STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

January 7, 2014

Mr. Keith Petersen
SixTen and Associates
P.O. Box 340430
Sacramento, CA 95834-0430

Mr. Jim Spano
Division of Audits
State Controller's Office
3301 C Street, Suite 700
Sacramento, CA 95816

And Parties, Interested Parties, and Interested Persons (See Mailing List)

RE: Proposed Statement of Decision and Notice of Hearing
Health Fee Elimination, 05-4206-I-04 and 05-4206-I-08
Education Code Section 76355
Statutes 1984, Chapter 1 (1983-1984 2nd Ex. Sess.); Statutes 1987, Chapter 1118
Fiscal Years 1999-2000, 2000-2001, 2001-2002, and 2002-2003
San Mateo County Community College District and San Bernardino Community College District, Claimants

Dear Mr. Petersen and Mr. Spano:

The proposed statement of decision for the above-named matter is enclosed for your review.

Hearing

This matter is set for hearing on **Friday, January 24, 2014**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01(c)(2) of the Commission's regulations.

Special Accommodations

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Please contact Heidi Palchik at (916) 323-3562 if you have any questions.

Sincerely,

Heather Halsey
Executive Director

ITEM 11

INCORRECT REDUCTION CLAIM

PROPOSED STATEMENT OF DECISION

Education Code Section 76355

Statutes 1984, Chapter 1 (1983-1984 2nd Ex. Sess.); Statutes 1987, Chapter 1118

Health Fee Elimination

Fiscal Years 1999-2000, 2000-2001, 2001-2002 and 2002-2003

05-4206-I-04 and 05-4206-I-08

San Mateo Community College District and San Bernardino Community College District, Claimants

EXECUTIVE SUMMARY

The sole issue before the Commission on State Mandates (Commission) is whether the proposed statement of decision accurately reflects the findings of the Commission at the December 6, 2013 hearing on the above-named incorrect reduction claim.

At the December 6, 2013 hearing, the Commission heard testimony from Mr. Keith B. Petersen, representing claimants San Mateo Community College District (San Mateo) and San Bernardino Community College District (San Bernardino), and from Mr. Jim Spano and Mr. Shawn Silva, representing the State Controller's Office (Controller). Mr. Petersen rested on his written comments submitted on this matter. The witnesses for the Controller narrowed their testimony to three disputed issues: the application of the health fee rule to San Bernardino's reimbursement claims; hepatitis immunizations disallowed in San Bernardino's reimbursement claims; and the disallowed salaries and benefits of two employees in San Mateo's reimbursement claims.

The Commission partially approved the consolidated IRCs at the December 6, 2013 hearing with the following votes:

1. A vote of 7 to 0 to modify the staff recommendation on the offsetting revenue reductions made in San Bernardino's claims, by striking the "arbitrary and capricious" language from the findings and adopting the recommendation to remand the issue back to the Controller to reexamine the health fees authorized based on the total number of *enrolled students less those exempt from the fee*. If San Bernardino is unable to assist the Controller and provide documentation of the number of exempt students for whom fees cannot legally be charged, the Controller may apply the Health Fee Rule using any reasonable source available to obtain enrollment and exemption information;
2. A vote of 7 to 0 approving the staff recommendation to reinstate costs for hepatitis immunizations;

3. A vote of 6 to 1, disagreeing with staff's recommendation to reinstate the Controller's reductions of salaries and benefits for two employees of San Mateo, and instead finding that the reductions made by the Controller were supported by some evidence and thus were not arbitrary and capricious; and
4. A vote of 7 to 0 to approve the staff recommendation on all remaining issues identified in the statement of decision.

Staff Recommendation

Staff recommends that the Commission adopt the proposed statement of decision to partially approve the incorrect reduction claim.

Staff further recommends that the Commission authorize staff to make any technical, non-substantive changes to the statement of decision following the hearing.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE INCORRECT REDUCTION CLAIM ON: Education Code Section 76355 Statutes 1984, Chapter 1 (1983-1984 2nd Ex. Sess.) (AB2X 1) and Statutes 1987, Chapter 1118 (AB 2336) Fiscal Years 1999-2000, 2000-2001, 2001-2002 and 2002-2003 San Mateo Community College District and San Bernardino Community College District, Claimants.	Case Nos.: 05-4206-I-04 and 05-4206-I-08 *Health Fee Elimination* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5. ARTICLE 7 (*Adopted January 24, 2014*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard these consolidated incorrect reduction claims (IRCs) during a regularly scheduled hearing on December 6, 2013. Mr. Keith B. Petersen appeared for the claimants, and Mr. Jim Spano and Mr. Shawn Silva appeared for the State Controller's Office (Controller). The Commission adopted this statement of decision at the January 24, 2014 hearing.

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

The Commission partially approved the consolidated IRCs at the hearing with the following votes:

1. A vote of 7 to 0 to modify the staff recommendation on the offsetting revenue reductions made in San Bernardino Community College District's (San Bernardino) claims, by striking the "arbitrary and capricious" language from the findings, and adopting the recommendation to remand the issue back to the Controller to reexamine the health fees authorized based on the total number of *enrolled students less those exempt from the fee*. If San Bernardino is unable to assist the Controller and provide documentation of the number of exempt students for whom fees cannot legally be charged, the Controller may apply the Health Fee Rule using any reasonable source available to obtain enrollment and exemption information;
2. A vote of 7 to 0 approving the staff recommendation to reinstate costs for hepatitis immunizations;
3. A vote of 6 to 1, disagreeing with staff's recommendation to reinstate the Controller's reductions of salaries and benefits for two employees of San Mateo, and instead finding

that the reductions made by the Controller were supported by some evidence and thus were not arbitrary and capricious; and

4. A vote of 7 to 0 to approve the staff recommendation on all remaining issues identified in the statement of decision.

Summary of the Findings

These IRCs were filed in response to audits conducted by the Controller, in which reimbursement was reduced to the claimant districts on several discrete bases. The analysis below addresses the IRCs filed by two community college districts disputing adjustments made by the Controller, pursuant to audits of the districts' cost claims filed under the *Health Fee Elimination* mandate (CSM-4206). The executive director has consolidated these claims pursuant to section 1185.4 of the Commission's regulations.[1]

The Commission partially approves these IRCs, finding that some of the reductions were appropriate, and some were incorrect. The Commission therefore remands the matter to the Controller with instructions to reinstate the incorrect reductions as specified below consistent with this statement of decision.

Pursuant to Government Code section 17551(d) and section 1185.7 of the Commission's regulations, the Commission finds that the following reductions by the Controller's Office are incorrect and that the costs, as specified, should be reinstated:

- Reduction of San Bernardino's reimbursement claims based on understated health fee revenues, in the amount of $150,031, ~~absent an attempt to establish the number of students exempt from the fee was arbitrary, capricious, or entirely lacking in evidentiary support; reductions made on the basis of understated fee revenues~~ should be reinstated pending reevaluation of the total number of students enrolled less those exempt from the fee. On remand, the Controller should reexamine the health fees authorized based on the total number of *enrolled students less those exempt from the fee*. If the District is unable to assist the Controller and provide documentation of the number of exempt students for whom fees cannot legally be charged, the Controller may apply the Health Fee Rule using any reasonable source available to obtain enrollment and exemption information.

- ~~Disallowance of salaries and benefits for Ernest Rodriguez and Dee Howard in San Mateo's reimbursement claims was arbitrary, capricious, or entirely lacking in evidentiary support, in light of costs allowed for other employees based on the same or similar documentation; costs for the salaries and benefits of Ernest Rodriguez and Dee Howard should be reinstated, to the extent those costs are supported by the district's accounting records substantiating amounts paid from health services accounts.~~

- Disallowance of costs for hepatitis and influenza immunizations, and outside lab services was arbitrary, capricious, or entirely lacking in evidentiary support; costs claimed for these services should be reinstated in the full amount reduced.

The Commission further finds that the following reductions were supported by the law, the parameters and guidelines, the claiming instructions, and the record:

[1] California Code of Regulations, title 2, section 1185.4 (Register 2010, No. 44).

- Reduction of San Mateo's reimbursement claims, on the basis of understated health fee revenues, in the amount of $70,603.
- The reduction of indirect costs claimed by San Mateo, in the amount of $112,243, based on the district's incorrect application of its approved 30% indirect cost rate to direct costs other than the distribution base of salaries and benefits.
- The reduction of indirect costs claimed by San Bernardino, in the amount of $281,494, based on the district's failure to comply with the claiming instructions in the development of its indirect cost rate, and the Controller's reasonable use of an alternative method to calculate indirect costs.
- The disallowance of salaries and benefits for Ernest Rodriguez and Dee Howard, based on an absence of employee time records or other documentation as required by the parameters and guidelines.
- The reduction of benefits claimed by San Mateo, in the amount of $88,633, based on the district's failure to support its claimed benefit amounts.
- The reduction of costs claimed for "other outgoing expenses" by San Mateo, in the amount of $41,375, based on the district's failure to support claimed expenses.
- The reduction of health insurance costs and other overstated services and supplies in San Bernardino's reimbursement claims, in the amounts of $37,348 for fiscal year 2001-2001, and $38,322 for fiscal year 2002-2003, based on the documentation submitted by the Controller.
- The reduction of health services costs for pap smears and marriage therapy, on the basis of San Bernardino's reimbursement claims failing to substantiate that these services were provided in the base year.

