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March 30, 2004

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
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RECEIVED

APR 01 2004

**COMMISSION ON
STATE MANDATES**

Re: Test Claim 02-TC-47
Santa Monica Community College District
Community College Construction

Dear Ms. Higashi:

I have received the comments of the Department of Finance ("DOF") dated February 11, 2004, and the comments of the California Community Colleges Chancellor's Office ("CCC") dated March 15, 2004, to which I now respond on behalf of the test claimant.

A. The Opposition and Comments of the DOF and CCC are Incompetent and Should be Excluded

Test claimant objects to the comments of the DOF and CCC, in total, as being legally incompetent and move that they be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

"...written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information or belief."

Furthermore, the test claimant objects to any and all assertions or representations of fact made in the responses (such as the hearsay statement of the DOF that "[I]n fact, the Chancellor's Office has verbally indicated that...") since DOF and CCC have failed to comply with Title 2, California Code of Regulations, Section 1183.02(c)(1) which requires:

"If assertions or representations of fact are made (in a response), they must be supported by documentary evidence which shall be submitted with the state agency's response, opposition, or recommendations. All documentary evidence shall be authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so and must be based on the declarant's personal knowledge or information or belief."

The DOF and CCC comments do not comply with these essential requirements. Since the Commission cannot use unsworn comments or comments unsupported by declarations, but must make conclusions based upon an analysis of the statutes and facts supported in the record, test claimant requests that the comments and assertions of the DOF and CCC not be included in the Staff's Analysis.

B. The Requirements to Obtain State Funding Are, In Fact, Compelled

DOF and CCC continue to assert the proposition that obtaining state funding to build needed campuses and other school facilities is a discretionary act and, therefore, all downstream activities are also discretionary.

A finding of legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate. The controlling case law on the subject of nonlegal compulsion is still City of Sacramento v. State of California (1990) 50 Cal.3rd 51 (hereinafter referred to as *Sacramento II*).¹

(1) Sacramento II Facts:

The adoption of the Social Security Act of 1935 provided for a Federal Unemployment Tax ("FUTA"). FUTA assesses an annual tax on the gross wages paid by covered private employers nationwide. However, employers in a state with a federally "certified" unemployment insurance program receive a "credit" against the federal tax in an amount determined as 90 percent of contributions made to the state system. A "certified" state program also qualifies for federal administrative funds.

California enacted its unemployment insurance system in 1935 and has sought to maintain federal compliance ever since.

¹ Neither DOF or CCC mention *Sacramento II* in their comments.

In 1976, Congress enacted Public Law number 94-566 which amended FUTA to require, for the first time, that a "certified" state plan include coverage of public employees. States that did not alter their unemployment compensation laws accordingly faced a loss of both the federal tax credit and the administrative subsidy.

In response, the California Legislature adopted Chapter 2, Statutes of 1978 (hereinafter chapter 2/78), to conform to Public Law 94-566, and required the state and all local governments to participate in the state unemployment insurance system on behalf of their employees.

(2) Sacramento I Litigation

The City of Sacramento and the County of Los Angeles filed claims with the State Board of Control seeking state subvention of the costs imposed on them by chapter 2/78. The State Board denied the claim. On mandamus, the Sacramento Superior Court overruled the Board and found the costs to be reimbursable. In City of Sacramento v. State of California (1984) 156 Cal.App.3d 182 (hereinafter *Sacramento I*) the Court of Appeal affirmed concluding, *inter alia*, that chapter 2/78 imposed state-mandated costs reimbursable under section 6 of article XIII B. It also held, however, that the potential loss of federal funds and tax credits did not render Public Law 94-566 so coercive as to constitute a "mandate of the federal government" under Section 9(b).²

In other words, *Sacramento I* concluded, *inter alia*, that the loss of federal funds and tax credits did not amount to "compulsion."

(3) Sacramento II Litigation

After remand, the case proceeded through the courts again. In *Sacramento II*, the Supreme Court held that the obligations imposed by chapter 2/78 failed to meet the "program" and "service" standards for mandatory subvention because it imposed no "unique" obligation on local governments, nor did it require them to provide new or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, was overruled.

² Section 1 of article XIII B limits annual "appropriations". Section 9(b) provides that "appropriations subject to limitation" do not include "appropriations 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 provision of existing services more costly."

However, the court also overruled that portion of *Sacramento I* which held that the loss of federal funds and tax credits did not amount to "compulsion."

(4) *Sacramento II* "Compulsion" Reasoning

Plaintiffs argued that the test claim legislation required a clear legal compulsion not present in Public Law 94-566. Defendants responded that the consequences of California's failure to comply with the federal "carrot and stick" scheme were so substantial that the state had no realistic "discretion" to refuse.

