

SixTen and Associates

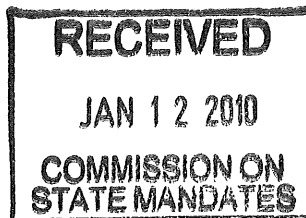
Mandate Reimbursement Services

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January 11, 2011



Drew Bohan, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Mr. Bohan:

RE: 1/84 Health Fee Elimination
Education Code Section 76355

CSM 09-4206-I-19 Citrus Community College District
Fiscal Years: 2002-03 through 2006-07

CSM 09-4206-I-20 Cerritos Community College District
Fiscal Years: 2002-03 through 2006-07

CSM 09-4206-I-23 Los Rios Community College District #3
Fiscal Years: 2005-06 through 2007-08

CSM 09-4206-I-26 Redwoods Community College District
Fiscal Years: 2002-03 through 2006-07

CSM 09-4206-I-28 Rancho Santiago Community College District #2
Fiscal Years: 2005-06 through 2008-09

CSM 09-4206-I-30 Pasadena Area Community College District #3
Fiscal Years: 2004-05 through 2005-06

Dear Mr. Bohan:

This letter is in response to the December 13, 2010, letter from Paula Higashi in regard to the above referenced incorrect reduction claims. I am responding as the representative of six of the seven Districts in this consolidated action.

I. CONSOLIDATION OF THE CLAIMS

The six Districts do not object to the consolidation of the seven claims.

II. THE IMPACT OF THE CLOVIS APPELLATE COURT DECISION

1. A New Standard for "Costs Mandated by the State"

The Appellate Court establishes a new standard ("basic principle") for mandate cost accounting: "To the extent a local agency or school district 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost." The Court (28) characterizes this as a "fundamental legal principle underlying state mandated costs." Declaration of this new legal maxim proceeded without a complete analysis of the issue of underground rulemaking and includes reliance on a factually incompatible court decision.

The analysis of the underground rulemaking was incomplete. In *Clovis*, the college districts argued that the Controller's "Health Fee Rule" constitutes an invalid, underground regulation because the Controller generally applies it and the rule implements, interprets or makes specific the program parameters and guidelines. The Court (26) agreed with the first condition. As to the second condition, the litigating districts argued that the parameters and guidelines require that the mandate claimants have actually "experienced," that is collected, the student health service fees that are deducted from the total program costs. However, instead of reaching a conclusion regarding whether the Controller's rule implemented the parameters and guidelines, the Court (26, 27) concluded that the "argument falters when exposed to the broader context of the nature of state-mandated costs and common sense." Thus, the second condition of the underground rulemaking analysis went unanswered in preference to the Court's analysis of the "broader context" of law and "common sense."

As for the "broader context" of "the nature of state-mandated costs" law, the Court (27), citing Government Code Section 17514 and Section 17556, subdivision (d), asserts that Section 17556 (d) "reflects" the Section 17514 requirement of new "increased costs" by presumptively carving away from those increased costs the amount of any authorized fees that the district "has the authority to levy." The Court (27, 28) then concludes that this joint operation of Sections 17556 and 17514 "embod[ies]" the "basic principle" that "[t]o the extent a local agency or school district 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost." Thus, this "basic principle," never before articulated in statutory law or a court opinion, will control the effect of statutory fee authority on program costs.

The Court's juncture of Sections 17514 and 17556 is forced in order to create the new "basic principle." Section 17556 is the basis for a determination of whether there are "costs mandated by the state," that is, whether the test claim is approved, not the basis

for imputing a revenue source to offset program costs. The Court (28) cites *Connell*, for the proposition that “the plain language of [section 17556, subdivision (d)] precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state mandated program.” The facts here are to the contrary, as described in the Clovis decision at Footnote 8.¹ The Commission did not determine, as a matter of fact or law, for the Health Fee Elimination Program, that the Education Code Section 76355 statutory authority was sufficient to entirely reimburse the cost of the program. Therefore, *Connell* and Section 17556, subdivision (d), do not fit the facts or law for this mandate program.