I. Background

Health Fee Elimination Program

Prior to 1984, former Education Code section 72246 authorized community college districts to charge almost all students a general fee (health service fee) for the purpose of voluntarily providing health supervision and services, direct and indirect medical and hospitalization services, and operation of student health centers.[2] Statutes 1984, chapter 1 repealed the community colleges' fee authority for health services.[3] However, it also included a provision to reauthorize the fee, which was to become operative on January 1, 1988.[4]

In addition to temporarily repealing community college districts' authority to levy a health services fee, Statutes1984, chapter 1 required any district which provided health services during

[2] Statutes 1981, chapter 763. Students with low-incomes, students that depend upon prayer for healing, and students attending a college under an approved apprenticeship training program, were exempt from the fee.

[3] Statutes 1984, 2nd Extraordinary Session 1984, chapter 1, section 4 [repealing Education Code section 72246].

[4] Statutes 1984, 2nd Extraordinary Session 1984, chapter 1, section 4.5.

the 1983-1984 fiscal year, for which it was previously authorized to charge a fee, to maintain the health services at the level provided during the 1983-1984 fiscal year for every subsequent fiscal year until January 1, 1988.[5] As a result, community college districts were required to maintain health services provided in the 1983-1984 fiscal year without any fee authority for this purpose.

Statutes1987, chapter 1118 amended former Education Code section 72246,[6] which was to become operative January 1, 1988, to incorporate and extend the maintenance of effort provisions of former Education Code section 72246.5.[7] As a result, beginning in 1988 all community college districts were required to maintain the same level of health services they provided in the 1987-1988 fiscal year each year thereafter. In addition, the community college districts regained a limited fee authority for the provision of the required health services.[8]

Commission Decisions

At the November 20, 1986 Commission hearing, the Commission determined that Statutes 1984, chapter 1, which required community college districts to maintain health services while repealing community college districts' fee authority for those services, imposed a reimbursable state-mandated new program upon community college districts.[9] On August 27, 1987, the Commission adopted parameters and guidelines for the *Health Fee Elimination* program.

At the May 25, 1989 Commission hearing, the Commission adopted amendments to the parameters and guidelines for the *Health Fee Elimination* program to reflect amendments made by Statutes 1987, chapter 1118.[10] The 1989 parameters and guidelines reflected a change in eligible claimants for the *Health Fee Elimination* program, (those districts that provided health services in the 1986-87 fiscal year, and would be required to continue to do so) and the reestablishment of community college districts' fee authority for the *Health Fee Elimination* program.

At the October 27, 2011 Commission hearing, the Commission adopted a decision regarding seven consolidated IRCs under the *Health Fee Elimination* program, which addressed some of the same substantive issues present in these consolidated IRCs.

This decision addresses the following issues:

- The statute of limitations applicable to audits of reimbursement claims by the Controller;
- The appropriate extent of offsetting revenue available from health service fees, pursuant to the *Clovis Unified* decision;

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[5] Education Code section 72246.5 (Stats. 1984, 2d. Ex. Sess., ch. 1, § 4.7).

[6] In 1993, former Education Code section 72246 was renumbered to Education Code section 76355. (Stats. 1993, ch. 8).

[7] Statutes 1987, chapter 1118.

[8] Education Code section 72246 (as amended, Stats. 1987, ch. 1118).

[9] Statement of decision, *Health Fee Elimination* (CSM 4206, adopted January 22, 1987). Reference to 1984 legislation refers to Statutes 1984, 2nd Extraordinary Session 1984, chapter 1.

[10] Amendments to parameters and guidelines, *Health Fee Elimination* (CSM 4206, adopted May 25, 1989). Reference to 1987 legislation refers to Statutes 1987, chapter 1118.

- Disallowances found against both districts based on asserted faults in the development and application of indirect cost rates;
- Disallowance of salaries and benefits against San Mateo based on asserted insufficient documentation of hours and duties;
- Disallowance of other outgoing expenses against San Mateo based on asserted insufficient documentation;
- Disallowance of discrete health services against San Bernardino based on an asserted failure to substantiate services provided in the base year;
- Disallowance of costs for student health insurance against San Bernardino based on the scope of reimbursement excluding student athletic costs.

II. Procedural History

San Mateo filed timely reimbursement claims for fiscal years 1999-2000,[11] 2000-2001,[12] and 2001-2002.[13] On October 28, 2004, the Controller issued a draft audit report addressing these three fiscal years.[14] On November 15, 2004, San Mateo issued a letter to the Controller responding to the draft audit report findings, disputing the Controller's adjustments and disallowance of costs.[15] On January 7, 2005, the Controller issued its final audit report, finding that $1,017,386 in claimed costs, of $1,259,226 total costs claimed in the relevant audit period, were unallowable.[16] On September 1, 2005, San Mateo filed IRC 05-4206-I-04.[17]

San Bernardino filed timely reimbursement claims for fiscal years 2001-2002,[18] and 2002-2003.[19] On September 30, 2004, the Controller issued a draft audit report addressing these two fiscal years. On October 13, 2004, San Bernardino issued a letter to the Controller responding to the draft audit report, disputing the Controller's findings regarding the overstatement of health services provided in the base year the development and application of indirect cost rates, and the reporting of health fee revenues, and disputing the Controller's calculation of the appropriate reductions.[20] On November 10, 2004, the Controller issued its final audit report, concluding that

[11] Exhibit A, San Mateo IRC, at p. 105.

[12] Exhibit A, San Mateo IRC, at p. 90.

[13] Exhibit A, San Mateo IRC, at p. 75.

[14] Exhibit A, San Mateo IRC, at p. 67.

[15] Exhibit A, San Mateo IRC, at pp. 67-68.

[16] Exhibit A, San Mateo IRC, at p. 45.

[17] Exhibit A, San Mateo IRC, at p. 1.

[18] Exhibit B, San Bernardino IRC, at p. 74.

[19] Exhibit B, San Bernardino IRC, at p. 95.

[20] Exhibit B, San Bernardino IRC, at pp. 61-63.

$610,323 in claimed costs, of $1,130,569 total costs claimed in the relevant audit period, were unallowable.[21] On September 13, 2005, San Bernardino filed IRC 05-4206-I-08.[22]

The Controller submitted written comments, dated December 31, 2007, on the San Bernardino IRC, reiterating the audit findings and asserting that its adjustments were appropriate. On April 24, 2008, the Controller submitted written comments on the San Mateo IRC, stressing the proper application of the statute of limitations, and restating its contention that the audit adjustments were proper. On July 13, 2009, San Mateo submitted rebuttal comments in response to the Controller's comments on its IRC, renewing its objections to the lack of explanation of the reasons for disallowance of specific costs, and to the application of an average benefit rate where actual benefit costs were available; reiterating its disagreement with the Controller's adjustment on the basis of health fees authorized; restating its claim that the indirect cost rate proposal had been improperly rejected; and continuing to challenge the statute of limitations asserted by the Controller.

On September 21, 2010, after the filing of the IRCs, the Third District Court of Appeal issued its opinion in *Clovis Unified*,[23] which specifically addressed two of the key disputed issues. The court found that community college districts were required to offset costs claimed for the *Health Fee Elimination* program by the health service fees that community college districts were *authorized* to charge, rather than, as the claimants have argued, the fees actually collected. In addition, the court held that the contemporaneous source document rule (CSDR) was, as applied to the audits of several mandated programs, an unenforceable underground regulation. The scope and effect of the *Clovis Unified* decision is addressed below, where relevant.

On August 2, 2013, Commission staff issued a draft staff analysis for these consolidated incorrect reduction claims.[24] On August 21, 2013, the claimants requested an extension of time to file comments and a postponement of the hearing, which was granted for good cause.[25] On October 21, 2013, the claimants filed comments on the draft staff analysis.[26] On October 22, 2013, the Controller filed late comments on the draft staff analysis.[27]

On December 6, 2013, the Commission heard and partially approved the claim, adopting the staff analysis as modified by the Commission and directing Commission staff to prepare the statement of decision for adoption at the January 24, 2014 hearing.

[21] Exhibit B, San Bernardino IRC, at p. 45.

[22] Exhibit B, San Bernardino IRC, at p. 1.

[23] *Clovis Unified School Dist. v. Chiang* (*Clovis*) (Cal. Ct. App. 3d Dist. 2010) 188 Cal.App.4th 794.

[24] Exhibit F, Draft Staff Analysis.

[25] Exhibit G, Claimant Request for Extension.

[26] Exhibit H, Claimants' Comments on Draft Staff Analysis.

[27] Exhibit I, Controller's Comments on Draft Staff Analysis.

III. Positions of the Parties

San Mateo Community College District

San Mateo argues that the Controller inappropriately reduced reported costs of salaries and benefits, and other indirect costs claimed.[28] San Mateo argues that the Controller reduced "outgoing expense costs" without explaining the distinction between "expenses" and "costs," and that "the district was not on notice of any particular reporting or audit standard with respect to journal voucher transactions."[29] San Mateo also takes issue with the Controller's finding that "the district improperly applied its claimed indirect cost rate to costs beyond those approved by the U.S. Department of Health and Human Services (DHHS)."[30] San Mateo argues that by reducing claims on the basis of fees collectible, but not collected, the Controller improperly disallowed a portion of the districts' reimbursable costs.[31] Finally, San Mateo disputes the application of the statute of limitations to allow audits of the subject fiscal years.[32]

In its rebuttal comments San Mateo maintains that the Controller has the burden of proof in showing that the district's claimed costs were not allowable, and that therefore several discrete costs that were disallowed were improperly reduced. San Mateo also argues that the application of an average benefit rate is inappropriate where actual benefit costs are available. San Mateo renews its contention regarding the health fee authority, and restates its challenge to the statute of limitations for audits asserted by the Controller.[33]

In its comments on the draft staff analysis, San Mateo maintains that staff's interpretation of the statute of limitations for audits remains incorrect; that the Controller's application of the Health Fee Rule is not supported; and that staff's analysis regarding indirect cost rates is not supported. Finally, the district states that staff correctly analyzed and recommended reinstatement of disallowed employee salaries and benefits, and concedes several other issues.[34]

San Bernardino Community College District

San Bernardino disputes the disallowance of costs for certain health services, arguing that "[t]he Controller established FY 1997-98 as an alternative base year, contrary to the Education Code and the parameters and guidelines."[35] San Bernardino further argues that the Controller improperly disallowed costs related to insurance premiums for the general student population, and "does not describe how the disallowance was calculated."[36] San Bernardino also disputes the Controller's finding that indirect costs were overstated because the indirect cost rate proposal

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[28] Exhibit A, San Mateo IRC, at p. 13.