In disapproving *Sacramento I*, the court explained:

"If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments." (Opinion, at page 74)

Plaintiffs argued that California was not compelled to comply because it could have chosen to terminate its own unemployment insurance system, leaving the state's employers faced only with the federal tax. The court replied to this suggestion:

"However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends. (¶) ...The alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards." (Opinion, at page 74, emphasis supplied)

In other words, terminating its own system was not an acceptable option because it was so far beyond the realm of practical reality so as to be a draconian response, leaving the state without discretion. The only reasonable alternative was to comply with the new legislation, since the state was practically "without discretion" to do otherwise.

The Supreme Court in *Sacramento II* concluded by stating that there is no final test for a determination of "mandatory" versus "optional":

"Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of

nonparticipation, noncompliance, or withdrawal.” (Opinion, at page 76)

(5) The “Kern” Case Did Not Change the Standard

In *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 736, (“Kern”) the Supreme Court first made it clear that the decision did not hold that legal compulsion was necessary in order to find a reimbursable mandate:

“For the reasons explained below, although we shall analyze the legal compulsion issue, we find it unnecessary in this case to decide whether a finding of legal compulsion is necessary in order to establish a right to reimbursement under article XIII B, section 6, because we conclude that even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate.” (Emphasis in the original, underlining added)

After concluding that the facts in *Kern* did not rise to the standard of nonlegal compulsion, the court reaffirmed that either double taxation or other draconian consequences could result in nonlegal compulsion:

“In sum, the circumstances presented *in the case before us* do not constitute the type of non-legal compulsion that reasonably could constitute, in claimants’ phrasing, a ‘de facto’ reimbursable state mandate. Contrary to the situation that we described in (Sacramento II), a claimant that elects to discontinue participation in one of the programs *here at issue* does not face ‘certain and severe...penalties’ such as ‘double...taxation’ or other ‘draconian’ consequences (citation), but simply must adjust to the withdrawal of grant money along with the lifting of program obligations.” (Opinion, at page 754, emphasis supplied to illustrate holding is limited to facts presented)

The test for determining whether there is a mandate is whether compliance with the test claim legislation is a matter of true choice, that is whether participation is truly voluntary. *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1582 State money³ offered to build needed facilities on the condition of the mandated

³ According to the unverified statement of CCC, over 3.5 billion dollars have been allocated to community college districts from the 8 bond acts from 1986 through

activities represents a very large carrot and a very short stick. The commission must determine, whether the "carrot and stick" method of funding community college facilities construction is, in fact, non-legal compulsion under the carrot and stick standards set forth in *Sacramento II*.

C. Erroneous Conclusions of Law on Specific Statutes

Test claimant will comment here on some of the erroneous points of fact law made by both DOF and CCC.

(1) Education Code Section 81823 is a post 1975 provision

Education Code Section 81823 was added by Chapter 967, Statutes of 1977, Section 1. It is, therefore, a new program. It only comes into play when (1) students are isolated within a district in terms of the distance from the location of an educational program, or the inadequacy of transportation, and students are unable financially to meet the costs of transportation to an educational program; or when (2) existing colleges and educational centers are unable to meet the unique educational and cultural needs of a significant number of ethnic students. Therefore, it is not an "optional" program unless you can state publically that these students are not required to be served.

(2) Educational Centers are a new Requirement

Education Code Section 81821 sets forth the requirements of the five-year plan for capital construction. Subdivision (b) requires enrollment projections to be made cooperatively by the Department of Finance and the community college district. Prior to 1975, these projections only required the projections of community colleges. The section has subsequently been amended to now include educational centers. Obviously, they are not the same. Therefore, to the extent that additional activities are required to make enrollment projections of educational centers, these are increased levels of mandated activities.

(3) Education Code Section 81836 Allows for Additional Fees

Prior to 1975, the Chancellor was authorized to charge community college districts \$25 for each 10 acres or fraction thereof for the review of potential sites, and one-seventh

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of 1 percent of the estimated cost for review of plans and specifications. (Former Education Code Section 20080.1) Now, its successor statute, section 81836, allows the Board of Governors to charge a "reasonable fee" for site reviews and the review of plans and specifications.⁴ To the extent that these "reasonable fees" exceed the former \$25 for each 10 acres or fraction thereof, or one-seventh of 1 percent, these are additional costs mandated by the state for which reimbursement is allowable under the California Constitution, Article XIII B, section 6.

(4) Title 5, California Code of Regulations Section 57001.5 Contains New Activities

The second paragraph of subdivision (b) of Section 57001.5 of Title 5, California Code of Regulations states that a "project" as defined in subdivision (a) on property that conforms to subdivision (b) shall be eligible for state funding. The predecessors to section 57001.5 are sections 20052 (pre-1975) and 81802 (post-1975). Neither of these former sections referred to the subdivision (a) projects of planning, a performing arts facility, a gymnasium, basic outdoor physical education facilities, basic food service facilities, child development centers or the initial furnishing of and initial acquisition of equipment.

Neither do these former sections refer to the subdivision (b) requirements related to "reconstruction or remodeling", the transfer of title, or leasing.

To the extent that these new requirements of Title 5, California Code of Regulations Section 57001.5 exceed those set forth in former Education Code Sections 20052 and 81802, these are new or increased levels of activities.