With the facts here contrary to the law relied upon by the Court, and the second condition of the underground rulemaking analysis remaining unanswered as to the proper application of the parameters and guidelines, what apparently remains in the *Clovis* decision is: “And this basic principle [to the extent the districts have the authority to levy a fee there is no increased cost] flows from common sense as well.” Thus, what we are left with for the analysis of some of the remaining audit issues is a “common sense” application of the statutory fee authority stated in Education Code Section 76355.²

¹ Clovis Court Opinion Footnote 8:

”In light of sections 17514 and 17556, subdivision (d), the Commission found the Health Fee Elimination Program to be a reimbursable state-mandated program to the extent the cost to community college districts of maintaining their level of health services at the 1986-1987 level, as required by the Health Fee Elimination Program mandate, is not covered by the nominal health fee authorized by section 76355, subdivision (a)(1) (\$10 maximum per semester per student).”

² Education Code Section 76355, added by Chapter 8, Statutes of 1993, Section 34, effective April 15, 1993, as last amended by Chapter 758, Statutes of 1995, Section 99:

“(a) The governing board of a district maintaining a community college may require community college students to pay a fee in the total amount of not more than ten dollars (\$10) for each semester, seven dollars (\$7) for summer school, seven dollars (\$7) for each intersession of at least four weeks, or seven dollars (\$7) for each quarter for health supervision and services, including direct or indirect medical and hospitalization services, or the operation of a student health center or centers, or both.

The governing board of each community college district may increase this fee by the same percentage increase as the Implicit Price Deflator for State and Local Government Purchase of Goods and Services. Whenever that calculation produces an increase of one dollar (\$1) above the existing fee, the fee may be increased by one dollar (\$1).

(b) If, pursuant to this section, a fee is required, the governing board of the

2. The Deflator Is Not Self-implementing

Education Code Section 76355, subdivisions (a) and (c), as a matter of law, provides to the college district governing board the discretion to charge a fee, the amount of the

district shall decide the amount of the fee, if any, that a part-time student is required to pay. The governing board may decide whether the fee shall be mandatory or optional.

(c) The governing board of a district maintaining a community college shall adopt rules and regulations that exempt the following students from any fee required pursuant to subdivision (a):

(1) Students who depend exclusively upon prayer for healing in accordance with the teachings of a bona fide religious sect, denomination, or organization.

(2) Students who are attending a community college under an approved apprenticeship training program.

~~(3) Low-income students, including students who demonstrate financial need in accordance with the methodology set forth in federal law or regulation for determining the expected family contribution of students seeking financial aid and students who demonstrate eligibility according to income standards established by the board of governors and contained in Section 58620 of Title 5 of the California Code of Regulations. (This subsection was removed by Statutes of 2005, Chapter 320, effective January 1, 2006)~~

(d) All fees collected pursuant to this section shall be deposited in the fund of the district designated by the California Community Colleges Budget and Accounting Manual. These fees shall be expended only to provide health services as specified in regulations adopted by the board of governors.

Authorized expenditures shall not include, among other things, athletic trainers' salaries, athletic insurance, medical supplies for athletics, physical examinations for intercollegiate athletics, ambulance services, the salaries of health professionals for athletic events, any deductible portion of accident claims filed for athletic team members, or any other expense that is not available to all students. No student shall be denied a service supported by student health fees on account of participation in athletic programs.

(e) Any community college district that provided health services in the 1986-87 fiscal year shall maintain health services, at the level provided during the 1986-87 fiscal year, and each fiscal year thereafter. If the cost to maintain that level of service exceeds the limits specified in subdivision (a), the excess cost shall be borne by the district.

(f) A district that begins charging a health fee may use funds for startup costs from other district funds and may recover all or part of those funds from health fees collected within the first five years following the commencement of charging the fee.