[29] Exhibit A, San Mateo IRC, at p. 15.

[30] Exhibit A, San Mateo IRC, at pp. 17-18.

[31] Exhibit A, San Mateo IRC, at pp. 19-23.

[32] Exhibit A, San Mateo IRC, at pp. 23-26.

[33] Exhibit E, San Mateo Rebuttal Comments, at pp. 1-4.

[34] Exhibit H, Claimants' Comments on Draft Staff Analysis, at pp. 2-12.

[35] Exhibit B, San Bernardino IRC, at p. 12-13.

[36] Exhibit B, San Bernardino IRC, at p. 19.

was not federally approved. The district argues that there is no requirement of federal approval.[37] Finally, San Bernardino argues that the proper measure of offsetting revenues should be the health fees collected, not the amount of fees authorized.[38]

In comments on the draft staff analysis, the District disagreed with staff's analysis of the Controller's application of the Health Fee Rule, as noted above, and disagreed with staff's analysis of indirect cost rates. The district concurred with staff's recommendation that all disallowed health services should be reinstated, a finding that has been revised in the final analysis.[39]

State Controller's Office

San Mateo Audit and IRC

The final audit report concluded that $793,165 in salaries and benefits were unallowable, because "the district did not provide documentation supporting the validity of the distribution made to the mandate."[40] The Controller maintains that San Mateo "was unable to support that salary costs claimed for several employees were directly attributable to the mandate." The Controller argues that San Mateo did not provide any documentation showing that the disallowed employees were tasked to the mandated activities. The Controller further maintains that it has calculated an appropriate benefit rate to apply to San Mateo's claim.

The audit report also disallowed $41,375 in "other outgoing expenses," finding that "the district did not provide any documentation supporting the validity of the costs claimed."[41] Additionally, the audit report concluded that "the district improperly applied its claimed indirect cost rate to costs beyond those approved by the U.S. Department of Health and Human Services," and thus "overstated indirect costs by $112,243."[42] And finally, by claiming health fees received rather than health fees collectible, the Controller concluded that San Mateo "understated offsetting health fee revenues by $70,603."[43] Finally, the Controller argues that the statute of limitations for audits under section 17558.5 permitted the Controller to audit fiscal years 1999-2000 and 2000-2001.[44]

San Bernardino Audit and IRC

The final audit report concluded that San Bernardino "overstated health services costs by $103,128 for the audit period…because the services were not provided in FY 1986-87."[45] The

[37] Exhibit B, San Bernardino IRC, at pp. 20-22.

[38] Exhibit B, San Bernardino IRC, at pp. 23-27.

[39] Exhibit H, Claimants' Comments on Draft Staff Analysis, at pp 12-13.

[40] Exhibit A, San Mateo IRC, at p. 52.

[41] Exhibit A, San Mateo IRC, at p. 54.

[42] Exhibit A, San Mateo IRC, at p. 54.

[43] Exhibit A, San Mateo IRC, at pp. 56-58.

[44] Exhibit C, Controller's Comments on San Mateo IRC, at pp. 1-3.

[45] Exhibit B, San Bernardino IRC, at p. 53.

Controller also concluded that "[t]he district overstated service and supply costs by $75,670 because it claimed ineligible athletic insurance costs of $72,554 and did not support costs of $3,116."[46] In addition, the Controller concluded that San Bernardino overstated indirect costs by $281,494, because the district "claimed indirect costs based on an indirect cost rate proposal prepared for each year by an outside consultant…[and] did not obtain federal approval for its rate."[47] And finally, the Controller concluded that San Bernardino "understated authorized health fee revenue by $150,031" by claiming "actual rather than authorized health fee revenues."[48]

Response to Draft Staff Analysis

In comments on the draft staff analysis, the Controller focuses primarily on staff's conclusions with respect to indirect cost rates, the recommended reinstatement of disallowed salaries and benefits for San Mateo, and the recommended reinstatement of disallowed health services not substantiated in the base year for San Bernardino. The Controller argues that the draft staff analysis "misapprehends the application of an indirect cost rate," and explains that a rate established on the basis of direct salaries and wages including fringe benefits is meant to be applied only to direct salaries and wages in order to arrive at the indirect costs for the entire program.[49] The Controller argues that the simplified method of claiming indirect costs uses salaries and wages as a measurement, or formula, and the rate is not meant to be applied to all direct costs. In addition, the Controller argues that the disallowed salaries and benefits for San Mateo employees was based on a lack of documentation, and was not inconsistent with salaries allowed for other employees, for whom more documentation corroborating their salaries was submitted.[50] Finally, the Controller argues that it did not disallow costs for health services on the basis of an alternate base year. The Controller argues that audit staff considered the 1997-98 claim information not to rule out services not provided in the base year, but to substantiate services provided in the base year.[51] In addition, the Controller argues that Commission staff's reading of the health services provided in the base year and listed in the parameters and guidelines is too broad, and that the Controller's audit staff "appropriately relied on the explicit list of reimbursable services in the Parameters & Guidelines" to deny health services claimed by San Bernardino.[52]

III. Discussion

Government Code section 17561(b) authorizes the Controller to audit the claims filed by local agencies and school districts and to reduce any claim for reimbursement of state mandated costs that the Controller determines is excessive or unreasonable. Government Code section 12410 further requires the Controller to:

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[46] Exhibit B, San Bernardino IRC, at p. 55.

[47] Exhibit B, San Bernardino IRC, at pp. 55-57.

[48] Exhibit B, San Bernardino IRC, at p. 57.

[49] Exhibit I, Controller's Comments on Draft Staff Analysis, at pp. 2-3.

[50] Exhibit I, Controller's Comments on Draft Staff Analysis, at pp. 3-4.

[51] Exhibit I, Controller's Comments on Draft Staff Analysis, at pp. 4-8.

[52] Exhibit I, Controller's Comments on Draft Staff Analysis, at p. 8.

> [S]uperintend the fiscal concerns of the state. The Controller shall audit all claims against the state, and may audit the disbursement of any state money, for correctness, legality, and for sufficient provisions of law for payment.

Although the Controller's Office is required to follow the parameters and guidelines when auditing a claim for mandate reimbursement, the Controller has broad discretion in determining how to audit claims. Government Code section 12410 provides in relevant part:

> Whenever, in [the Controller's] opinion, the audit provided for by [Government Code section 925 et seq.] is not adequate, the Controller *may make such field or other audit* of any claim or disbursement of state money *as may be appropriate to such determination*. (Italics added.)

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.7 of the Commission's regulations requires the Commission to send the statement of decision to the Controller and request that the costs in the claim be reinstated.

The Commission must determine in this case whether the Controller's audit decisions were arbitrary, capricious, or entirely lacking in evidentiary support. This standard is similar to the standard used by the courts when reviewing an alleged abuse of discretion of a state agency with respect to an adjudicatory decision in which an evidentiary hearing is not required.[53] Under this standard, the courts have found that:

> When reviewing the exercise of discretion, "[t]he scope of review is limited, out of deference to the agency's authority and presumed expertise: 'The court may not reweigh the evidence or substitute its judgment for that of the agency. [Citation.]'" ... "In general ... the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. . . ." [Citations.] When making that inquiry, the " ' "court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." [Citation.]' "[54]

Thus, with respect to the Controller's authority and responsibility over state audits, the Commission exercises "very limited review 'out of deference to…the legislative delegation of administrative authority of the agency, and to the presumed expertise of the agency within its scope of authority.'"[55]

The Commission must review the Controller's audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.[56] As more fully

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[53] *Johnston v. Sonoma County Agricultural* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

[54] *American Bd. of Cosmetic Surgery, Inc, supra*, 162 Cal.App.4th at pgs. 547-548.

[55] *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, at p. 230.

[56] *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

discussed in the analysis below, the parameters and guidelines governing these reimbursement claims require that costs claimed be supported by documentation maintained by the claimant.

In addition, the Commission must review questions of law *de novo*, without consideration of conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[57] The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[58]

A. Statute of Limitations and Document Retention Requirements Applicable to Audits of Mandate Reimbursement Claims

San Mateo asserts that the statute of limitations applicable to audits of mandate reimbursement claims bars the Controller's audits of the claims filed for fiscal years 1999-2000 and 2000-2001. San Mateo disputes also the document retention requirements asserted by the Controller.

1. The audit of community college district claims beginning in 1999-2000 is not barred by the statute of limitations found in Government Code section 17558.5.