(5) Title 5, California Code of Regulations Section 57011 Contains New Audit Requirements

Title 5, California Code of Regulations Section 57011 subjects a district to a state post-audit review of fund claims for all projects. The predecessors to section 57011 are sections 20058 (pre-1975) and 81809 (post-1975). Neither of these former sections refers to a state post-audit review of fund claims. These audits are, therefore, new programs.

⁴ The unsworn statement of CCC that "...the Chancellor's Office does not "currently" charge such fees..." (emphasis provided) is totally irrelevant. If the Chancellor's Office continues this policy in the future, annual claimants need not claim the cost.

(6) Title 5, California Code of Regulations Section 57013 is a New Program

Title 5, California Code of Regulations Section 57013, for the first time, requires the governing board of a community college district to meet with appropriate local government recreations and park authorities to review all possible methods of coordinating planning, design, and construction of new facilities and sites or major additions to existing facilities and recreation and park facilities in the community. The comments of DOF that the section does not require more than one meeting is both irrational and irrelevant. A review of "all possible methods" for coordination, planning, design and construction, and the discussion of both new facilities and major additions to existing facilities do not translate into one hearing agenda. CCC traces the section back to former section 81831.5 (added by Chapter 797, Statutes of 1979) and inappropriately concludes that the requirement is merely a clarification of law existing prior to January 1, 1975.

(7) Board Agenda Items are Not Law or Regulations

In response to Title 5, California Code of Regulations Sections 57052, 57053, 57055, 57062 and 57063, CCC refers to a 1980 Board of Governor's agenda item. A board agenda item cannot be elevated to the status of law or regulation. As to the underlying issue of discretionary versus mandatory activities, test claimant refers the reader to Part B, above.

In addition, these sections are part of Subchapter 1.5, the provisions on Energy and Resource Conservation. The subchapter was added on September 25, 1980 and is, therefore, a new program. It is based upon a finding of the Board of Governors that it is in the interest of the state and of the people thereof for the state to aid community college districts in finding cost-effective methods of conserving energy and that the costs involved to become more energy efficient are often prohibitive. Title 5, California Code of Regulations Section 57060

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D. Sections 57001.5, 57010 and 57011 of the Title 5 Regulations are New Programs

Title 5, California Code of Regulations Sections 57001.5, 57010 and 57011 have Education Code predecessors:

<u>Former Education Code Sections</u>	<u>Current Title 5 Regulations</u>
81802	57001.5
81806	57010
81809	57011

Former Education Code Sections 81802, 81806 and 81809 were repealed by Sections 563, 567 and 569 of Chapter 1372, Statutes of 1990. In each instance, the statute directed that the section "is repealed." It does not say "may be repealed." It does not say that the section might be repealed if (a subsequent event occurs). It says each of those sections "is repealed." These sections were repealed and became inoperative on January 1, 1991.

Section 708 of Chapter 1372/90 directed the Board of Governors of the California Community Colleges to "initially" adopt and put into effect regulations which incorporate the text of the repealed sections. Since an "initial" adoption was anticipated, the section only permitted 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. This "initial" cut-and-paste operation was ordered to be done "[P]rior to January 1, 1991."

While it is recognized that subdivision (2) of Section 708 contains exculpatory language, the "intent" of the legislature cannot undo the clear effect that each of the sections "is repealed."

The Board of Governors did not obey the directive until March 4, 1991 (operative April 3, 1991). Therefore Sections 57001.5, 57010 and 57011 of Title 5, California Code of Regulations are new programs.

CCC's reference to *Barnhart v. Cabrillo Community College*⁵ (1999) 76 Cal.App.4th 818

⁵ Pursuant to Title 2, California Code of Regulations, Section 1183.03(2), a copy of *Barnhart v. Cabrillo Community College* is attached hereto as Exhibit "A", since CCC

is factually distinguishable. *Barnhart* is a tort liability case where the sole issue was whether the immunity provisions of Title 5, section 55450 applied to that case. (Opinion, at page 821)

The court discussed the statute-regulation dichotomy at pages 824-825. Plaintiffs argued that the Title 5 regulation should be given a lesser effect than a conflicting Education Code section. After discussing the history of the “code section turned regulation”, the court held that the two sections must be deemed to have equal dignity.

What the court did not decide was whether the Education Code section was effective or operational between January 1, 1991 (the date of the statutory repeal) and April 5, 1991 (the operative date of the regulation). In fact, the date of the accident is not even mentioned in the facts as recited by the court.

Simply stated, *Barnhart* does not resolve the question of the viability of a statute, after repeal, but before the effective date of the replacement regulation.

E. Energy Savings Do Not Prevent a Finding of a Mandate

In response to the Title 5 regulations relative to the subchapter on Energy and Resource Conservation, DOF cites Government Code Section 17556(e) as purported legal support for its hope that “these projects, by definition, provide offsetting cost savings to districts through reduced energy consumption.”

