

**CALIFORNIA COMMUNITY COLLEGES
CHANCELLOR'S OFFICE**

1102 Q STREET
SACRAMENTO, CA 95814-6511
(916) 445-8752
HTTP://WWW.CCCCO.EDU



RECEIVED

March 15, 2004

MAR 16 2004

**COMMISSION ON
STATE MANDATES**

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Test Claim: Community College Construction, 02-TC-47

Dear Ms. Higashi:

As an interested state agency, the Chancellor's Office has reviewed the above test claim in light of the following questions that address key issues before the Commission:

- Do the provisions stated in the test claim (Ed. Code, §§ 81663, 81800, 81805, 81807, 81808, 81820, 81821, 81822, 81823, 81836, 81837 and 81839; and California Code of Regulations, title 5, §§ 57001, 57001.5, 57001.7, 57002, 57010, 57011, 57013, 57014, 57015, 57016, 57033.1, 57050, 57051, 57052, 57053, 57054, 57055, 57060, 57061, 57062, 57063, 57150, 57152, 57154, 57156 and 57158) impose a new program or higher level of service within an existing program upon local entities within the meaning of section 6, article XIII B of the California Constitution and costs mandated by the state pursuant to section 17514 of the Government Code?
- Does Government Code section 17556 preclude the Commission from finding that any of the test claim provisions impose costs mandated by the state?
- Have funds been appropriated for this program (e.g., state budget) or are there any other sources of funding available? If so, what is the source?

There are several bases for rejecting the Claim in its entirety, and various challenged sections raise other specific defenses to reimbursement.

I. BRIEF BACKGROUND.

A. The Community College Construction Act

We have tracked the relevant laws back as far as 1967 (although they may certainly go back farther), when the Junior College Construction Act of 1967 (Act) was enacted. (Former Ed. Code, §§ 20050 et seq.; Stats. 1967, ch. 1550, § 2.) Much of the language in this 1967 enactment has been carried forward to the present day in the statutes and regulations challenged by Claimant. In 1970, the name of the Act was changed to the Community College Construction Act of 1967 (former Ed. Code, §§ 20050 et seq.; Stats. 1970, ch. 102), the responsible party concerning the administrative duties set forth in the Act was changed from the Department of

Education to the to the chancellor, and the responsible party with regard to the rulemaking duties in the Act was changed from the State Board of Education to the Board of Governors (former Ed. Code, § 20054; Stats. 1971, ch. 1525, § 8).

In 1976, former Education Code sections 20050 et seq. were converted into Education Code sections 81800 et seq. in substantially the same form in a major restructuring of the Education Code, pursuant to Statutes 1976, chapter 1010. Section 3 of article 1 of chapter 1 of part 1 of division 1 of title 1 that enactment stated:

"The provisions of this code, insofar as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations, and not as new enactments."

Because the Education Code has been reorganized several times, it is important to trace statutory requirements to their original sources. This is not always an easy undertaking where the Education Code is concerned. Most statutes that concerned public schools were first assembled in the School Code in 1929. Prior to that time, such statutes appeared in various codes. The School Code became the Education Code in 1943. The Education Code was reorganized in 1959 and again in 1976. Some of the challenged statutes, as they appear in today's Education Code or in the legislative history of the challenged regulations, show that they were added in 1976 – which date incorrectly suggests that they came into being after January 1, 1975, a critical date for purposes of finding a state mandate. For many of the challenged sections, the 1976 date merely reflects the 1976 comprehensive reorganization of the Education Code. That 1976 date does not represent the date of initial legislative pronouncement.

A bill updating the name of the chapter to the Community College Construction Act of 1980 made "various changes in connection therewith." (Stats. 1980, ch. 910 (AB 1171).) This bill changed the calculation of the funding formula from the concept of "relative district ability" (former §§ 20081, 20081.1 prior to 1976) to "a community college district's matching share" (former § 81838 prior to Stats. 1990, ch. 1372, § 708 (SB 1854)). In addition to the fact that Claimant's "Part III. Statement of the Claim" does not claim mandated costs as a result of the change of the funding formula, it cannot, as stated below, as actions taken with regard to applications for state funding by the districts, which actions are entirely voluntary, cannot be construed to be a state mandated cost. In addition, as stated above, this formula is part of the statutory, and now regulatory framework (as discussed below) for the minimum standards for community college construction that predates 1975.

B. The Challenged Regulations

Many of the regulations challenged by Claimant were converted into regulation from the above-discussed Community Construction Act by operation of SB 1854 (Stats. 1990, ch. 1372).

Section 708(a) of that bill states, in pertinent part:

"(a) Prior to January 1, 1991, the Board of Governors of the California Community Colleges shall initially adopt and put into effect regulations which incorporate the text of the following Education Code provisions that have been repealed or amended by this act. The text of these sections, as they relate to

community colleges, may be changed when initially adopted as regulations in accordance with the character of the California Community Colleges as a postsecondary education system, as specified in Section 70900 of the Education Code, and the responsibilities assigned to the Board of Governors of the California Community Colleges, as specified in the Education Code, including Sections 66700 and 70901. The changes shall not alter the requirements, rights, responsibilities, conditions or prescriptions contained in these statutes. Permitted initial changes include grammatical or technical changes, renumbering or reordering sections, removal of outdated terms or references to inapplicable or repealed statutory authorities, and the correction of gender references. . . ." (Emphasis added.)