(g) The board of governors shall adopt regulations that generally describe the types of health services included in the health service program."

fee, and whether it shall be mandatory or optional for part-time students. The amount of this fee is stated to be “not more than” \$10 for the fall and spring semesters and \$7 for the summer, quarter, and intersession periods. Subdivision (a) also provides the governing board with the discretion to increase this fee based on a specified price deflator. Since Section 76355 requires the district governing board to exercise its legislative power, both whether to charge the fee and to determine the amount of the fee, Section 76355 is not self-implementing.

Further, Section 76355 does not specify the application of the deflator. It does not designate which deflator components are relevant to college district or health services costs. It does not designate what date the additional dollar increases may be assessed (use of the start of the subsequent school/fiscal year may be reasonable, but is still arbitrary). The language of Section 76355 is insufficient to make the application of the cited deflator self-implementing.

Absent the self-implementation of the deflator provision, the maximum student health service fee amounts that can be used by the Controller to calculate the collectible student health service fees, absent independent legislative activity by the college governing board to charge a higher fee, are the amounts listed in Section 76355, that is, \$10 and \$7.

3. The Controller Cannot Rely Upon the Chancellor’s Office Letter as a Basis for Adjustment

The Controller’s calculation of “collectible” student health service fees impermissibly relies upon the increased student health service fee amount periodically published by the Chancellor’s Office in a form letter to all college districts. The latest letter, dated April 27, 2010, is representative of the prior letters, in that the Chancellor informs the colleges when the Implicit Price Deflator increases the potential fee amount. For FY 2010, the potential fee amount is “a maximum” \$17 per student for a full semester and \$14 per student for the shorter sessions. The audit reports have cited this letter or the Chancellor’s Office as the source of these fee amounts. However, Section 76355 does not authorize either the Chancellor’s Office, the Controller, or any other state agency, to set or increase this fee, it is within the jurisdiction of the college district governing board.³ Therefore any state agency wishing to enforce subdivision (a) would be required to comply with the Administrative Procedure Act, and the Controller never has done so. The Controller’s use of the letter, for audit purposes for the calculation of the

³ College District Rulemaking: While the college districts may have used the Chancellor’s letter as the basis to increase its fees is an issue separate from the Controller’s use of the letter for audit purposes. When setting fees, the district governing board is operating as the legislative body of the district and may independently rely on relevant and rational sources.

collectible amount, is a rule of general application without benefit of rulemaking.

While the *Clovis* decision would seem to indicate that the Controller's failure to comply with the APA is subsumed by the new "basic principle," this Court's use of the new "basic principle" did not address the legal issue of whether the statute is self-implementing, that is, whether the Controller can impute a student health service fee amount greater than that charged by the district governing board. The Controller is not a legislative body, nor, is there evidence that the periodic rate increases published in the Chancellor's letters are the result of any Title 5 rulemaking by the California Community College Board of Governors. Further, the Commission parameters and guidelines, as last amended on May 25, 1989, make no provision for a self-implementing deflator. The record is bereft of any statutory or rulemaking authority for any state agency to impute a fee higher than that stated in Section 76355 for purposes of calculating the offsetting amount of student health services.

The Controller's calculation of collectible offsetting student health service fees is thus limited to the amount in Section 76355 without increase, or the amount actually charged and received by each district. Since the Controller has not audited the districts' actual student health service fee revenue amounts, the audit reports are without evidence or legal basis for any adjustments made to the student health service fees.

4. Students Exempt From the Health Service Fee

Education Code Section 76355, subdivision (c), *requires* the districts to adopt local rules, that is, to utilize its legislative power, to exempt certain students from payment of the health service fee. To the contrary, Section 76355 merely *authorizes* districts to charge the fee to any other class of student. Subdivision (c) states that the districts cannot charge a fee to apprenticeship students or students that request a religion-based exemption. Until January 1, 2006, students receiving BOGG fee waivers (perhaps as much as 30% of the enrollment) were also exempted from paying the fee. Note that these exemptions do not automatically mean that the district can exclude these students from student health services, rather, the district just cannot collect a fee. Thus, to the extent that these students utilize the student health services, the district is incurring an unfunded program cost.