Subdivision (e) of Section 17556 of the Government Code provides that the Commission shall not find costs mandated by the state if:

“...(e) The statute of executive order provides for offsetting savings to local agencies or school districts **which result in no net costs** to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate **in an amount sufficient to fund** the cost of the state mandate.” (Emphasis added)

The error of DOF’s argument is that it refers to savings from the energy conservation program, whereas, section 17556(e) refers to savings provided in the statute or executive order. The test claim legislation provides absolutely no offsetting savings. Furthermore, there is not one scintilla of evidence before the

did not do so.

Commission (verified or unverified) that the hoped-for energy savings will **result in no net costs** or be **in an amount sufficient to fund** the cost of the state mandate. This argument of the DOF fails both in law and in fact.

CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,



Keith B. Petersen

C: Per Mailing List Attached

DECLARATION OF SERVICE

RE: Community College Construction 02-TC-47
CLAIMANT: Santa Monica Community College District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant(s). I am 18 years of age or older and not a party to the within entitled matter.

On the date indicated below, I served the attached: letter of March 30, 2004, addressed as follows:

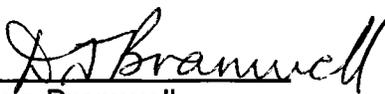
Paula Higashi
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Sacramento, CA 95814

AND per mailing list attached

FAX: (916) 445-0278

- | | |
|--|---|
| <p><input checked="" type="checkbox"/> U.S. MAIL: I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.</p> | <p><input type="checkbox"/> FACSIMILE TRANSMISSION: On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.</p> |
| <p><input type="checkbox"/> OTHER SERVICE: I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:</p> <p>_____ (Describe)</p> | <p><input type="checkbox"/> A copy of the transmission report issued by the transmitting machine is attached to this proof of service.</p> <p><input type="checkbox"/> PERSONAL SERVICE: By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).</p> |

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 3/30/04, at San Diego, California.


Diane Bramwell

Commission on State Mandates

Original List Date: 7/9/2003
Last Updated: 10/31/2003
List Print Date: 02/09/2004
Claim Number: 02-TC-47
Issue: Community College Construction

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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EXHIBIT A
BARNHART V. CABRILLO COMMUNITY COLLEGE
76 Cal.App.4th 818; 90 Cal.Rptr.2d 709

[No. H019287. Sixth Dist. Dec. 2, 1999.]

ROY DEWEY BARNHART III et al., Plaintiffs and Appellants, v.
CABRILLO COMMUNITY COLLEGE et al., Defendants and
Respondents.

SUMMARY

Three members of a community college soccer team brought an action against the college and their coach for personal injuries suffered in an automobile accident that occurred when the coach, a college employee, was driving plaintiffs from the college to a game in a van owned by the college. The trial court granted summary judgment for defendants on the basis of immunity pursuant to an administrative regulation providing immunity for injuries occurring during a field trip or excursion (Cal. Code Regs, tit. 5, § 55450). (Superior Court of Santa Cruz County, No. 133273, Samuel S. Stevens, Judge.)

The Court of Appeal affirmed. The court held that the trial court properly granted summary judgment for defendants on the basis of Cal. Code Regs, tit. 5, § 55450. Although Ed. Code, § 87706, reaffirms the general statutory rule of vicarious liability for accidents occurring to students where the community college district provides transportation to and from the school premises for an off-premises school-sponsored activity, the regulation overrides the general statutory rule of vicarious liability and immunizes a community college district from liability for accidents occurring during field trips or excursions; thus, the regulation controlled in this case. First, the disputed facts about the voluntary or involuntary nature of plaintiffs' participation on the soccer team were immaterial. Further, the regulation and Ed. Code, § 87706, can easily be harmonized. There is a difference between a field trip or excursion and a school-sponsored activity. A field trip or excursion is simply a narrowly defined type of the more broadly defined school-sponsored activity. Plaintiffs' trip clearly fell within the broad category of a school-sponsored activity given that participation in an extracurricular sports program is part of the school curriculum. Also, by its own terms, the regulation places trips in connection with extracurricular sports programs into the narrowly defined field trip or excursion type of school-sponsored activity. Thus, plaintiffs were on a field trip or excursion, and Cal.

Code Regs, tit. 5, § 55450, the special or specific immunity statute, applied.
(Opinion by Premo, J., with Cottle, P. J., and Elia, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