Section 708 of SB 1854 also stated:

"(b) It is the intent of the Legislature that there be no lapse in the requirements, rights, responsibilities, conditions, or prescriptions contained in the statutes. Should the board of governors fail to adopt and put into effect regulations in accordance with subdivision (a), the listed statutes shall remain operative until the effective date of the corresponding board of governors regulations."

Some of the challenged regulations have not been substantively amended since being converted into regulation by the Board of Governors in 1991 from statutes that predate 1975.

In *Barnhart III v. Cabrillo Community College* (1999) 76 Cal.App.4th 818, the court had the opportunity to discuss the special status of statutes converted into regulations under Senate Bill 1854 (Stats. 1990, ch. 1372). The court reasoned that these regulations were adopted by the Board of Governors pursuant to the Legislature's mandate "to keep in effect the 'requirements, rights, responsibilities, conditions, or prescriptions' of an identical repealed statute. Under these peculiar circumstances, [a statute converted into regulation] and [the repealed statute] must be deemed to have equal dignity." (*Barnhart III v. Cabrillo Community College, supra*, 76 Cal.App.4th 818, 825, citing Stats. 1990, ch. 1372, § 708, at p. 6321 ["It is the intent of the Legislature that there be no lapse in the requirements, rights, responsibilities, conditions, or prescriptions contained in the statutes"].)

All of the challenged regulations were promulgated under the Board of Governors' duty and authority to set standards for community college construction under the Act. In a few instances, the challenged regulations are also supported by statutes in other Education Code sections.

"Costs mandated by the state" do not include costs associated with statutes that were enacted prior to January 1, 1975. (Gov. Code, § 17514.) Regulatory requirements that existed before January 1, 1975, cannot be the basis for reimbursement.

C. State Capital Outlay Funds

The following table illustrates the amount of state general obligation bonds that have been approved and spent or will be spent on community college capital construction projects since

1986, including several projects at Santa Monica CCD.

| Statewide General Obligation Bonds | CCC Share |
|---|------------------------|
| 1986 Bond Act, Prop 56 | \$133,333,333 |
| 1988 Bond Act, Prop 78 | \$200,000,000 |
| 1990 Bond Act, Prop 143 | \$150,000,000 |
| 1992 Bond Act, Prop 146 | \$300,000,000 |
| 1996 Bond Act, Prop 203 | \$325,000,000 |
| 1998 Bond Act, Prop 1A | \$800,000,000 |
| 2002 Bond Act, Prop 47 | \$746,000,000 |
| 2004 Bond Act, Prop 55 | \$920,000,000 |
| TOTAL | \$3,574,333,333 |

In addition to these amounts, the state has also provided hundreds of millions of dollars of lease revenue bonds for community college capital construction.

II. MINIMUM STANDARDS ARE NOT ELIGIBLE FOR REIMBURSEMENT IF THEY WERE REQUIRED BY LEGISLATIVE ACTION THAT PREDATED JANUARY 1, 1975.

It is clear that the Act predates January 1, 1975, and that portions of the Act were converted into regulations and have the same force and effect as the original statutes.

The California Constitution provides that:

"Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide subvention of funds for the following mandates: . . .

(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."
(Cal. Const., art. XIII B, § 6.)

The challenged statutes and regulations identified by Claimant reflect minimum standards for community college construction and conditions for receipt of state aid with regard to the same. These requirements were in statute prior to January 1, 1975. For the most part, herein, the only changes in the challenged statutes and regulations from the original language predating January 1, 1975, concern clarification of these minimum standards by the Legislature or by the Board of Governors, under the authority and mandatory administrative and rulemaking duties provided for in statute since 1967. In many cases, the language in the challenged statutes and regulations is identical to language that was in statute prior to January 1, 1975.

A recent California Attorney General opinion concluded that reimbursement is often unavailable

for minimum standard regulations. The question posed to the Attorney General concerned minimum standards for juvenile justice facilities. The Attorney General concluded that where a statute enacted prior to 1975 required a state body to establish minimum standards, revising those standards does not constitute a new program or increased level of service in an existing program. The Legislature itself can also revise such minimum standards without creating a new program or increased level of service in an existing program within the meaning of article XIII B, section 6 of the California Constitution.

The Attorney General considered a county's claim for reimbursement for bringing a juvenile justice facility into compliance with the minimum standards established by the Board of Corrections. The Attorney General concluded that the Board of Corrections had been required to set minimum standards for suitable juvenile facilities since at least 1915. In our response to this Test Claim, we have tracked statutory language back to at least 1967.

Former Education Code section 20054 stated, in 1967, that

"This chapter shall be administered by the Department of Education, and for purposes of such administration the State Board of Education may adopt all necessary rules and regulations.

For purposes of this chapter, the Department of Education shall assemble statewide data of facility and construction costs, and on the basis thereof formulate cost standards and construction standards. The formulation of standards shall include also the formulation of average ratios of equipment cost to total project costs, unit equipment costs per faculty or other staff measure, and unit costs as related to floor areas." (Emphasis added.)

The only changes to that language since 1967 are technical, and do not change any costs that might be involved in compliance. In 1971 section 20054 was amended, mandating that the administrative duties of the Act be performed by the chancellor, and that the rulemaking duties be performed by the Board of Governors (Stats. 1971, ch. 1525, § 8). The current language can be found in Education Code section 81805, wherein the wording of the provision is identical to the 1967 statute, except that the duties of administration and rulemaking now lie with the Board of Governors of the California Community Colleges. As will be discussed in detail below, setting standards regarding the Act, promulgating rules regarding the submission of materials by the districts with regard to district projects, review of the same by this agency, reporting by the districts, and other duties for which the districts are claiming state-mandated costs have been required by the Act as part of the minimum standards for community college construction which were in statute prior to January 1, 1975.