San Mateo asserts that "the first two years of the three claim years audited, fiscal years 1999-00 and 2000-01, were beyond the statute of limitations for an audit when the Controller issued its audit report on January 7, 2005."[59] Statutes 1995, chapter 945 (operative July 1, 1996), effective at the time of the two earliest claims, provided as follows:

> A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to audit by the Controller no later than two years after the end of the calendar year in which the reimbursement claim is filed or last amended. However, if no funds are appropriated for the program for the fiscal year for which the claim is made, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.[60]

San Mateo contends that this code section provides for two standards: "if no funds are appropriated," the Controller may initiate an audit for two years from the initial date of payment of the claim; but if the claims for a program are being paid (San Mateo calls this a "funded program") the claims are subject to audit no later than two years after the end of the calendar year in which the reimbursement claim is filed. San Mateo contends that "subject to audit" means subject to the completion of an audit, rather than the initiation of an audit, and that the 2002 amendment of section 17558.5, which changed "subject to audit" to "subject to the

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

[58] *County of Sonoma, supra*, 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[59] Exhibit A, San Mateo IRC, at pp. 23-24.

[60] Government Code section 17558.5 (Stats. 1995, ch. 945 (SB 11)); Exhibit A, San Mateo IRC, at p. 25.

initiation of an audit," is more than a mere clarifying change, and the claims filed prior to the effective date of the 2002 amendment should not be held to the enlarged standard.[61] San Mateo contends that the relevant periods for which those claims would be *subject to audit* expired December 31, 2003 for the 1999-00 claim, filed January 10, 2001; and December 31, 2004 for the 2000-2001 claim, filed January 10, 2002. Thus, San Mateo reasons that the January 7, 2005 audit report was *completed* outside the period subject to audit.

The Controller argues that San Mateo's conclusion "is based on an erroneous interpretation that attempts to rewrite that section, adding a deadline for completion of the audit where none exists."[62] The Controller argues that section 17558.5 does not require an audit to be completed within two years; "subject to audit," the Controller holds, means subject to *initiation* of an audit. The Controller asserts that the audit in this case was initiated as of the entrance conference conducted on January 2, 2003, "well before the earliest deadline [cited by San Mateo] of December 31, 2003."[63]

In addition, the Controller argues that Government Code section 17558.5, *as later amended by Statutes 2002, chapter 1128* (AB 2834), provides the proper statute of limitations, because "[u]nless a statute expressly provides to the contrary, any enlargement of a statute of limitations provision applies to matters pending but not already barred."[64] The Controller reasons that the amendment made by AB 2834 became effective January 1, 2003, and even under San Mateo's interpretation the earliest claim (fiscal year 1999-2000) would not have been barred until December 31, 2003. Therefore, the Controller reasons, the expanded statute of limitations is applicable, providing that a reimbursement claim "is subject to the *initiation of an audit* by the Controller no later than *three years* after the date that the actual reimbursement claim is filed or last amended."[65] Therefore, because the 2003 version of section 17558.5 would require an audit to be initiated "not later than" January 10, 2004 (three years after the earlier claim was filed), and the audit in issue was initiated January 2, 2003, the statute of limitations does not bar the audit.

The Commission finds that the audit of community college district claims beginning in 1999-2000 is not barred by the statute of limitations found in Government Code section 17558.5. The audits of reimbursement claims filed January 10, 2001 and January 10, 2002, respectively, were initiated "no later than January 2, 2003, when the entrance conference was held."[66] The only reading of these facts and of section 17558.5 that could bar the audits would be to hold that section 17558.5 requires an audit to be *completed* within two years, in which case the final audit report issued January 7, 2005 would be barred. This is the interpretation urged by San Mateo, but this reading of the code is not supported. Based only upon the plain language of the former section, the reimbursement claims in issue would be "subject to audit" until the end of the

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[61] Exhibit H, Claimants' Comments on Draft Staff Analysis, at pp. 2-4.

[62] Exhibit C, Controller's Comments on San Mateo IRC, at p. 2.

[63] Exhibit C, Controller's Comments on San Mateo IRC, at p. 3.

[64] Exhibit C, Controller's Comments on San Mateo IRC, at p. 3 [citing *Douglas Aircraft Co. v. Cranston* (1962) 58 Cal.2d 462, at p. 465.].

[65] Government Code section 17558.5 (Stats. 2002, ch. 1128 (AB 2834)).

[66] Exhibit C, Controller's Comments on San Mateo IRC, at p. 3.

calendar year 2003, for a claim filed in January of 2001. However, "[u]nless a statute expressly provides to the contrary, any enlargement of a statute of limitations provision applies to matters pending but not already barred."[67] Therefore, the 2002 statute that enlarged the statute of limitations effective January 1, 2003, would control, and the enlargement of the statute would apply to the subject claims.

Based on the foregoing, the Commission finds that the audit of San Mateo's reimbursement claims is not barred by the statute of limitations.

2. Document retention requirements cited by the Controller are consistent with the parameters and guidelines, and are not dependent on the period subject to audit.

San Mateo asserts, with respect to the disallowance of employee salaries and benefits, discussed below under section D, that "[o]ne of the stated reasons for the disallowance was that claimants must retain source documentation on file 'for a period of no less than three years from the date of the final payment of the claim.'" San Mateo argues that "[n]o legal citation was provided for this assertion."[68]

The Controller counters that document retention was not a stated reason for the disallowance of costs.[69] However, the Controller also points to the parameters and guidelines of the *Health Fee Elimination* mandate, which state:

> For auditing purposes, all costs claimed must be traceable to source documents and/or worksheets that show evidence of the validity of such costs…*These documents must be kept on file by the agency submitting the claim for a period of no less than three years from the date of the final payment of the claim pursuant to this mandate,* and made available on the request of the State Controller or his agent.

Thus, at the time the subject reimbursement claims were filed, the parameters and guidelines expressly provided for retention of documents to "no less than three years from the date of the final payment of the claim." The three year period is provided in the parameters and guidelines for all of the subject claim years, and is controlling.[70] The parameters and guidelines were adopted in the normal course of Commission hearings, and constitute a final decision of the Commission.[71] San Mateo's assertion that the document retention period "appears to be a ministerial preference of the Controller's" is clearly in error.

Based on the foregoing, the Commission finds that source documents are required to be retained for a minimum of three years after final payment of the claim.

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[67] *Douglas Aircraft Co. v. Cranston* (1962) 58 Cal.2d 462, at p. 465.

[68] Exhibit A, San Mateo IRC, at p. 13.

[69] Exhibit C, Controller's Comments on San Mateo IRC, at p. 15.

[70] Exhibit A, San Mateo IRC, at pp. 37-38.

[71] *CSBA v. State of California* (2009) 171 Cal.App.4th 1183, at p. 1201 ["Once the Commission's decisions are final, whether after judicial review or without judicial review, they are binding, just as are judicial decisions."].

B. Understated Offsetting Revenues in the Reimbursement Claims of Both Districts: *Clovis Unified* and the Health Fee Rule Support a Reduction of Reimbursement to the Extent of Fees Authorized Under Law.

The Controller reduced the reimbursement claims filed by San Mateo by $13,175 for fiscal year 1999-2000, and $57,428 for fiscal year 2001-2002.[72] San Bernardino's reimbursement claims were reduced by $97,642 for fiscal year 2000-2001, and $52,389 for fiscal year 2001-2002.[73] These reductions were made on the basis of the fee authority available to the districts, multiplied by the number of students subject to the fee, less any amount of offsetting revenue already claimed.

Both San Mateo and San Bernardino disputed the Controller's findings that offsetting revenues from student health fees had been understated in the relevant claim years. Both districts argued that the parameters and guidelines only require a claimant to declare offsetting revenues that the claimant "experiences," and that while the fee amount that districts were authorized to impose may have increased for the applicable period, nothing in the Education Code made the increase of those fees mandatory. The claimants argue that the issue is the difference between fees collected and fees collectible.[74]

After the districts filed their IRCs, the Third District Court of Appeal issued its opinion in *Clovis Unified*, which specifically addressed the Controller's practice of reducing claims of community college districts by the maximum fee amount that districts are statutorily authorized to charge students, whether or not a district chooses to charge its students those fees. As cited by the court, the Health Fee Rule states in pertinent part:

> Eligible claimants will be reimbursed for health service costs at the level of service provided in the 1986/87 fiscal year. The reimbursement will be reduced by the amount of student health fees authorized per the Education Code [section] 76355.[75] (Underline in original.)

The Health Fee Rule relies on Education Code section 76355(a), which provides in relevant part:

> (a)(1) 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.
>
> (a)(2) The governing board of each community college district may increase [the health service fee] by the same percentage increase as the Implicit Price Deflator for State and Local Government Purchase of Goods and Services. Whenever that

[72] Exhibit A, San Mateo IRC, at p. 56.

[73] Exhibit B, San Bernardino IRC, at p. 57.

[74] Exhibit A, San Mateo IRC, at pp. 20-23; Exhibit B, San Bernardino IRC, at pp. 23-27.

[75] *Clovis Unified School Dist. v. Chiang, supra*, 188 Cal.App.4th at page 811.

> calculation produces an increase of one dollar ($1) above the existing fee, the fee may be increased by one dollar ($1).