The Controller's collectible fee calculation excludes these exempted students from the calculation of the offsetting revenue, but does not determine the cost of the services to these exempt students. The *Clovis* decision has concluded that if a charge can be made, then a cost is not incurred. Since no charge can be made for exempted students, these costs should be reimbursed without regard to the offsetting savings applied to all other student program costs. The Controller has the burden of going forward on this issue of properly reimbursing the cost of services provided to the exempt students. In these seven "desk" audits, the Controller did not audit any of the program costs, so the Controller inappropriately reduced the health service costs for the

exempt students.

5. Student Health Service Centers Not Practically Accessible to Students

Many community colleges have academic “learning centers” located significant distances away from the main campus location of the student health service center and other student services or programs. One example is Kern Community College District’s Mammoth Lakes Learning Center that is located many travel hours from the student health service center located at Bakersfield College in the city of Bakersfield. It would be unreasonable for the district to charge a student at these remote locations for services that will not be provided because they are not practically accessible.

The Controller’s calculation of collectible fees includes all students regardless of whether there is a student health service center at their location of attendance. The result is that the Controller is offsetting the cost of services provided to other students for students from whom the district does not collect a revenue or incur a program cost. The *Clovis* decision has concluded that if a charge can be made, then a cost is not incurred. No charge can reasonably be made for students that cannot access the services, so total program costs should not be reduced by student health service fees never collected, perhaps, at the very least, as a matter of “common sense.”

This issue is also applicable to other students that either by district governing board determination, or otherwise, cannot access the student health services: non-credit students enrolled in off-campus classes or events, adult education students who are not enrolled in the college, and concurrently enrolled high school students without legal capacity to consent to health care services. Each district may have other factual variations of students without access to health care services.

6. Scope of Services Pursuant to Title 5 Sections 54706 and 54708

Pursuant to Education Code 76355, subdivision (g), the California Community Colleges Board of Governor’s adopted Title 5 regulations regarding the appropriate (Title 5, Section 54708) and inappropriate (Title 5, Section 54706) uses of the student health services fee. This does not limit the type of services that can be provided, just the service that can be funded by the student health service fee. The Title 5 regulations were not designed to address the issue of reimbursement, only the stated use of the student health service fee funds as directed by Education Code Section 76355, subdivision (d). The scope of reimbursable services described in the parameters and guidelines exceed the program regulations. Therefore, districts are eligible for reimbursement for some parameters and guidelines services that are outside the scope of the Title 5 constraints for use of the fees.

To the extent that the Controller’s use of the “collectible” fee calculation offsets the cost of the services provided that are subject to reimbursement but are outside the scope of

Title 5, the Controller has improperly reduced reimbursement for the cost of reimbursable services. The Controller has the burden of going forward on this issue of properly matching the offsetting student health services income to the cost of services within the scope of Title 5 services. The Controller did not audit the program costs for this criterion, so the Controller incorrectly reduced the claims.

7. The Chancellor's Enrollment Data

The Controller did not audit the districts' enrollment data. Instead, the Controller utilized enrollment data from the Chancellor's Office for the calculation of collectible fees. The Controller has utilized this Chancellor's Office data for audits for several years, so it is being used as a rule of general application. This enrollment information was collected, processed, and reported by a separate state agency for other purposes and not audited by the Controller. There has been no examination or validation of the data for the data's relevance for purposes of mandated cost reimbursement calculations. Since this data is used to calculate the collectible offsetting revenues, the data must be relevant and supported by the Controller since the Controller is making the adjustment. The Controller has the burden of going forward on this issue of validating the accuracy and relevance of the Chancellor's enrollment data for purposes of mandated cost reimbursement.

III. NO AUDIT WAS CONDUCTED

The District does not dispute the Controller's authority to audit claims for mandated costs and to reduce those costs that are excessive or unreasonable. This authority is expressly contained in Government Code Section 17561. Government Code Section 17561(d)(2)⁴ requires the Controller to pay claims, provided that the Controller may audit the records of any school district to verify the actual amount of the mandated costs, and may reduce any claim that the Controller determines is excessive or

⁴ Government Code Section 17561, added by Chapter 879, Statutes of 1986, Section 6, as amended by Chapter 1124, Statutes of 2002, Section 30.6, effective September 30, 2002:

"(d) . . .