The Attorney General opined that

"Here, we do not have a 'new program' being imposed by the Legislature upon local governments. Counties have been required to maintain a 'suitable' place for the detention of minors since at least 1915. [Citations omitted.] Setting the minimum standards for what is 'suitable' does not create a 'higher' level of service-

-it has long been the level of service required of local agencies. [Citations omitted.]" (83 Ops.Cal.Atty.Gen. 111 (2000).)

The Attorney General considered the language of Welfare and Institutions Code section 210, which provided: "The Board of Corrections shall adopt minimum standards for the operation and maintenance of juvenile halls for the confinement of minors." The term "suitable" is not part of the charge to the Board of Corrections in setting minimum standards. The term is implied.

Under the theory articulated by the Attorney General in his 2000 opinion, no new programs or higher level of services are established by either legislatively-enacted statutes that set minimum standards, or the Board of Governors' regulations that set minimum standards, if the Legislature required the adoption of those minimum standards prior to 1975. (83 Ops.Cal.Atty.Gen. 111 (2000).) In addition, some of the challenged regulations are merely converted statutes that predate January 1, 1975.

The fact that we are offering the analysis of each of the challenged statutes and regulations below does not change our position that, in accordance with the Attorney General's Opinion discussed above, we believe that changes to the statutes and regulations in accordance with legislative enactments predating 1975 do not constitute a new program or service, and thus no state mandate can be claimed. We will not raise this general defense for each of the challenged statutes and regulations assessed below, but by setting out the defense as to all of the challenged statutes and regulations, we incorporate this defense into each of the following analyses.

III. IF CLAIMANT HAS COMPLIED WITH THE CHALLENGED PROVISIONS IN ORDER TO RECEIVE STATE AID AND HAS RECEIVED STATE AID, CLAIMANT HAS ALREADY BEEN COMPENSATED FOR COMPLIANCE, AND NO FURTHER REIMBURSEMENT IS WARRANTED.

Claimant's Statement of Claim concern statutory and regulatory requirements under which the college districts receive state aid for community college construction. Thus these statutes and regulations constitute minimum standards for the receipt of state aid for such projects. If Claimant has not complied with the statutes and regulations, Claimant cannot raise an issue of reimbursement because Claimant has not taken action in response to a claimed mandate. If Claimant has complied with the statutes and regulations so as to collect state aid, Claimant is not eligible for further reimbursement. That is, funds have already been appropriated and paid for any required actions set out in the Claim.

The California Supreme Court recently addressed the conditions for reimbursement of claimed state mandates. (*Department of Finance v. Commission on State Mandates (Kern High School)* (2003) 30 Cal.4th 727, hereinafter referred to as "*Kern High School*.") The primary focus of the Court's analysis was that districts cannot voluntarily participate in programs, and then claim reimbursement for mandates. This is because there is no mandate under the law if a district has the option of not participating in a program or activity.

The Court in *Kern High School* pointed out that even if costs are incurred, they may be permissibly payable from funds that have already been obtained from the state. (*Id.*, at p. 747.) Claimant can use the funds it has already received from the state to satisfy any costs of

complying with the statutes and regulations that are the subject of this Claim. Claimant is supposed to satisfy the regulations in order to be eligible to collect state funding.

To the extent that Claimant has already received state funding for the purposes of complying with the subject provisions, the Claim should be rejected in its entirety. We will not raise this general defense for each of the statutes and regulations assessed below, but by setting out the defense as to all minimum standards, we incorporate this defense into each of the following analyses.

Santa Monica CCD has received the following state funds for capital construction:

| | | |
|--------------|--|---------------------|
| 1989-91 | Technology Building Addition | \$ 5,046,000 |
| 1992 | Automotive Technology Remodel | \$ 547,000 |
| 1995 | Remodel Technology Building, 2nd Floor | \$ 2,848,000 |
| 1998 | Replace Science Building | \$ 3,107,000 |
| 1999-2000 | Seismic Retrofit/Library Addition | \$17,016,000 |
| 2003 | Liberal Arts Replacement | \$ 4,458,000 |
| TOTAL | | \$33,022,000 |

IV. CLAIMANT IS NOT REQUIRED TO COLLECT STATE AID. TO THE EXTENT CLAIMANT CHOOSES TO DO SO, THAT CHOICE NEGATES THE FINDING OF A STATE MANDATE FOR ACTIVITIES THAT ARE NECESSARY TO MAKE CLAIMANT ELIGIBLE FOR STATE AID.

As noted above, the California Supreme Court recently confirmed that reimbursement is not authorized where the Claimant voluntarily undertakes an activity. (See *Department of Finance v. Commission on State Mandates*, supra, 30 Cal. 4th 727, referred to herein as "*Kern High School*".) In *Kern High School*, the district sought reimbursement from the state for the costs of preparing notices and agenda items related to certain programs it offered. The Supreme Court found that the district chose to participate in the programs, and therefore the costs of the programs were also voluntarily assumed. No mandates exist where a district voluntarily participates in a program.