Pursuant to the plain language of Education Code section 76355(a)(2), the fee authority given to districts automatically increases at the same rate as the Implicit Price Deflator; when that calculation produces an increase of one dollar above the existing fee, the fee may be increased by one dollar.[76] Both San Mateo and San Bernardino argue that the actual increase of the fee imposed upon students requires action of the community college district governing board,[77] and that "the issue is one of student health fees revenue actually received, rather than student health fees which might be collected."[78] But the *authority* to impose the fee increases without any legislative action by a community college district, or any other entity (state or local), and the court in *Clovis Unified* upheld the Controller's use of the Health Fee Rule to reduce reimbursement claims based on the fees districts are *authorized* to charge. In making its decision the court notes that the concept underlying the state mandates process that Government Code sections 17514 and 17556(d) embody is:

> 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.[79]

The court also notes that, "this basic principle flows from common sense as well. As the Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'"[80] Additionally, in responding to the community college districts' argument that, "since the Health Fee Rule is a claiming instruction, its validity must be determined *solely* through the Commission's P&G's."[81] The court held:

> To accept this argument, though, we would have to ignore, and so would the Controller, the fundamental legal principles underlying state-mandated costs. We conclude *the Health Fee Rule is valid*.[82] (Italics added.)

Thus, pursuant to the court's decision in *Clovis Unified*, the Health Fee Rule used by the Controller to adjust reimbursement claims filed by the Districts for the *Health Fee Elimination* program is valid. The Commission is bound by the court's decision in *Clovis Unified*, and bound to apply the Health Fee Rule set forth by the court.

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[76] See Education Code section 76355 (Stats. 1995, ch. 758 (AB 446)). The Implicit Price Deflator for State and Local Purchase of Goods and Services is a number computed annually (and quarterly) by the United States Department of Commerce as part of its statistical series on measuring national income and product, and is used to adjust government expenditure data for the effect of inflation.

[77] Exhibit A, San Mateo IRC, at p. 69. See also Exhibit B, San Bernardino IRC, at pp. 25-27.

[78] Exhibit A, San Mateo IRC, at pp. 22-23; Exhibit B, San Bernardino IRC, at pp. 26-27.

[79] *Clovis Unified School Dist. v. Chiang, supra*, 188 Cal.App.4th at page 812.

[80] *Ibid.*

[81] *Ibid.* (Original italics.)

[82] *Clovis Unified School Dist. v. Chiang, supra*, 188 Cal.App.4th at page 812.

In comments submitted on the draft staff analysis, the claimants acknowledge the Health Fee Rule, but maintain that the Controller has misapplied the rule to reach the audit reductions made. The claimants argue: "[t]here is no evidence on the record for this incorrect reduction claim that the Controller has properly applied the Health Fee Rule to either District's annual claims, therefore the Commission's ultimate conclusion that the adjustments here are not arbitrary or lacking in evidentiary support is unfounded." The claimants argue that the application of the Health Fee rule "involves two factual elements: *the number of exempt students and the specific enrollment statistics for each semester*." The determination of exempt students can be found in the plain language of Education Code section 76355, which provides that community college districts are authorized to charge *all students the health service fee, except*: (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; and until January 1, 2006, (3) low-income students.[83] With respect to enrollment information, the claimants argue that the Commission's earlier decision on seven consolidated Health Fee Elimination IRCs provided for obtaining enrollment information from the "Community College Chancellor's MIS data." The claimants argue that there is no evidence that the approved data has been utilized in the Controller's audit adjustments.

In its audit of San Mateo, the Controller appears to have utilized the enrollment and exemption figures reported *by the claimant*, and San Mateo has not sought to dispute those figures. The audit report reveals that the District reported the fees *collected*, rather than *collectible*, for 13,175 students in the summer semester of fiscal year 1999-2000, at which time the District was authorized to charge a fee of $8.00 per student, but charged only $7.00 per student. The Controller found that this one dollar discrepancy resulted in an understatement of $13,175. A similar result was found for fiscal year 2001-2002, during which the District was authorized to increase the fee from $8.00 to $9.00 for the summer semester, and from $11.00 to $12.00 for the fall and spring semesters. The Controller found that the one dollar difference between the fees authorized and the fees charged, multiplied by the claimant's reported number of students enrolled and not exempted from the fee for the three semesters, resulted in an understatement of $70,603.[84] Thus, with respect to San Mateo, the record supports a finding that the audit adjustment made was based on enrollment and exemption information reported by the district, and the understatement of fee revenues was exactly one dollar per student per semester.[85]

Based on the foregoing, the Commission finds that the Controller correctly reduced the reimbursement claims of San Mateo to the full extent of student health fees authorized by law.

However, with respect to San Bernardino, the reimbursement claims in the record appear to state only the total amount of fees collected and the number of students charged the fees, in accordance with the District's theory that only fees *collected*, rather than fees *collectible*, should be considered offsetting.[86] San Bernardino interpreted the offsetting revenue that it was required

[83] Statutes 2005, chapter 320, repealed the exemption for low-income students from Education Code section 76355.

[84] Exhibit C, Controller's Comments on San Mateo IRC, at pp. 148-149.

[85] Exhibit C, Controller's Comments on San Mateo IRC, at pp. 148-149.

[86] Exhibit B, San Bernardino IRC, at pp. 77-78.

to declare to be limited to fees "experienced," and as a result the Controller's audit report indicates substantially higher enrollment figures than those reported in the District's reimbursement claims.[87] In the audit report, the Controller states that in order to calculate the fees that should have been charged (i.e., the *full extent* of San Bernardino's "fee authority" under law), "enrollment information was obtained from the term unit report, and the student waiver information was obtained from the Board of Governors Grant (BOGG) report."[88] The claimant has not alleged specifically how the Controller's fee calculation is incorrect, or whether information from "the term unit report" is different from "specific enrollment statistics for each semester," but it is not clear from the record that the Controller has considered all exempt students in making its calculation of the fees authorized. The BOGG report, pursuant to Code of Regulations, title 5, sections 58611 and 58620, contains data on low-income students who qualify for a fee waiver to attend a community college.[89] The report is not required to contain data on students attending an apprenticeship training program or students who depend on prayer for healing, which are exempt categories under section 76355.[90] Because the exemption from the health fee applies also to these students, the BOGG report is not sufficient in itself to establish the number of students exempt from the fee pursuant to the plain language of the test claim statute.

In the earlier decision on seven consolidated Health Fee Elimination IRCs, the Commission found that the "Community College Chancellor's MIS data" was a "reasonable and reliable source" for enrollment data, and use of such data was not arbitrary or capricious.[91] The claimant here points out that more recent audits have used "enrollment data from the CCCCO."[92] However, the Commission did not determine that the MIS data was the *only* reasonable and reliable source for the data, and the "term unit report" may be equally reasonable. What is certain, however, is that *Clovis Unified, supra*, permits the Controller to adjust reimbursement to the full extent of fee authority provided under law; here, the adjustment based on enrollment less only those exemptions reported in the BOGG report may have exceeded the fee authority provided under section 76355.

Based on the record, the Commission finds that the Controller's reduction of costs for San Bernardino does not demonstrate that *all exempt students* have been excluded from the fee calculation. Therefore, the Commission remands the issue with respect to San Bernardino's reimbursement claims to the Controller, with instructions to reexamine the health fees authorized based on the total number of *enrolled students less those exempt from the fee*. If the District is unable to assist the Controller and provide documentation of the number of exempt students for whom fees cannot legally be charged, the Controller may apply the Health Fee Rule using any reasonable source available to obtain enrollment and exemption information.

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[87] Exhibit B, San Bernardino IRC, at p. 26. Compare Exhibit D, SCO Comments on San Bernardino IRC, pp. 165-166 with Exhibit D, p. 145.

[88] Exhibit D, Controller's Comments on San Bernardino IRC, at p. 145.

[89] Code of Regulations, title 5, sections 58611; 58620.

[90] *Ibid*. See also Education Code section 76355.

[91] Statement of Decision, Health Fee Elimination, 09-4206-I-19, at p. 35.

[92] Exhibit H, Claimants' Comments on Draft Staff Analysis, at p. 6.

C. Application of an Indirect Cost Rate Proposal in the Reimbursement Claims of Both Districts

The Controller reduced indirect costs claimed by San Mateo by $30,417 for fiscal year 1999-2000, $32,728 for fiscal year 2000-2001, and $49,098 for fiscal year 2001-2002, on grounds that the indirect cost rate was applied to direct costs beyond the scope of the distribution base employed to develop the rate.[93] The Controller also reduced the indirect costs claimed by San Bernardino by $122,795 for fiscal year 2001-2002, and $158,699 for fiscal year 2002-2003, on grounds that San Bernardino did not utilize a federally approved indirect cost rate.[94]

The districts dispute the Controller's findings that the indirect cost rate proposal was incorrectly applied, and was required to be federally approved, charging that the Controller's conclusions were without basis in the law.

1. The parameters and guidelines expressly reference the Controller's claiming instructions, which in turn provide for an indirect cost rate to be developed in accordance with federal OMB guidelines.

Both districts argue that claimants are not required to adhere to the claiming instructions.[95] The parameters and guidelines plainly state that "indirect costs *may be claimed in the manner described by the State Controller*." The districts argue that the word "may" is permissive, and that therefore the parameters and guidelines do not require that indirect costs be claimed in the manner described by the Controller.[96] In addition, San Bernardino argues that "[n]either state law nor the parameters and guidelines made compliance with the Controller's claiming instructions a condition of reimbursement."[97] The districts' argument is unsound: the interpretation that is consistent with the plain language of the parameters and guidelines is that "indirect costs may be claimed," or may not, but if a claimant chooses to claim indirect costs, the claimant must adhere to the Controller's claiming instructions. This interpretation is urged by the Controller.[98]

The claiming instructions specific to the *Health Fee Elimination* mandate, included in the submissions of both claimants and of the Controller,[99] do not discuss specific rules or guidelines for claiming indirect costs with respect to this mandate. However, the School Mandated Cost Manual[100] provides *general instructions* for school districts and community college districts

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[93] Exhibit A, San Mateo IRC, at p. 55.