(2) In subsequent fiscal years each local agency or school district shall submit its claims as specified in Section 17560. The Controller shall pay these claims from funds appropriated therefor, provided that the Controller (A) may audit the records of any local agency or school district to verify the actual amount of the mandated costs, (B) may reduce any claim that the Controller determines is excessive or unreasonable, and (C) shall adjust the payment to correct for any underpayments or overpayments which occurred in previous fiscal years. . . ."

unreasonable. As stated before, the Controller did not audit the districts' enrollment or program costs. The Controller does not assert that the claimed costs were excessive or unreasonable. It would therefore appear that the entire findings are based upon the wrong standard for review. If the Controller wishes to enforce other audit standards for mandated cost reimbursement, the Controller should comply with the Administrative Procedure Act.

CERTIFICATION

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

Executed on January 11, 2011 at Sacramento, California, by



Keith B. Petersen, President
SixTen & Associates

Attachment: Exhibit "A" Chancellor's Office "Fiscal Services Memo 10-02"

C: Commission Mailing List dated 12/13/2010 and

Carol Horton, Vice President Financial and Administrative Services
Citrus Community College District

Berlanti Rizkallah, Director Fiscal Services
Cerritos Community College District

Jon Sharpe, Deputy Chancellor
Los Rios Community College District

Carla Spalding, Controller
Redwoods Community College District

Elizabeth Miller, Ed.D., Vice President Administrative Services
Allan Hancock Joint Community College District

Noemi Kanouse, Assistant Vice Chancellor
Rancho Santiago Community College District

Richard Van Pelt, Interim Vice President Administrative Services
Pasadena Area Community College District

Jim Spano, Chief, Mandated Cost Audits Bureau
State Controller's Office

STATE OF CALIFORNIA

JACK SCOTT, CHANCELLOR

**CALIFORNIA COMMUNITY COLLEGES
CHANCELLOR'S OFFICE**1102 Q STREET
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HTTP://WWW.CCCCO.EDU

Memorandum

April 27, 2010

Fiscal Services Memo 10-02
Via E-mail Only

To: Superintendents/Presidents
Chief Business Officers
Chief Student Services Officers
Health Services Program Directors
Financial Aid Officers
Admissions and Records Officers
Extended Opportunity Programs and Services Directors

From: Frederick E. Harris, Assistant Vice Chancellor
College Finance and Facilities Planning

Subject: Student Health Fee

Education Code Section 76355 provides the governing board of a community college district the option of increasing the student health services fee by the same percentage as the increase in the Implicit Price Deflator for State and Local Government Purchase of Goods and Services. Whenever that calculation produces an increase of one dollar above the existing fee, the fee may be increased by \$1.00.

The Implicit Price Deflator Index used to calculate increases to this fee did not change enough from last year to produce an increase of one dollar so there will be **NO** change in the student health fee this year. Therefore, effective with the Summer Session of 2010, districts may continue to charge a maximum fee of **\$17.00** per semester, **\$14.00** for summer session, **\$14.00** for each intersession of at least four weeks, or **\$14.00** for each quarter.

For part-time students, the governing board shall decide the amount of the fee, if any, that the student is required to pay. The governing board may decide whether the fee shall be mandatory or optional.

The governing board operating a health services program must have rules that exempt the following students from any health services fee:

- Students who depend exclusively upon prayer for healing in accordance with the teachings of a bona fide religious sect, denomination, or organization.
- Students who are attending a community college under an approved apprenticeship training program.

All fees collected pursuant to this section shall be deposited in the Student Health Fee Account in the Restricted General Fund of the district. These fees shall be expended only to provide health services as specified in regulations adopted by the board of governors. Allowable expenditures include health supervision and services, including direct or indirect medical and hospitalization services, or the operation of a student health center or centers, or both. Allowable expenditures exclude athletic-related salaries, services, insurance, insurance deductibles, or any other expense that is not available to all students. No student shall be denied a service supported by student health fee on account of participation in athletic programs.