- (1) **Appellate Review § 145—Scope of Review—Construction of Statutes.**—The meaning and effect of statutory provisions is a matter for the appellate court's independent review.
- (2) **Statutes § 37—Construction—Giving Effect to Statute—Sustaining Validity.**—In the interpretation of a statute, where the language is clear, its plain meaning should be followed. Generally, a statute should be construed so as to harmonize, if possible, with other laws relating to the same subject. To harmonize two statutes relating to the same subject, a particular or specific statute will take precedence over a conflicting general statute. Also, significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided.
- (3) **Government Tort Liability § 4—Grounds for Relief—As Dependent on Liability of Employee.**—A public entity, as an employer, is generally liable for the torts of an employee committed within the scope of employment if the employee is liable. Under Gov. Code, § 820, subd. (a), except as otherwise provided by statute, a public employee is liable for an injury caused by his or her act or omission to the same extent as a private person. Thus, the general rule is that an employee of a public entity is liable for his or her torts to the same extent as a private person, and the public entity is vicariously liable for any injury that its employee causes to the same extent as a private employer.
- (4a, 4b) **Government Tort Liability § 15—Grounds for Relief—Liability Arising From Governmental Activities—Community Colleges—Supervision of Students—Field Trips or Excursions—Immunity.**—In an action brought by three members of a community college soccer team against the college and their coach for personal injuries suffered in an automobile accident that occurred when the coach, a college employee, was driving plaintiffs from the college to a game in a van owned by the college, the trial court properly granted summary judgment for defendants. Defendants were immune from liability pursuant to Cal. Code Regs, tit. 5, § 55450, an administrative regulation

providing immunity for injuries occurring during a field trip or excursion. Although Ed. Code, § 87706, reaffirms the general statutory rule of vicarious liability for accidents occurring to students where the community college district provides transportation to and from the school premises for an off-premises, school-sponsored activity, the regulation overrides the general statutory rule of vicarious liability and immunizes a community college district from liability for accidents occurring during field trips or excursions; thus, the regulation controlled in this case. First, the disputed facts about the voluntary or involuntary nature of plaintiffs' participation on the soccer team were immaterial. Further, the regulation and Ed. Code, § 87706, can easily be harmonized. There is a difference between a field trip or excursion and a school-sponsored activity. A field trip or excursion is simply a narrowly defined type of the more broadly defined school-sponsored activity. Plaintiffs' trip clearly fell within the broad category of a school-sponsored activity given that participation in an extracurricular sports program is part of the school curriculum. Also, by its own terms, the regulation places trips in connection with extracurricular sports programs into the narrowly defined field trip or excursion type of school-sponsored activity. Thus, plaintiffs were on a field trip or excursion, and Cal. Code Regs, tit. 5, § 55450, the special or specific immunity statute, applied.

[See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 155.]

- (5) **Government Tort Liability § 2—As Governed by Statute—Regulation Providing Immunity for Injuries Occurring During Field Trips or Excursions.**—Cal. Code Regs, tit. 5, § 55450, an administrative regulation providing community college districts with immunity for injuries occurring during or by reason of a field trip or excursion, is no mere administrative regulation but, rather, is a regulation adopted pursuant to the Legislature's intent to keep in effect the requirements, rights, responsibilities, conditions, or prescriptions of an identical repealed statute. Thus, the regulation and Ed. Code, § 87706, which reaffirms the general statutory rule of vicarious liability for accidents occurring to students where the community college district provides transportation to and from the school premises for an off-premises, school-sponsored activity, must be deemed to have equal dignity.

COUNSEL

Gary Haraldsen for Plaintiffs and Appellants.

Burton, Volkmann & Schmal, Timothy R. Volkmann and Karen E. Lintott
for Defendants and Respondents.

OPINION

PREMO, J.—Plaintiffs Roy Dewey Barnhart III, Masao Drexel, and Robert Zamora sued defendants Cabrillo Community College and Jason Rene Larrieu for personal injuries suffered in an automobile accident. The accident occurred while Cabrillo's employee, Larrieu, was driving plaintiffs from the college to Fresno City College to play an intercollegiate soccer match. The trial court granted defendants' motion for summary judgment on the basis of immunity pursuant to title 5, California Code of Regulations, section 55450 (hereafter, title 5, section 55450). On appeal, plaintiffs contend that Education Code section 87706 (hereafter, section 87706) applies to this case and allows them to prove liability. We disagree and affirm the judgment.

SCOPE OF REVIEW

The parties do not dispute the material facts. The issue is simply whether title 5, section 55450 immunity applies to this case. (1) "The meaning and effect of statutory provisions is a matter for our independent review." (*Service Employees Internat. Union v. Board of Trustees* (1996) 47 Cal.App.4th 1661, 1665 [55 Cal.Rptr.2d 484].)

(2) "It is axiomatic that in the interpretation of a statute where the language is clear, its plain meaning should be followed." (*Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 155 [137 Cal.Rptr. 154, 561 P.2d 244].) Generally, a statute should be construed so as to harmonize, if possible, with other laws relating to the same subject. (*Isobe v. Unemployment Ins. Appeals Bd.* (1974) 12 Cal.3d 584, 590-591 [116 Cal.Rptr. 376, 526 P.2d 528].) To harmonize two statutes relating to the same subject, a particular or specific statute will take precedence over a conflicting general statute. (Code Civ. Proc., § 1859.) And significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].)