[94] Exhibit B, San Bernardino IRC, at p. 56.

[95] Exhibit A, San Mateo IRC, at pp. 16-17; Exhibit B, San Bernardino IRC, at pp. 21-22.

[96] See Exhibit A, San Mateo IRC, at pp. 16-17; Exhibit B, San Bernardino IRC, at pp. 21-22.

[97] Exhibit B, San Bernardino IRC, at p. 22.

[98] See, e.g., Exhibit D, Controller's Comments on San Bernardino IRC, at pp. 20-21.

[99] Exhibit A, San Mateo IRC, at pp. 40-42; Exhibit B, San Bernardino IRC, at pp. 40-42; Exhibit C, Controller's Comments on San Mateo IRC, at pp. 35-46; Exhibit D, Controller's Comments on San Bernardino IRC, at pp. 34-45.

[100] Exhibit C, Controller's Comments on San Mateo IRC, at pp. 30-33; Exhibit D, Controller's Comments on San Bernardino IRC, at pp. 29-32.

seeking to claim indirect costs, and those instructions provide guidance to claimants for *all mandates*, absent specific provision to the contrary. More recently the manuals for school districts and community college districts have been printed separately, and therefore *both the general instructions, and the instructions specific to the Health Fee Elimination Mandate,* are now provided in the Mandated Cost Manual for Community Colleges, available on the Controller's web site.[101] The Mandated Cost Manual contains general instructions for claiming under all mandates, with the suggestion that claimants refer to the parameters and guidelines and specific claiming instructions, as follows:

> *This manual is issued to assist claimants in preparing mandated cost claims for submission to the State Controller's Office (SCO). The information contained in this manual is based on the State of California's statutes, regulations, and the parameters and guidelines (P's & G's) adopted by the Commission on State Mandates (CSM). Since each mandate is unique, it is imperative that claimants refer to the claiming instructions and P's & G's of each program for updated data on established policies, procedures, eligible reimbursable activities, and revised forms.*[102]

The Controller submitted copies of the Mandated Cost Manual addressing indirect cost rates, revised September 2002, in response to both IRCs.[103] The Controller also submitted an excerpt of the School Mandated Cost Manual revised September 1997, which contained the program-specific instructions for the *Health Fee Elimination* Mandate.[104] This last submission suggests that all community college claiming instructions were, at or near the relevant time period, published in the School Mandated Cost Manual. Therefore, the reference in the parameters and guidelines to the Controller's claiming instructions necessarily includes the general provisions of the School Mandated Cost Manual, and the manual provides ample notice to claimants as to how they may properly claim indirect costs. San Bernardino's assertion that "[n]either State law or the parameters and guidelines made compliance with the Controller's claiming instructions a condition of reimbursement" is therefore clearly in error.[105]

Both districts also argue that because the claiming instructions "were never adopted as law, or regulations pursuant to the Administrative Procedure Act, the claiming instructions are merely a statement of the ministerial interests of the Controller and not law."[106] In *Clovis Unified*, discussed above, the Controller's contemporaneous source document rule, or CSDR, was held to be an unenforceable underground regulation because it was applied generally against school

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[101] See, e.g., Exhibit X, Community College Mandated Cost Manual General Instructions Revised 09/03

[102] Exhibit X, Community College Mandated Cost Manual Foreword, Revised 07/12.

[103] Exhibit C, Controller's Comments on San Mateo IRC, at pp. 30-33; Exhibit D, Controller's Comments on San Bernardino IRC, at pp. 29-32.

[104] Exhibit C, Controller's Comments on San Mateo IRC, at pp. 35-46; Exhibit D, Controller's Comments on San Bernardino IRC, at pp. 34-45.

[105] Exhibit B, San Bernardino IRC, at p. 22.

[106] See, e.g., Exhibit A, San Mateo IRC, at p. 16.

districts and had never been adopted as a regulation under the APA.[107] Here, the districts imply the same fault in the claiming instructions with respect to indirect cost rates. But the distinction is that here the parameters and guidelines, which were duly adopted at a Commission hearing, require compliance with the claiming instructions. The Commission's parameters and guidelines are a final, binding document,[108] and provide notice of the options for claiming indirect costs, pursuant to duly issued claiming instructions, which are general and apply to all programs. Moreover, the Commission is not the venue in which to challenge the Controller's claiming instructions on the ground that those instructions may constitute an underground regulation. Until the courts declare otherwise, the Commission will presume that, where reasonable and consistent with the parameters and guidelines, the Controller's claiming instructions are valid and enforceable.

Based on the foregoing, the Commission finds that the parameters and guidelines expressly reference the claiming instructions, which clearly provide one of two options for indirect cost rates is to be developed in accordance with OMB guidelines, including seeking federal approval.

2. San Mateo did not comply with the requirements of the claiming instructions in developing and applying its indirect cost rate, and the Controller's reduction was not arbitrary, capricious, or entirely lacking in evidentiary support.

In its audit of San Mateo's reimbursement claims for the period of July 1, 1999 through June 30, 2002, the Controller concluded that San Mateo "improperly applied its claimed indirect cost rate to costs beyond those approved by the U.S. Department of Health and Human Services." The Controller concluded that the indirect cost rate was *developed* using "a base consisting of 'Direct Salaries and Wages including all fringe benefits,'" but improperly applied, the Controller asserts, to "direct services and supplies, other operating expenses, and capital outlay costs.[109] The Controller asserted that "*if the district wishes to apply its indirect cost rate to a distribution base other than salaries and wages*, the district's approved A-21 rate must be based on modified total direct costs."[110]

San Mateo counters that federal approval of an indirect cost rate proposal is merely a "ministerial preference," and not based on any requirement in law.[111] San Mateo asserts that the Controller accepted its 30 percent indirect cost rate but "did not accept application of the rate to costs other than salary and benefits because the rate was calculated using only salary and benefit costs."[112] San Mateo asserts that "no accounting rationale or legal basis"[113] supports the Controller's reduction. San Mateo further argues that "cost accounting principles allow indirect cost rates to be established based on a variety of bases…without regard for the scope of the distribution base

[107] *Clovis Unified*, *supra*, 188 Cal.App.4th, at p. 807.

[108] *CSBA v. State*, *supra*, 171 Cal.App.4th 1183, at p. 1201.

[109] Exhibit A, San Mateo IRC, at pp. 54-55.

[110] Exhibit A, San Mateo IRC, at p. 56.

[111] Exhibit A, San Mateo IRC, at p. 16.

[112] Exhibit A, San Mateo IRC, at pp. 14-15.

[113] Exhibit A, San Mateo IRC, at pp. 15-16.

except that the source of the rate has to be representative of the 'distribution base.'"[114] In other words, the District argues that an indirect cost rate does not necessarily have to be developed on the basis of the same direct costs to which it will be applied, as long as the basis is "representative of" the direct costs to which it will be applied.

The Controller counters, in comments on the IRC, that "during the audit period, the district improperly applied its indirect cost rate to direct services and supplies, other operating expenses, and capital outlay costs." The Controller argues that the 30% rate was developed and approved on a distribution base of salaries and wages including fringe benefits, but "the auditor determined that the district (in determining applicable mandate indirect costs) did not apply the rate to the same base that was used in developing the rate, i.e., salaries and wages including all fringe benefits." Finally, the Controller argues that "regardless of which methodology the district uses to claim indirect costs in its mandate reimbursement claim, the district must bear the responsibility to calculate the indirect cost rate accurately and apply the rate properly based upon the criteria it used to create the rate" and "the district applied its indirect cost rate to costs beyond those that were included in the distribution base."[115] The Commission finds, as discussed below, that the Controller's interpretation is consistent with the OMB guidelines, and that San Mateo failed to apply its approved indirect cost rate properly.

The claiming instructions referenced in the parameters and guidelines reveal that while federal approval of an indirect cost rate is not strictly required, it is one of two options for developing an indirect cost rate. The claiming instructions provide, in pertinent part:

> A college has the option of using a federally approved rate, utilizing the cost accounting principles from Office of Management and Budget Circular A-21 "Cost Principles for Educational Institutions," or the Controller's methodology outlined in the following paragraphs. If the federal rate is used, it must be from the same fiscal year in which the costs were incurred.[116]

The plain language of the above-cited paragraph provides that either a district can use a federally approved rate, incorporating the accounting principles of the OMB Circular A-21; or, the district can use the alternative state procedure.[117] The OMB Circular A-21, an excerpt of which the Controller submitted along with its comments on San Mateo's IRC, provides two options for the development of an indirect cost rate for facilities and administrative costs (referred to as F&A in the text). The first option is a simplified rate based on "salaries and wages," and the second is labeled a "modified total direct cost base." The 30% rate employed by the claimant is developed using a salaries and wages cost base.[118] The Controller explains, in comments on the draft staff analysis,[119] that a salaries and wages base rate developed in accordance with the steps described is to be applied "to direct salaries and wages for individual agreements to determine the amount

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[114] Exhibit A, San Mateo IRC, at pp. 16-17.

[115] Exhibit C, Controller's Comments on San Mateo IRC, at pp. 18; 20-21.

[116] Exhibit C, Controller's Comments on San Mateo IRC, at p. 30.

[117] Exhibit C, Controller's Comments on San Mateo IRC, at p. 31.

[118] Exhibit I, Controller's Comments on Draft Staff Analysis, at p. 58.