If you have any questions about the fee, please contact Glen Campora at 916-323-6899 or gcampora@cccco.edu.

1 **DECLARATION OF SERVICE**

2
3 RE: 09-4206-I-19, et al.
4 Health Fee Elimination
5 Incorrect Reduction Claims
6

7 I declare:

8
9 I am employed in the office of SixTen and Associates, which is the appointed
10 representative of the above named claimants. I am 18 years of age or older and not a
11 party to the entitled matter. My business address is 3270 Arena Blvd., Suite 400-363,
12 Sacramento, CA 95834.
13

14 On the date indicated below, I served the attached response to the March 28, 2006,
15 Commission on State Mandates draft staff analysis to:

16
17 Drew Bohan, Executive Director
18 Commission on State Mandates
19 980 Ninth Street, Suite 300
20 Sacramento, CA 95814
21

22 In addition, a copy of the document for each of the recipients on the attached list was
23 provided to the Commission for the Commission to distribute once the responses from
24 all of the state agencies have been received.
25

26 **U.S. MAIL:** I am familiar with the business
27 practice at SixTen and Associates for the
28 collection and processing of
29 correspondence for mailing with the
30 United States Postal Service. In
31 accordance with that practice,
32 correspondence placed in the internal mail
33 collection system at SixTen and
34 Associates is deposited with the United
35 States Postal Service that same day in the
36 ordinary course of business.
37

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.

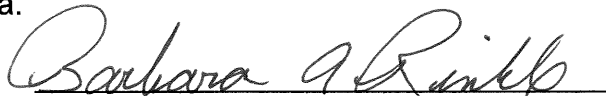
38 **OTHER SERVICE:** I caused such
39 envelope(s) to be delivered to the office of
40 the addressee(s) listed above by:

A copy of the transmission report issued
by the transmitting machine is attached to
this proof of service.

41
42 _____
43 (Describe)
44

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).

45 I declare under penalty of perjury under the laws of the State of California that the
46 foregoing is true and correct and that this declaration was executed on January 11, 2011,
47 at Sacramento, California.

48 
49 _____
50 Barbara Rinkle

Commission on State Mandates

Original List Date:
Last Updated: 12/13/2010
List Print Date: 12/13/2010
Claim Number: 09-4206-I-19, et al.
Issue: Health Fee Elimination

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.)

Mr. Keith B. Petersen SixTen & Associates 3270 Arena Blvd., Suite 400-363 Sacramento, CA 95834	Tel: (916) 419-7093 Email kbpsixten@aol.com Fax: (916) 263-9701
Ms. Elizabeth Miller, EdD Allan Hancock Joint Community College District 800 South College Drive Santa Maria, CA 93454	Tel: (805) 922-6966 Email Emiller@hancockcollege.edu Fax:
Ms. Carol R. Horton Citrus Community College District Financial and Administrative Services 1000 West Foothill Blvd. Glendora, CA 91741-1899	Tel: (626) 914-8886 Email chorton@citruscollege.edu Fax: (626) 914-8823
Ms. Kimberley Nguyen MAXIMUS 3130 Kilgore Road, Suite 400 Rancho Cordova, CA 95670	Tel: (916) 471-5516 Email kimberleynguyen@maximus.com Fax: (916) 366-4838
Ms. Jill Kanemasu State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916) 322-9891 Email jkanemasu@sco.ca.gov Fax:
Ms. Susan Geanacou Department of Finance (A-15) 915 L Street, Suite 1280 Sacramento, CA 95814	Tel: (916) 445-3274 Email susan.geanacou@dof.ca.gov Fax: (916) 449-5252
Ms. Jeannie Oropeza Department of Finance (A-15) Education Systems Unit 915 L Street, 7th Floor Sacramento, CA 95814	Tel: (916) 445-0328 Email jeannie.oropeza@dof.ca.gov Fax: (916) 323-9530
Mr. Jay Lal State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916) 324-0256 Email JLal@sco.ca.gov Fax: (916) 323-6527