Although most community college districts seek state aid for construction projects, the districts are not required to do so. In addition, the acquisition of a new college site is not required by law, and is voluntary on the part of a district. To the extent Claimant complies with the statutes and regulations cited herein in order to obtain the state aid that results from compliance, Claimant voluntarily accepts the obligations. (See also, this agency's response to CSM 02-TC-31 (Minimum Conditions for State Aid) with regard to the general oversight of the Board of Governors with regard to minimum conditions for receipt of state aid, and the fact that college districts must meet the requirements of the regulations authorized by Education Code section 70901 in order to receive state funding to operate colleges within the system.)

Under *Kern High School*, Claimant's choice to receive state funding for the purposes of complying with the subject provisions renders the conduct optional. We will not raise this

general defense for each of the statutes and regulations assessed below, but by setting out the defense as to all minimum conditions, we incorporate this defense into each of the following analyses.

**V. Claimant's "Part III. Statement of the Claim. Section 1."
Education Code sections**

A. Education Code section 81808. "To transfer any unused project funds appropriates (sic), or authorized for appropriation, when the existing district is incorporated into a newly formed district. . . ."

These requirements have been the same since 1967 (former Ed. Code, § 20057; Stats. 1967, ch. 1550, § 2; Stats. 1970, ch. 102, § 277), and the language in section 81808 is virtually identical to the former statute. Thus these requirements existed prior to January 1, 1975, and "costs mandated by the state" do not include costs associated with statutes that were enacted prior to January 1, 1975. (Gov. Code, § 17514.)

B. Education Code section 81820. "To prepare and submit a plan for capital construction to the Board of Governors of the California Community Colleges reflecting the five-year period commencing with the next proposed year of funding. . . . The capital construction plan is subject to annual review by the Board and a report outlining any required modifications or changes must be submitted before the 1st day of February. . . ."

Submission of plans for capital construction has been required since 1967 (former Ed. Code, § 20065; Stats. 1967, ch. 1550, § 2; amended Stats. 1970, ch. 102, § 279; Stats. 1971, ch. 1525, § 12; Stats. 1974, ch. 280, § 1). Before January 1, 1975, the required submission was a 10-year plan. An amendment to the law requiring the submission of 5-year plans rather than 10-year plans was enacted in 1974 (former Ed. Code, § 20065; Stats. 1974, ch. 280, § 1). Annual review and reports outlining any required modifications have been required since 1967 (former Ed. Code, § 20065). Thus all the above-mentioned requirements existed prior to January 1, 1975, and "costs mandated by the state" do not include costs associated with statutes that were enacted prior to January 1, 1975. (Gov. Code, § 17514.)

The date for submission of the plans has changed over the years from November (in 1967), and for subsequent years former section 20065 (Stats. 1967, ch. 1550, § 2) stated that the plans would be submitted "on or before the first day of September"; to "on or before the first day of November" in each year after 1975 (former section 20065 as amended by Stats. 1974, ch. 280, § 1); to "on or before the first day of February" in current law (with possible intervening changes, as we have not researched whether there were changes to the submission date between 1974 and the present⁰. However, such changes are non-substantive, and claimant has not made a Statement of Claim with regard to the change of date.

Education Code section 81823. " The capital construction plan is subject to annual review by the Board and a report outlining any required modifications or changes must be submitted before the 1st day of February. . . ."

As discussed above, annual review and reports outlining any required modifications have been required since 1967. Complying with the requirements of section 81823 (former § 81823, similar to the current section, was added by Stats. 1977, ch. 967, § 1; and repealed and added by Stats. 1980, ch. 910, § 2) is voluntary on the part of the districts. Section 81823 states, in pertinent part:

"If a community college district maintains colleges, or one college and one or more educational centers, it may additionally submit the plan required by Section 81820 on the basis of each college or educational center maintained by the district, if either of the following circumstances is present that such students will be better served by evaluating the capital outlay program for the district on that basis:" (Ed. Code, § 81823(a), emphasis added.)

Giving the districts an optional, alternate means of plan submittals that have been required by statutes that predate January 1, 1975, is not a state-mandated cost. It merely increases district flexibility, and the district can voluntarily decide whether or not to use this option.

Title 5, California Code of Regulations, section 57014. See discussion below, under VI(B), below.

C. Education Code section 81821. "To set out the estimated capital construction needs of the district in its five-year capital construction plan including: . . ."

1. Education Code section 81821(a). "The district's plans concerning its future academic and student services programs, and the effect on estimated construction needs arising from particular courses of instruction, subject matter areas, or student services to be emphasized. . . ."

The requirements have been the same since 1967 (former Ed. Code, § 20066(a); Stats. 1967, ch. 1550, § 2; Stats. 1970, ch. 102, § 280; Stats. 1971, ch. 1525, § 13), except that "student services programs" were added to section 81821(a) by Statutes of 1980, chapter 910, section 2, an urgency measure. This change was merely a clarification by the Legislature of minimum standards statutes enacted prior to January 1, 1975.

2. Education Code section 81821(b). "The district's enrollment projections. . . ."

This requirement has been the same since 1967 (former Ed. Code, § 20066(b)); Stats. 1967, ch. 1550, § 2; Stats. 1970, ch. 102, § 280; Stats. 1971, ch. 1525, § 13), except that in the provisions regarding enrollment projections, educational centers were added to section 81821(a) by Statutes of 1980, chapter 910, section 2, an urgency measure. The addition of educational centers does not create a new program or service, since any report of enrollment projections at the districts would necessarily include educational centers. Thus the addition "educational centers" into the law is merely a clarification by the Legislature of minimum standards statutes enacted prior to January 1, 1975. In addition, since there is no requirement in law that college districts create educational centers, and thus the creation of educational centers is voluntary and within the discretion of the districts, the subsequent change in the law did not create a state mandated

program.