UNDISPUTED MATERIAL FACTS

Plaintiffs were members of the men's soccer team; Larrieu was the assistant coach. An away game was scheduled in Fresno. Larrieu drove

plaintiffs and other players to the game in a van owned by Cabrillo. On southbound Highway 99, one of the tires blew out. Larrieu lost control of the van. The van traveled across two lanes of traffic, overturning several times.

LEGAL BACKGROUND

Under the California Tort Claims Act, "Except as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, § 815, subd. (a).)

Government Code section 815.2, subdivision (a), is one such statute. It provides: "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee"

(3) "Through this section, the California Tort Claims Act expressly makes the doctrine of respondeat superior applicable to public employers. [Citation.] 'A public entity, as the employer, is generally liable for the torts of an employee committed within the scope of employment if the employee is liable. [Citations.]' [Citation.] Under [Government Code] section 820, subdivision (a), '[e]xcept as otherwise provided by statute . . . , a public employee is liable for injury caused by his act or omission to the same extent as a private person.' Thus, 'the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person [citation] and the public entity is vicariously liable for any injury which its employee causes [citation] to the same extent as a private employer [citation].' [Citation.]" (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 932 [80 Cal.Rptr.2d 811, 968 P.2d 522].)

Section 87706 states that "Notwithstanding any other provision of this code, no community college district, or any officer or employee of such district or board shall be responsible or in any way liable for the conduct or safety of any student of the public schools at any time when such student is not in school property, unless such district has undertaken to provide transportation for such student to and from the school premises, has undertaken a school-sponsored activity off the premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances. [¶] In the event of such a specific undertaking, the district shall be liable or responsible for the conduct or safety of any student only while such student is or should be under the immediate and direct supervision of an employee of such district or board."

On the other hand, title 5, section 55450, subdivision (a), provides that the governing board of a community college district may conduct "field trips or excursions in connection with courses of instruction or school-related social, educational, cultural, athletic, or college band activities to and from places" But subdivision (d), states, in pertinent part: "All persons making the field trip or excursion shall be deemed to have waived all claims against the district or the State of California for injury, accident, illness, or death occurring during or by reason of the field trip or excursion."

DISCUSSION

(4a) A plain reading of section 87706 is that the section reaffirms the general statutory rule of vicarious liability for accidents occurring to students where the community college district provides transportation to and from the school premises for an off-premises school-sponsored activity (or otherwise affirmatively assumes responsibility for student safety) and the accident occurs while the student is or should be under the supervision of an employee.

A plain reading of title 5, section 55450 is that the section overrides the general statutory rule of vicarious liability and immunizes a community college district from liability for accidents occurring during field trips or excursions to participants thereof.

Plaintiffs' position is that section 87706 applies to this case so as to make operative against defendants the general statutory rule of vicarious liability. They point out that section 87706 contemplates transportation to a "school-sponsored activity." They urge that their trip to the soccer match fits within this definition. They conclude that section 87706 is a specific statute applicable to the circumstances. They further contend that title 5, section 55450 is a mere regulation that cannot alter or impair the scope of a statute. (*Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1081 [230 Cal.Rptr. 413].)

Defendants' position, on the other hand, is that title 5, section 55450 applies to this case so as to make them immune from liability. They point out that section 55450 contemplates "field trips or excursions" in connection with athletic activities. They urge that plaintiffs' trip to the soccer match fits within this definition. They conclude that section 55450 is a specific statute applicable to the circumstances. They bolster this point by claiming that plaintiffs' participation on the soccer team was voluntary in the sense that they were not required to travel to away games in college-provided transportation or even attend away games in the first instance.

Plaintiffs counter that, at the very least, there exists a triable issue of fact as to whether their participation on the soccer team was voluntary, pointing

to their declarations in which they stated that they believed attendance at away games was mandatory because their grades would otherwise suffer.

1. *Statute-Regulation Dichotomy*

Education Code section 70902 provides in pertinent part: "(a) Every community college district shall be under the control of a board of trustees, which is referred to herein as the 'governing board.' The governing board of each community college district shall establish, maintain, operate, and govern one or more community colleges in accordance with law. In so doing, the governing board may initiate and carry on any program, activity, or may otherwise act in any manner that is not in conflict with or inconsistent with, or preempted by, any law and that is not in conflict with the purposes for which community college districts are established. . . ."

Education Code "[s]ection 70902 was added to the code in 1988 but contained the same language as former section 72233, which had been added in 1976. Section 72233 was enacted in response to a 1972 amendment to the California Constitution, article IX, section 14, which added the following sentence to that section: 'The Legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established.'

"When the Education Code was amended in 1981, the Legislature stated that 'It is the intent of the Legislature, in enacting this act, to implement more fully, for the community colleges of California, the intent of the people in adopting the amendment of Section 14 of Article IX of the California Constitution. The Legislature further finds and declares that, in order to do so, it is necessary to amend or repeal many provisions of the Education Code. [¶] Wherever in this act a power or duty of a community college district governing board is repealed, or otherwise deleted by an amendment, it is not the intent of the Legislature to prohibit the board from acting as prescribed by the deleted provisions. Rather, *it is the intent of the Legislature, that the community college district governing board shall have the power, in the absence of other legislation, to so act under the general authority of Section 72233 of the Education Code.*' [Citation.] This 'general authority,' now embodied in section 70902, became known as the 'permissive code' concept.

