 2001, No. 6; and Register 2002, No. 13).)

(B) A copy of the notice to the complainant required pursuant to California Code of Regulations, title 5, section 59338(a). (Cal. Code Regs., tit. 5, § 59340(b) (Register 2001, No. 6; and Register 2002, No. 13).)

(C) Such other information as the Chancellor may require. (Cal. Code Regs., tit. 5, § 59340(c) (Register 2001, No. 6; and Register 2002, No. 13).)

(2) File a written request that the Chancellor grant an extension of the 90-day or 150-day deadline to forward the investigative report to the Chancellor or to forward the final district decision to the Chancellor (specified in Cal. Code Regs., tit. 5, § 59336 or 59340), 10 days before the expiration of the deadline, if for reasons beyond the districts control the district is unable to comply with the deadline. (Cal. Code Regs., tit. 5, § 59342(a) (Register 2001, No. 6; and Register 2002, No. 13).)

Provide the reasons for the request for an extension of the 90-day or 150-day deadline to forward the investigative report to the Chancellor or to forward the final district decision to the Chancellor, and the date by which the district expects to be able to submit the required materials in the request. (Cal. Code Regs., tit. 5, § 59342(a) (Register 2001, No. 6; and Register 2002, No. 13).)

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the dates when services were performed and itemize all costs for those services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs may include: (a) the indirect costs originating in each department or agency of the governmental unit carrying out state mandated programs; and (b) the costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

Community colleges have the option of using: (1) a federally approved rate, utilizing the cost accounting principles from the Office of Management and Budget Circular A-21, "Cost Principles of Educational Institutions"; (2) the rate calculated on State Controller's Form FAM-29C; or (3) a 7% indirect cost rate.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[1] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

[1] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The statements of decision adopted for the test claim and parameters and guidelines are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record. The administrative record is on file with the Commission.