3. **Education Code section 81821(c)**. "The district's current enrollment capacity. . ."

The requirements have been the same since 1967 (former Ed. Code, § 20066(c); Stats. 1967, ch. 1550, § 2; Stats. 1970, ch. 102, § 280; Stats. 1971, ch. 1525, § 13), except that the body adopting "space and utilization standards for . . . classrooms and laboratories" has changed over the years (Board of Education (1967); Board of Governors (1971); Board of Governors in consultation with California Postsecondary Education Commission (changes to section 81821(c) made by Stats. 1981, ch. 981). Changing the body that creates the space and utilization standards does not create a state mandated program, as the districts must comply with section 81821 regardless of a change of the body or bodies that promulgate the standards.

4. **Education Code section 81821(d)**. "The district's office, library and supporting facility capacities. . . ."

See C(3), above with regard to 20066(d) and 81821(d), as the body adopting the "physical plant standards for office, library, and supporting facilities" has also changed over the years.

5. **Education Code section 81821(e)**. "The district's annual inventory of all facilities and land. . . ."

The requirements have been the same since 1967 (former Ed. Code, § 20066(e); Stats. 1967, ch. 1550, § 2; Stats. 1970, ch. 102, § 280; Stats. 1971, ch. 1525, § 13), except that the provision that the inventory includes land was added in 1980 (Stats. 1980, ch. 910, § 2). This amendment does not create a new program or service, and is merely a clarification by the Legislature of minimum standards statutes enacted prior to January 1, 1975.

6. **Education Code section 81821(f)**. "The district's estimate of funds available for capital outlay matching purposes. . . ."

This requirement was added in 1980 (Stats. 1980, ch. 910, § 2); however, matching fund requirements concern voluntary actions of the Districts with regard to the receipt of state funding for elements of its capital construction plan, and thus, no state mandate can be claimed in this regard.

D. Education Code section 81823. It is not necessary to reiterate claimant's statement of claim, as the requirements of section 81823 (former § 81823, similar to the current section, was added by Stats. 1977, ch. 967, § 1; and repealed and added by Stats. 1980, ch. 910, § 2) are voluntary. Section 81823 states, in pertinent part:

"If a community college district maintains colleges, or one college and one or more educational centers, it may additionally submit the plan required by Section 8120 on the basis of each college or educational center maintained by the district, if either of the following circumstances is present that such students will be better

served by evaluating the capital outlay program for the district on that basis:" (Ed. Code, § 81823(a), emphasis added.)

This gives the Districts a voluntary, alternate means of submitting plans required by statutes that predate January 1, 1975, and thus no state-mandated cost can be claimed.

E. Education Code section 81836. "To pay to the Board of Governors any reasonable fees charged for the review of proposed new college sites. . . ."

The requirement that the district pay fees to the Board of Governors for its review of proposed new college sites has been in statute since 1974 (former Ed. Code, § 20080.1; Stats. 1974, ch. 30, § 3). When the statute was enacted in 1974, the fees were "twenty-five dollars (\$25) for each 10 acres or fraction thereof of school site reviewed." The same language was converted into Education Code section 81836(a) in major 1976 Education Code conversion (Stats. 1976, ch. 1010). Fees pursuant to current law, "a reasonable fee as determined by the board of governors for each 10 acres or fraction thereof of school site reviewed," are the result of a 1980 amendment to section 81836 (Stats. 1980, ch. 910, § 2.)

First, the Chancellor's Office does not currently charge such fees for the review of new college sites. Second, even if such fees were to be charged, the fact that the districts must pay a reasonable fee for review of proposed new college sites is not a state mandated cost due to the fact that it is voluntary on the part of a district whether or not to seek the acquisition of a new college site, and thus any resultant fees are incurred as a result of that discretionary decision on the part of a district.

Third, the fact that the districts must pay a reasonable fee is an ongoing minimum condition that predates January 1, 1975, and thus cannot be claimed as a state-mandated cost. No "new program" has been created, and no "higher level of service" is involved. "A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service." (*Long Beach Unified Sch. Distr. v. State of California* (1990) 225 Cal.App.3d, 155, 173, citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54-56.)

"State mandate jurisprudence has established that in general, local agencies are not entitled to reimbursement of all increased costs mandated by state law, but only those resulting from a 'new' program or an 'increased level of service' imposed upon them by the state. (*Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835. . . .) A 'program' is defined as a program which carries out the 'governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.' (*County of Los Angeles v. State of California, supra*, 43 Cal.3d at p. 56. . . .) A program is 'new' if the local governmental entity had not previously been required to institute it. (*City of San Jose v. State of California, supra*, 45 Cal.App.4th at p. 1812, 53 Cal.Rptr.2d 521.)" (*County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189.)

It is clear that an increase in fees resulting from a program that has been in effect prior to January 1, 1975, cannot be claimed as a state-mandated cost.

F. Education Code section 81837. "To submit its capital construction plans for any new college facility, or for any addition to, or alteration of, an existing facility totaling for more than one hundred fifty thousand dollars (\$150,000) to the Board of Governors before contracting for such. . . . No contract is valid, nor will any public money be paid out before the district receives written approval from the Board of Governors. . . ."