". . . As the Legislature expressly stated, the permissive code allows a district's governing board to act under its general authority without specific statutory authorization.

“Since the permissive code was enacted in 1976, the Legislature has repealed many Education Code provisions which had specifically authorized community colleges to conduct various activities. . . . According to legislative counsel, specific statutory authority for such activities is no longer necessary in light of the permissive code. [Citation.] [¶] The only limitation placed on a governing board’s authority under the permissive code is that the board may not act in any manner ‘in conflict with, or inconsistent with, or preempted by, any law.’ [Citation.]” (*Service Employees Internat. Union v. Board of Trustees, supra*, 47 Cal.App.4th at pp. 1665-1666.)

As part of the permissive code, the Legislature also (1) directed that the Board of Governors of the California Community Colleges adopt regulations incorporating the text of specified repealed or amended Education Code sections, and (2) provided that the specified sections would remain operative until the effective date of the corresponding regulation. (Stats. 1990, ch. 1372, § 708, p. 6320.) It specifically stated: “It is the intent of the Legislature that there be no lapse in the requirements, rights, responsibilities, conditions, or prescriptions contained in the statutes.” (*Id.* at p. 6321.)

One of the specified Education Code sections was former Education Code section 72640 (repealed by Stats. 1990, ch. 1372, § 354, p. 6268), which is identical, in pertinent part, to title 5, section 55450. (Stats. 1990, ch. 1372, § 708, p. 6320, operative Apr. 5, 1991.) The immunity aspect of former Education Code section 72640 stated: “All persons making the field trip or excursion shall be deemed to have waived all claims against the district or the State of California for injury, accident, illness, or death occurring during or by reason of the field trip or excursion.” (Stats. 1987, ch. 1118, §§ 9, 10, pp. 3800-3802.)

(5) Thus, title 5, section 55450 is no mere administrative regulation. It is a regulation adopted by the Board of Governors of the California Community Colleges pursuant to the board’s constitutional authority and the Legislature’s mandate to the board to keep in effect the “requirements, rights, responsibilities, conditions, or prescriptions” of an identical repealed statute.

Under these peculiar circumstances, title 5, section 55450 and section 87706 must be deemed to have equal dignity.

2. Voluntary Participation

Defendants rely on *Wolfe v. Dublin Unified School Dist.* (1997) 56 Cal.App.4th 126 [65 Cal.Rptr.2d 280], and, by extension, *Castro v. Los Angeles Bd. of Education* (1976) 54 Cal.App.3d 232 [126 Cal.Rptr. 537].

In *Wolfe*, a first grade student sued a school district for injuries suffered in an automobile accident when he was returning to school during school hours from a field trip in a car driven by a volunteer parent. The student's parent had signed a form consenting to the student's participation in the field trip. All students participated in the field trip, but if a student had not produced a consent form he or she would have remained at school and participated in alternate activities. The trial court granted summary judgment for the district.

In affirming the judgment, the court examined the immunities afforded school districts under Education Code sections 44808 and 35330, sections identical to section 87706 and title 5, section 55450, but applicable to elementary and secondary school districts.

Wolfe, however, does not hold that voluntary participation is an issue in these types of cases. It simply held that Education Code section 35330 immunity applied because the plaintiff was on a field trip. (*Wolfe v. Dublin Unified School Dist.*, *supra*, 56 Cal.App.4th at p. 134.) And it alternatively held that, if Education Code section 44808 arguably applied (because the field trip was a school-sponsored activity to which the school district undertook to provide transportation and supervision), the specific field-trip statute would control over the general school-sponsored-activity statute. (56 Cal.App.4th at p. 135.) The court discussed the voluntary participation issue only as part of its discourse on *Castro*. (*Id.* at pp. 131-132.)

In *Castro*, a high school student died while participating with an ROTC unit in a summer camp organized and supervised by the board of education. In the wrongful death action, the trial court sustained a demurrer on the basis of Education Code section 35330 immunity (then numbered as § 1081.5).

In reversing the judgment on the basis of Education Code section 44808 (then numbered as § 13557.5), the court noted that there existed a difference between "field trip or excursion" and "school-sponsored activity" and stated: "The Legislature, by these sections, recognized that: not all educational facilities can be provided within the confines of each school's property. To accomplish a school's educational aims, it therefore is necessary for students to accomplish portions of their study off the school's property. Students who are off of the school's property for *required* school purposes are entitled to the same safeguards as those who are on school property, within supervisory limits. Students who participate in *nonrequired* trips or excursions, though possibly in furtherance of their education but not as *required* attendance, are effectively on their own; the *voluntary nature of the event absolves*

the district of liability. [¶] As we construe the governing sections, we conclude that where a 'school-sponsored activity,' i.e., one that *requires* attendance and for which attendance credit may be given, is involved, the event is a 'specific undertaking' of the district. In such a case 'the district . . . shall be liable or responsible for the . . . safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district.'" (*Castro v. Los Angeles Bd. of Education, supra*, 54 Cal.App.3d at p. 236, italics added, fn. omitted.)