[119] Exhibit I, Controller's Comments on Draft Staff Analysis, at pp. 2-3; 16-17.

of F&A costs allocable to such agreements."[120] The rate is calculated using *all* "facilities and administrative" costs (F&A), divided by salaries and wages, including fringe benefits, attributable to the programs or contracts.[121] Then the rate is negotiated and approved by DHHS, and can be applied in future years to the salaries and benefits attributable to a other programs, which will yield an indirect cost allocation appropriate to that program covering *all indirect costs*, not just the indirect costs related to salaries and benefits.

Here, the claimant has an approved rate of 30%, developed using a distribution base *only* of salaries and benefits. That approved rate cannot properly be applied more broadly than the direct cost distribution base used to develop it. Application of the approved rate *only* to salaries and benefits of other programs or subsequent years is intended to provide a calculation of indirect costs for the *entire mandated program.*[122] In its audit of San Mateo's claim, the Controller reduced indirect costs claimed by a total of $112,243 for the three audit years, finding that the district "improperly applied the indirect cost rate to direct services and supplies, other operating expenses, and capital outlay costs."[123] As discussed above, San Mateo was required, if it chose to utilize a federally approved rate, to apply that rate consistently with the manner in which the rate was developed, and San Mateo did not do so. Consequently, a reduction in reimbursement was called for.

Based on the foregoing, the Commission finds that San Mateo's application of the indirect cost rate to direct costs *other than salaries and wages* was inconsistent with the parameters and guidelines and the claiming instructions, and yielded a total indirect cost calculation significantly higher than permitted. The federally approved rate that the District chose to use (30%) was calculated to reimburse for all indirect costs on the basis of direct salaries and benefits, and should have been applied only to direct salaries and benefits in order to yield an indirect cost calculation for the entire mandated program. Therefore, the Commission finds that the Controller's reduction of indirect costs was not arbitrary, capricious, or without evidentiary support.

3. *San Bernardino did not comply with the requirements of the claiming instructions in developing and applying its indirect cost rates, and therefore an adjustment to indirect costs claimed was not arbitrary, capricious, or entirely lacking in evidentiary support.*

In the audit of San Bernardino's reimbursement claims for the period of July 1, 2001 through June 30, 2003, the Controller concluded that the district's claimed indirect costs were based on a rate not federally approved, and that the costs were highly disproportionate to the Controller's calculations. San Bernardino claimed indirect costs of $210,961 for fiscal year 2001-2002,

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[120] Exhibit C, Controller's Comments on San Mateo IRC, at p. 59.

[121] Exhibit C, Controller's Comments on San Mateo IRC, at p. 59.

[122] Exhibit I, Controller's Comments on Draft Staff Analysis, at p. 58 [In the draft staff analysis, staff misunderstood the correct application of a salaries and benefits indirect cost rate, and incorrectly concluded that the Controller had improperly reduced indirect costs for other items to zero. The Controller's comments clarified that an indirect cost rate developed on the basis of salaries and benefits is only intended to be applied to salaries and benefits, and that it does account for *all* indirect costs when properly applied.]

[123] Exhibit C, Controller's Comments on San Mateo IRC, at p. 18.

against direct costs of $467,227; and $249,766 for fiscal year 2002-2003, against direct costs of $522,176.[124] Those claimed costs represent indirect costs at a rate of approximately 45 percent for 2001-2002 and 48 percent for 2002-2003. The Controller reduced the claimed indirect costs to $88,166 (an 18.87% rate) for fiscal year 2001-2002 and $91,067 (a 17.44% rate) for fiscal year 2002-2003.[125]

The Controller maintains that the claiming instructions required the district to use either a federally approved rate "prepared in accordance with OMB Circular A-21, or the SCO's alternate methodology using Form FAM-29C."[126] The Controller argues that the district claimed its indirect costs "based on an indirect cost rate proposal (ICRP) prepared for each fiscal year by an outside consultant using OMB Circular simplified indirect cost rate methodology." The Controller continues: "However, the district did not obtain federal approval for its rate." The Controller calculated indirect cost rates using the alternative method allowed by the claiming instructions, and found that "the calculated indirect cost rates did not support the indirect cost rates claimed."[127]

San Bernardino counters that "there is no requirement in law that the claimant's indirect cost rate must be 'federally' approved," and that "[n]o particular indirect cost rate calculation is required by law." San Bernardino argues that the Controller's claiming instructions "were never adopted as law, or regulations pursuant to the Administrative Procedure Act," and are therefore "merely a statement of the ministerial interests of the Controller and not law."[128] San Bernardino stands on its assertion that there is no requirement that a rate be federally approved, arguing that "the District has computed its ICRPs utilizing cost accounting principles from the Office of Management and Budget Circular A-21, and the Controller has disallowed it without a determination of whether the product of the District's calculation would, or would not, be excessive, unreasonable, or inconsistent with cost accounting principles."[129] In addition, San Bernardino asserts that "[n]either the Commission nor the Controller has ever specified the federal agencies which have the authority to approve indirect cost rates."[130]

As discussed above, the Commission's duly adopted parameters and guidelines require compliance with the Controller's claiming instructions, and the claiming instructions are presumed to be valid and enforceable. Those claiming instructions reveal that while federal approval of an indirect cost rate is not strictly required, it is an element of one of two options for developing an indirect cost rate. There is no third option in the claiming instructions to develop an indirect cost rate in accordance with the OMB Circular without seeking federal approval. Furthermore, the OMB Circular A-21, which San Bernardino claims to have followed, states that "[c]ost negotiation cognizance is assigned to the Department of Health and Human Services…[or

[124] Exhibit B, San Bernardino IRC, at p. 56.

[125] *Ibid.*

[126] Exhibit B, San Bernardino IRC, at pp. 55-56.

[127] Exhibit B, San Bernardino IRC, at p. 55.

[128] Exhibit B, San Bernardino IRC, at pp. 20-21.

[129] Exhibit B, San Bernardino IRC, at p. 22.

[130] Exhibit B, San Bernardino IRC, at p. 20.

the Department of Defense, depending on which provides more funding to the educational agency]…In cases where neither HHS or DOD provides Federal funding to an educational institution, the cognizant agency assignment *shall default to HHS.*"[131] Therefore, while the Commission and the Controller may not have directly identified the responsible agency, the OMB guidelines explicitly direct claimants to HHS for approval of their federally recognized rates.

Based on the foregoing, San Bernardino's application of an indirect cost rate prepared without federal approval was inconsistent with the parameters and guidelines and the claiming instructions, and therefore an adjustment to indirect costs claimed was not arbitrary, capricious, or entirely lacking in evidentiary support.

4. The Controller's decision to apply the alternative method described in the claiming instructions to San Bernardino's reimbursement claim was not arbitrary, capricious, or entirely lacking in evidentiary support.

In its audit of San Bernardino's reimbursement claim, the Controller, concluding that the rate was not approved and therefore not supported consistently with the parameters and guidelines and the claiming instructions, recalculated the indirect cost rate using the alternative state procedure, the "FAM-29C method," outlined in the School Mandated Cost Manual.[132] San Bernardino asserts that the difference between its claimed rate and the audited rate is "the determination of which of those cost elements are direct costs and which are indirect costs." San Bernardino continues, "[i]ndeed, federally 'approved' rates which the Controller will accept without further action, are 'negotiated' rates calculated by the district and submitted for approval, indicating that the process is not an exact science, but a determination of the relevance and reasonableness of the cost allocation assumptions made for the method used."[133] San Bernardino argues that the Controller "made no determination as to whether the method used by the District was reasonable, but, merely substituted its FAM-29C method for the method reported by the District." San Bernardino also argues that the Controller's decision to recalculate indirect costs by its own method "is an arbitrary choice of the Controller, not a 'finding' enforceable by fact or law."[134]

San Bernardino argues that this substitution of methods was arbitrary. But, based on the above analysis, San Bernardino failed to comply with the requirements of the claiming instructions with respect to the OMB method of calculating indirect cost rates. San Bernardino does not assert that the rate calculated was arbitrary; only that it was arbitrary to substitute the state method outlined in the claiming instructions for the claimant's preferred but incorrectly executed method.

However, in comments submitted on the draft staff analysis, the claimant acknowledges that "the Controller staff have readily available from the Community College Chancellor's Office sufficient information (the CCFS-311) to calculate any district's indirect cost rates using the

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[131] Exhibit C, Controller's Comments on San Mateo IRC, at p. 59 [emphasis added].

[132] See Exhibit D, Controller's Comments on San Bernardino IRC, at p. 29.

[133] Exhibit B, San Bernardino IRC, at p. 21.

[134] Exhibit B, San Bernardino IRC, at p. 22.

Controller's FAM 29-C method." Therefore, given that the claimant concedes that "the Controller staff have readily available" the information sufficient to calculate indirect costs using the FAM 29-C method provided in the claiming instructions, and the claimant has made no effort to introduce a federally approved rate under the OMB guidelines, the Controller's decision to substitute the state method is not unreasonable.

Finally, San Bernardino concedes that the difference between the claimed and audited methods turns on what costs are considered direct or indirect, and that "the process is not an exact science." The Commission does not have evidence in the record suggesting a finding that the Controller's reductions to San Bernardino's claim were unreasonable; the determination of which costs are direct and which are indirect is not sufficiently explained in the record, nor are any specific delineations made. If the claimant wishes to have the Commission reinstate costs adjusted by the Controller, the claimant must carry the burden of establishing what adjustments were unreasonable and why.[135]

Based on the foregoing, the Commission finds that the Controller's reduction was based on an alternative method authorized by the claiming instructions for calculating indirect costs, and is therefore not arbitrary, capricious, or entirely lacking in evidentiary support.