These requirements have been the same since 1974 (former Ed. Code, § 20080.2; Stats. 1974, ch. 30, § 4), except that, instead of the current requirement that plans be submitted with regard to "any contract or contracts totaling one hundred fifty thousand dollars (\$150,000), or more" the 1974 requirement was with regard to "any contract or contracts totaling \$10,000) or more." It is unclear to us how the districts would find compliance with the current requirement setting the bar at \$150,000 to create more of a hardship than setting the bar at \$10,000, as it was previously in 1974.

G. Education Code section 81839. "The district shall, as may be necessary, include a proposed site in its capital construction plan, and enter into an option contract with the property owner whereby the district pays the consideration for the option. . . ."

These requirements have been essentially the same since 1971 (former Ed. Code, § 20085; Stats. 1971, ch. 373, § 1), and have thus existed in law prior to January 1, 1975, although the law has been clarified through amendments since that time. In addition, the requirements of section 81839 are permissive and voluntary; therefore no state mandate has been created. The law does not say the district "shall," as claimant states. The actual language of the section paraphrased incorrectly by claimant states, in pertinent part, that:

"The governing board of a community college district may include a proposed site in its plans for a project and may enter into agreement with the owner of the property constituting such proposed site whereby the district, for an annual consideration to be borne by the district, is given an option to purchase, or lease with an option to purchase such property at an unspecified future date, as a building site." (Ed. Code, § 81839, emphasis added.)

In addition, taken in context, section 81839 encompasses situations in which the district is voluntarily requesting funding from the state for its project, as section 81839 goes on to state that, "The existence of such an agreement shall in no way affect the determination of the share of the cost of the project to be borne by the state. . . ."

No Claim Made

Claimant has listed Education Code sections 81663, 81800, 81806, 81807 and 81822 on the face sheet of this Test Claim, but has not made a Statement of Claim in regard to these statutes.

Therefore, they will not be discussed here, except to briefly state:

Section 81663 – participation is voluntary;

Section 81800 is a general statement of legislative intent "for the state to provide assistance to community college districts for the construction of community college facilities," which is hardly a mandated cost, rather it is financial assistance;

Section 81805 – the language has been essentially the same since 1967, except that the person or entity that administers the Act and the name of the Act itself have changed over the years, which creates no fiscal impact; and,

Section 81807 – the language has been essentially the same since 1967, except that the person or entity that allocates and disburses the funding has been changed over the years, which creates no fiscal impact.

**VI. Claimant's "Part III. Statement of the Claim. Section 1."
Regulations of the Board of Governors of the California
Community Colleges contained in
California Code of Regulations, title 5, division 6**

As discussed in I(B) above, some of the challenged regulations were converted into regulations from statute, and have the force of continuing statutes that predate January 1, 1975. In addition, as discussed in I(A), above, either the Board of Education or the Board of Governors has had the continuing authority to promulgate regulations and set standards in this regard since 1967 (former Ed. Code, § 20054, currently § 81805).

In converting the enumerated statutes into regulation, section 708 of Statutes 1990, chapter 1372 (SB 1854) required that, "Permitted initial changes include grammatical or technical changes, renumbering or reordering sections, removal of outdated terms or references to inapplicable or repealed statutory authorities, and the correction of gender references. . . ." Thus the Board of Governors could only make technical changes to the original statutory language in the original conversion, and many of the challenged provisions have not been amended since their conversion into regulations in 1991 pursuant to SB 1854. In light of the Attorney General opinion discussed above, we believe any changes to these provisions made after 1975 are part of the continuing process of promulgating minimum standards with regard to community college construction and facilities under statutes predating 1975, and thus any resultant alleged costs do not constitute a state mandate. We place this discussion here as for the sake of brevity we will not raise it with regard to each challenged regulation discussed below, although it may be mentioned in passing.

B. Section 57014¹. " The capital construction plan is subject to annual review by the Board and a report outlining any required modifications or changes must be submitted before the 1st day of February. . . ."

This language has been in law since 1967 (former Ed. Code, § 20075; Stats. 1967, ch. 1550, § 2; Stats. 1970, ch. 102, § 282; Stats. 1971, ch. 1525, § 15). Former Education Code section 20075 referred to former Education Code section 20066. These sections were renumbered by Statutes of 1976, chapter 1010 as sections 81830 and 81821, respectively. (See discussion of section 81821 in section V(C), above.) Section 81830 was converted from statute into regulation as title

¹ All section references in the 50000 series refer to sections in the California Code of Regulations, title 5, division 6, unless otherwise indicated.

5, section 57014 by SB 1854, and has not been amended since its conversion into regulation. Thus these requirements existed prior to January 1, 1975, and "costs mandated by the state" do not include costs associated with statutes that were enacted prior to January 1, 1975. (Gov. Code, § 17514.)

H. Title 5, section 57001.5. "To apply, as may be necessary, for project assistance under the Community College Construction Act of 1980, including:"

Without going into an extensive discussion of the legislative and regulatory history with regard to items H(1) through H(6), and without setting forth the language of each Statement of Claim, it must be noted that it is voluntary on a district's part whether to apply for funding for its projects. Section 57001.5 was formerly Education Code section 20052, was converted into Education Code section 81802 by Statutes 1976, chapter 1010, and into regulation by SB 1854, and has not been amended by the Board of Governors since its conversion into regulation. Thus with regard to the following claims under H:

1. 57001.5(a). Some of the language has been in statute since 1967, and as amended prior to January 1, 1975. Any amendments to the definition of the word "project" since 1975 are merely a clarification of the existing law, and thus would not change the meaning of the existing law for the purposes of creating a new program or service. In addition, these changes are with regard to minimum standards that predated 1975.