The dispositive reason for the reversal in *Castro*, however, was not the voluntary nature of the participation. The court stated that the reason for the reversal was the need to provide the plaintiffs with "the forum in which to prove, if they can, that the ROTC 'summer camp, bivouac and summer training' was just as much a part of the school curriculum as a school-sponsored band or orchestra performance at an off-premises event." (*Castro v. Los Angeles Bd. of Education, supra*, 54 Cal.App.3d at p. 237.)

Hence, under *Castro*, the test is not really whether the student's participation was voluntary or not, but whether the off-premises activity was part of the school curriculum.

The Supreme Court has commented that *Castro's* discussion about the voluntary nature of the event was "dicta" and, in doing so, correctly observed that *Castro's* holding rested upon that "the activity was school-related." (*Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 518, fn. 3 [150 Cal.Rptr. 1, 585 P.2d 851].)

Thus, *Castro's* statements about the voluntary or involuntary nature of the participation are (1) dicta, and (2) of questionable validity given that neither Education Code section 44808 nor Education Code section 35330 suggests such a test. (4b) For our purposes, neither section 87706 nor title 5, section 55450 suggests such a test. We therefore hold that the disputed facts about the voluntary or involuntary nature of plaintiffs' participation on the soccer team are immaterial. (Code Civ. Proc., § 437c, subds. (b), (c).)

3. Statutory Construction

At first blush, section 87706 and title 5, section 55450 appear inconsistent. And plaintiffs appear to tacitly assume that the sections are inconsistent by arguing that statutes prevail over regulations. But the sections can easily be harmonized.

As *Castro* observed, there is a difference between a field trip or excursion and a school-sponsored activity. More particularly, a field trip or excursion

is simply a narrowly defined type of the more broadly defined school-sponsored activity. (*Castro v. Los Angeles Bd. of Education*, *supra*, 54 Cal.App.3d at p. 236, fn. 2 ["We recognize the possibility of a 'field-trip or excursion' being permitted even during a 'school-sponsored activity.'"]; *Wolfe v. Dublin Unified School Dist.*, *supra*, 56 Cal.App.4th at p. 135 ["A field trip is a special type of off-premises activity, making section 35330 the special statute, should both statutes apply."].)

Plaintiffs' trip clearly falls within the broad category of a school-sponsored activity given that participation in an extracurricular sports program is part of the school curriculum. (See *Hartzell v. Connell* (1984) 35 Cal.3d 899, 910 [201 Cal.Rptr. 601, 679 P.2d 35] ["in cases determining the scope of school-related tort liability and insurance coverage, courts have held that 'school-sponsored activities, such as sports, drama, and the like,' though denominated 'extracurricular,' . . . nevertheless form an integral and vital part of the educational program"]; *Acosta v. Los Angeles Unified School Dist.* (1995) 31 Cal.App.4th 471, 478 [37 Cal.Rptr.2d 171] ["most states, including California, have held a school district's duty of reasonable supervision applies to school-sponsored extracurricular sports programs"].)

The question in this case, however, boils down to whether plaintiffs were on a field trip or excursion. If so, then there is immunity.

Castro defined field trip or excursion as follows: "'Field trip' is defined as a visit made by students and usually a teacher for purposes of first hand observation (as to a factory, farm, clinic, museum). 'Excursion' means a journey chiefly for recreation, a usual brief pleasure trip, departure from a direct or proper course, or deviation from a definite path." (*Castro v. Los Angeles Bd. of Education*, *supra*, 54 Cal.App.3d at p. 236, fn. 1.)

Strictly speaking, plaintiffs' trip to Fresno does not appear to be a field trip given that it was a trip to participate rather than observe; and, though the trip had recreational and pleasurable aspects, the essence of the trip was not excursionary given that the trip was part of a regular activity rather than a departure or deviation from the norm.

But title 5, section 55450 itself further describes field trips or excursions. The section supposes that field trips or excursions are conducted "in connection with . . . school-related . . . athletic . . . activities." (tit. 5, § 55450, subd. (a).) School-related athletic activities necessarily include extracurricular sports programs. Thus, by its own terms, title 5, section 55450 places trips in connection with extracurricular sports programs into the narrowly defined field trip or excursion type of school-sponsored activity.

Plaintiffs were therefore on a field trip or excursion; hence, the special or specific immunity statute applies. (*Wolfe v. Dublin Unified School Dist.*, *supra*, 56 Cal.App.4th at p. 135.)

DISPOSITION

The judgment is affirmed.

Cottle, P. J., and Elia, J., concurred.

Appellants' petition for review by the Supreme Court was denied February 23, 2000. Mosk, J., and Werdgar, J., were of the opinion that the petition should be granted.