2. **57001.5(a).** Same as 1, above.
3. **57001.5(a).** The language paraphrased has been the same since 1967.
4. **57001.5(a).** Same as 3, above.
5. **57001.5(a).** Same as 1, above.
6. **57001.5(b).** Same as 1, above.

I. Section 57010. "To appeal to the Board of Governors any action of the Chancellor adversely affecting the district, pursuant to title 5, California Code of Regulations Section 57010."

The concept of such appeals has been in statute since 1967 (former Ed. Code, § 20055; Stats. 1967, ch. 1550, § 2; Stats. 1970, ch. 102, § 275; Stats. 1971, ch. 1525, § 9; converted to Ed. Code, § 81806 by Stats. 1976, ch. 1010; converted to regulation by SB 1854, and has not been amended by the Board of Governors since conversion into regulation).

J. Section 57011. "To submit to the Chancellor, within 30 days after the closure of the current fiscal year, a final report on all expenditures in connection with the sources of funds expended for completed projects. . . . The district must further submit to any state post-audit review of fund claims for all projects. . . ."

The concept of such reports has been in statute since 1967 (former Ed. Code, § 20058; Stats. 1967, ch. 1550, § 2; Stats. 1970, ch. 102, § 278; Stats. 1971, ch. 1525, § 11; converted to Ed. Code, § 81809 by Stats. 1976, ch. 1010; converted to regulation by SB 1854, and has not been amended by the Board of Governors since conversion into regulation).

The addition of the statutory language with regard to post-audit reviews was made in 1981 (Stats. 1981, ch. 891, § 1), and is merely a clarification of existing law. As this new language concerns a "fund claim," it has to do with conditions for state funding, application for which is voluntary on the part of the districts. In addition, these changes are with regard to minimum standards that predated 1975.

K. Section 57013. "To meet with appropriate local government recreation and park authorities to review all possible methods of coordination, planning, design and construction of new facilities and sites or major additions to existing facilities and recreation and part facilities in the community. . . . Any district planning, designing, or constructing new facilities must report to the Chancellor's office on plans to achieve. . . ."

Section 57013 was converted from statute to regulation pursuant to SB 1854, and has not been amended by the Board of Governors since that time. Section 57013 was formerly Education Code section 81821.5 (Stats. 1980; ch. 910, § 2), which was formerly section 81831.5 (Stats. 1979, ch. 797, § 115). The statutes that were converted into title 5, section 57013 must be looked at in context in order to see that they merely clarified pre-existing minimum standards for community college construction pursuant to the Act, rather than imposing a new mandated program or service. Section 1 of Statutes 1979, chapter 797 (AB 1549) stated:

"It is the intent of the Legislature in enacting this act to update and technically clarify provisions of the law which establish powers and duties of the Board of Governors of the California Community Colleges and the Chancellor of the California Community Colleges. This act repeals numerous Education Code provisions relating to the board of governors and the chancellor's office which are outdated or redundant. . . . Finally, it technically amends numerous provisions so as to clarify or make less burdensome various functions of the board of governors and the chancellor's office. In so doing, it is the intent of the Legislature to streamline the statewide governance of community colleges, and thereby to promote the more efficient use of resources within the community college system."

The wording of former Education Code section 81831.5 has been essentially the same since its renumbering to section 81821.5, and through its conversion into regulation pursuant to SB 1854. As this requirement is merely a clarification of law existing prior to January 1, 1975, no state mandated cost can be claimed.

1. Section 57013(a). "A greater use of any joint or contiguous recreation and park facilities by the district. . . ."

See discussion above.

2. Section 57013(b). "Possible use by the total community of such facilities and sites and recreation and park facilities. . . ."

See discussion above.

L. Section 57015. "To include in its capital construction program submission to the Chancellor's office the following to aid in the review and evaluation process. . . ."

1. Section 57015(a). "An architectural analysis. . . ."

This requirement that an "architectural analysis" be an element of the review has been in statute since 1967 (former Ed. Code, § 20081; Stats. 1967, ch. 1550, § 2; Stats. 1970, ch. 102, § 288; Stats. 1971, ch. 1525, § 21), converted into Education Code section 81838 (Stats. 1976, ch. 1010), and converted into regulation pursuant to SB 1854, and the original statutory language has not been amended by the Board of Governors since that time.

2. Section 57015(b). "A determination of the amount of federal funds available for the project. . . ."

This requirement has been in statute since 1967 (see L(1), above.)

3. Section 57015(c). "a determination of the total cost of the project, reducing the total cost by the amount of federal funds available thereof, and determining the remainder thereof to be borne by the state, or if the district has matching funds, by the state and by the district. . . ."

Although the funding formula has changed over the years from "relative district ability" to "matching funds," the requirement of "determining the total cost of the project, reducing the same by the amount of federal funds available," and determining "the respective shares of the project to be borne by the state and the district" has been in statute since 1967 (see L(1), above).

4. Section 57015(d). "A determination of the total of funds required for the first phase of the project to be provided on a matching basis by the state and the district. . . ."

Although the funding formula has changed over the years from "relative district ability" to "matching funds," the requirement to determine "the total of funds . . . required for the first phase of the project," including the portion that will be provided by the state "and the funds . . . to be provided to the district," has been in statute since 1967 (see L(1), above).

M through Q. Sections 57052, 57053, 57055, 57062 and 57063. Without going into an unnecessary amount of analysis and discussion, these regulations concern voluntary applications for state funding for energy conservation projects. The authority under which the Board of Governors promulgates regulations in this area goes back to 1967, as discussed above with regard to current Education Code section 81805. (See I(A) and VI, first paragraph, above. See also, Ed. Code, §§ 81620 et seq. and 81660 et seq.)

This regulatory scheme was adopted in 1980. The original enactment consisted of sections 57050, 57051, 57052, 57053, 57054 and 57055. The Board of Governors' agenda item with regard to these regulations stated that, "Compliance with the regulations will be required,

however, only if a district requests state funding for an energy related construction project." (Agenda of the Board of Governors, June 26-27, 1980, Item 5, Background; emphasis added.) Thus the requirements of section 57050 to 57055 are triggered by a voluntary action on the part of the districts.

In 1991, nonsubstantive technical changes were made to section 57050 through 57055 in a title 5 review pursuant to AB 1725 (Stats. 1988, ch. 973), and section 57060 to 57062 were converted from statute into regulation, pursuant to SB 1854. The converted statutes, former Education Code sections 17900 through 17903, were added by Statutes 1981, chapter 626, section 1. Section 17900, as enacted, stated that:

"The Legislature finds and declares that it is in the interest of the state and of the people thereof for the state to aid school districts and community college districts in finding cost-effective methods of conserving energy in school buildings maintained by the districts. . . ."

Former Education Code section 17901 began with the words: "(a) . . . community college districts may borrow funds from federal or state regulated financial institutions. . . ." (Emphasis added.)

Thus the requirements of sections 57052, 57053, 57055, 57062 and 57063 concern requirements that are triggered upon a voluntary action by the districts, and no state mandated cost can be claimed.

M. Section 57052(a). This regulation states, "For those districts requesting a state supported energy conservation project. . . ." (Emphasis added.)

State aid is being requested, and thus participation is voluntary.

Section 57052(b). This regulation states, "A community college district submitting an energy conservation project for state aid under the capital outlay program. . . ." (Emphasis added.)

State aid is being requested, and thus participation is voluntary.

N. Section 57053(a). This regulation states, "When the need for state financial assistance for an energy conservation project. . . ." (Emphasis added.)

Participation is voluntary.

O. Section 57055(b). "To include in its preliminary plans, for energy related projects. . . ."

Section 57055(b) does not contain this language. Instead, language similar to that paraphrased by Claimant can be found in section 57055(c). However, these requirements are triggered by a voluntary action on the part of the districts.

P. Section 57062. "To arrange, to the extent that services are available, for the pre-audit and post-audit of buildings. . . ."

Action on the part of the districts that triggers these requirements – applying for state funding for an energy project – is voluntary.

Q. Section 57063. This regulation states, "Community college districts taking action under this article. . . ."

Action on the part of the districts that triggers these requirements – applying for state funding for an energy project – is voluntary.

R. Section 57154. "To include complete and accurate take-off of assignable and gross square feet of space, complying with any and all requirements prescribed by the Chancellor in each application for capital construction and approval. . . ."

Section 57154 was adopted in 1980 by the Board of Governors under the authority of Education Code section 81836, with reference to section 81837. Sections 81836 and 81837 predate 1975. Education Code section 81836(b) requires the Board of Governors to "Establish standards for community college facilities." This requirement has been in law since 1974 (former Ed. Code, § 20080.1(b); Stats. 1974, ch. 30, § 3; converted to section 81836 by Stats. 1976, ch. 1010. See also V(E) and (F), above for a discussion of the history of these sections.)

In addition, Education Code section 81805 requires the Board of Governors to administer the Community College Construction Act and to adopt all necessary rules and regulations. This requirement has been in law since 1967 (former Ed. Code, § 20054; Stats. 1967, ch. 1550, § 2; Stats. 1971, ch. 1525, § 8; converted into section 81805 by Stats. 1976, ch. 1010). The only changes in 20054 and 81805 over the years had to do with the body establishing the standards and promulgating the regulations, which has no fiscal impact, and changing the word "may adopt all necessary rules and regulations" to "shall adopt all necessary rules and regulations." This is merely a clarification of existing law, as promulgating regulations is a form of establishment of standards; without the promulgation of regulations, such standards would amount to illegal, "underground" regulations.

Thus these requirements existed prior to January 1, 1975, and "costs mandated by the state" do not include costs associated with statutes that were enacted prior to January 1, 1975. (Gov. Code, § 17514.)

No Claim Made

In addition, claimant has listed California Code of Regulations, title 5, sections 57001, 57001.7, 57002, 57016, 57033.1, 57050, 57051, 57054, 57060, 57061, 57150, 57152, 57156 and 57158 on the face sheet of Test Claim 02-TC-47, but has not made a statement of claim regarding these regulations. Therefore, they will not be discussed separately herein.

We hope that the foregoing information is useful to the Commission.

Sincerely,

A handwritten signature in black ink that reads "Frederick E. Harris". The signature is written in a cursive style with a large, decorative initial "F".

FREDERICK E. HARRIS, Assistant Vice Chancellor
College Finance and Facilities Planning