D. Disallowance of Salaries and Application of Audited Benefit Rates for San Mateo's Reimbursement Claims.

The Controller reduced the reimbursement claims filed by San Mateo for salaries and benefits by $281,607 for fiscal year 1999-2000, $246,609 for fiscal year 2000-2001, and $264,949 for fiscal year 2001-2002, on grounds that "the district did not provide documentation supporting the validity of the distribution made to the mandate."[136]

San Mateo disputes the Controller's disallowance of certain employee salaries and the application of an "audited" benefit rate to the remaining employees, based on the Controller's conclusion that San Mateo did not adequately support the claimed costs.

~~*1. The Controller's disallowance of salaries and benefits for Dee Howard and Ernest Rodriguez was arbitrary, capricious, or entirely lacking in evidentiary support, and costs claimed for these employees should be reinstated.*~~

San Mateo argues that the Controller is attempting to enforce an auditing standard, with respect to the documentation required, that is not consistent with the parameters and guidelines.[137] The

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[135] Government Code 17558.7 ["If the Controller reduces a claim approved by the commission, the claimant may file with the commission an incorrect reduction claim pursuant to regulations adopted by the commission."]; Code of Regulations, title 2, section 1185 [An incorrect reduction claim shall contain: "(2) A written detailed narrative that describes the alleged incorrect reduction(s). The narrative shall include a comprehensive description of the reduced or disallowed area(s) of cost(s). ¶ (3) If the narrative describing the alleged incorrect reduction(s) involves more than discussion of statutes or regulations or legal argument and utilizes assertsions or representations of fact, such assertions or representations shall be supported by testimonial or documentary evidence and shall be submitted with the claim."].

[136] Exhibit A, San Mateo IRC, at p. 52.

[137] Exhibit A, San Mateo IRC, at p. 12.

Controller does not specifically describe an auditing standard, but states that "the district did not provide documentation supporting the validity of the distribution made to the mandate."[138] The Controller also notes the absence of "time logs, time studies, or other corroborating documentation" supporting the claimed salaries and benefits.[139]

The parameters and guidelines in effect for the Health Fee Elimination mandate provide that in order to claim employee salaries and benefits, a claimant must demonstrate the following:

> Identify the employee(s), show the classifications of the employee(s) involved, describe the mandated functions performed and specify the actual number of hours devoted to each function, the productive hourly rate, and the related benefits. The average number of hours devoted to each function may be claimed if supported by a documented time study.[140]

In its reimbursement claims for fiscal years 1999-2000, 2000-2001, and 2001-2002, San Mateo stated its salary and benefit costs for the mandate, certified under penalty of perjury, on the Controller's claim forms.[141] The claim forms submitted to the Commission along with San Mateo's IRC showed only the *total* salaries and benefits for the audit years,[142] but the district asserts that "salary and benefits were reported in the District general ledger in the normal course of financial accounting," and that it "has also provided employee names, positions (job titles), hours worked, salary and benefit amounts, and a description of the tasks performed as they relate to this mandate, and in some cases declarations."[143] In addition, the Controller's comments filed on the IRC included worksheets and schedules that show disallowed salaries and benefits identified by employee and classification, suggesting that somewhat more detailed information was submitted to the Controller prior to the final audit.[144] The Controller's comments on the IRC also included emails between the district's chief financial officer and the Controller's audit manager discussing the accounts from which the disputed employees were paid and their job descriptions.[145]

The Controller's audit report provides the totals of salaries and benefits disallowed,[146] and the "schedule of allowable salaries and benefits" submitted in the Controller's comments on the IRC identifies employees whose time spent on mandated activities was not verified to the satisfaction of the Controller.[147] In emails exchanged between the district and the Controller's audit

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[138] Exhibit C, Controller's Comments on San Mateo IRC, at p. 14.

[139] *Ibid*.

[140] Exhibit A, Test Claim, at p. 37.

[141] Exhibit A, San Mateo IRC, at pp. 75; 89; 90; 104; 105; 119.

[142] Exhibit A, San Mateo IRC, at pp. 89; 104; 119.

[143] Exhibit A, San Mateo IRC, at p. 13.

[144] Exhibit C, Controller's Comments on San Mateo IRC, at pp. 52-54.

[145] Exhibit C, Controller's Comments on San Mateo IRC, at pp. 48-50.

[146] Exhibit A, San Mateo IRC, at p. 52.

[147] Exhibit C, Controller's Comments on San Mateo IRC, at pp. 52-54.

manager, the Controller asked for more information regarding certain employees whose activities were not clearly attributable to the mandate, while salaries for persons identified as nurses and doctors, for example, were allowed without question.[148] In response to these emails, San Mateo submitted additional documentation and explanation to the Controller showing that the district omitted from its reimbursement claim certain costs charged to accounts outside the health services department. For example, a letter to the Controller explains that "[f]or Ernest Rodriguez, in March 2002, he took on a teacher assignment which is reflected in the account code… 201000. This was not charged to the claim."[149] Similarly, the letter shows that Dee Howard, who is identified as "Full-time Faculty" in the Controller's schedules,[150] worked as a counselor in departments other than "Health Services," and therefore only the portion of her wages attributed to the health services account was claimed.[151] Similarly, the letter states that Gloria D'Ambra, identified as an office assistant, earned overtime pay in fiscal year 1999-2000, which was not charged to the claim.[152] Additional documentation was submitted along with this letter, including employee earnings reports for several persons, detailing the accounts from which employees were paid, and the portions of total salary attributable to each account.

Ultimately the Controller accepted this type of documentation for some employees, including "$5762 of salary expense for Donna Elliot," which San Mateo had explained was incorrectly charged to account 543000, instead of 643000. The Controller also allowed the costs for Gloria D'Ambra based on the amounts reported as non-overtime wages charged to account code 643000; overtime wages charged to account code 649001 were not claimed, and the Controller accepted the omission of those amounts from the claim.[153] The Controller therefore accepted the earnings reports and other documentation to support the validity of salaries claimed for two persons identified as "office assistant." But for Dee Howard and Ernest Rodriguez, each of whom had a portion of their salary charged to "code 643000," the Controller ultimately disallowed salaries "in the absence of time records supporting the hours worked performing mandate activities at the Health Center."[154]

The Controller maintains that "the audit determined that the claimant was unable to support that salary costs claimed for several employees were directly attributable to the mandate." The Controller asserts that the district provided information regarding salaries, but "no documentation supporting the validity of the distribution of those costs to the performance of mandated activities."[155] San Mateo argues that its August 31, 2004 letter to the Controller's audit manager, issued prior to the final audit report, "clearly distinguishes between claimed costs,

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[148] Costs were allowed for persons named as nurses without question.

[149] Exhibit E, San Mateo Rebuttal Comments, at pp. 23-25.

[150] Exhibit C, Controller's Comments on San Mateo IRC, at pp. 52-54.

[151] Exhibit E, San Mateo Rebuttal Comments, at pp. 23-25.

[152] Exhibit E, San Mateo Rebuttal Comments, at pp. 27-30.

[153] Account code 643000 appears, in context, to be accepted by the Controller as related to the health services department.

[154] Exhibit C, Controller's Comments on San Mateo IRC, at pp. 48-49.

[155] Exhibit C, Controller's Comments on San Mateo IRC, at p. 2.

which relate to the mandate, and those costs that were not claimed and did not relate to the mandate."[156]

The documents in the record pertaining to this IRC do not show "the actual number of hours devoted to each [mandated] function," as required by the parameters and guidelines., but the Controller has apparently allowed salary and benefit costs for some employees on the basis of job titles,[157] and in some cases on the basis of earnings reports that show an employee's salary paid from an account recognized to be related to the provision of health services.[158] In the case of those employees, the Controller did not insist on hours worked toward the mandate, even for the non-overtime wages paid to Gloria D'Ambra, a health services center office assistant. In contrast, and without any explanation of its differential treatment, the Controller disallowed salary and benefit costs for employees that San Mateo (under penalty of perjury) claimed worked at least a portion of their salaried time for the health services department. The Controller made this disallowance citing an absence of employee time records supporting the hours worked performing mandated activities. Although the documents in the record do not substantiate actual hours performing mandated activities for Dee Howard and Ernest Rodriguez, the same type of documents were accepted by the Controller to substantiate omitting from the reimbursement claim overtime hours worked by Gloria D'Ambra; and the same documents were accepted by the Controller as evidence that D'Ambra and Donna Elliot, identified as office assistants, were both engaged in mandate-related activities at the health services department. In other words, if the account codes to which the salaries of D'Ambra and Elliot were charged are sufficient to substantiate costs for their salaries, disallowing costs for Howard and Rodriguez on the basis of the same documentation is potentially inconsistent~~arbitrary and capricious~~.

In comments submitted on the draft staff analysis, the claimant concurs with the above discussion, and maintains that the inconsistent application of evidence warrants reinstatement of costs.[159] However, the Controller, in its comments, disputes the above analysis. The Controller submits 45 pages of additional documentation regarding salaries and benefits allowed and disallowed, some of which has been submitted previously, and argues that "[w]e considered and accepted the additional supporting documentation for certain employees of the district in lieu of timesheets or other records supporting hours charged for Health Fee Elimination activities."[160] Nevertheless, Controller's audit staff determined that the job description "full time faculty" was inconsistent with the mandate and "indicated that they [Howard and Rodriguez] were primarily instructors." Therefore, because "the district did not provide any additional information for us to consider other than the employee earnings reports and a statement in the letter dated August 31, 2004…indicating that these two employees were Counselors in one of the district's Health Centers," the Controller concluded that "the documentation provided supported only that salary

[156] Exhibit E, San Mateo Rebuttal Comments, at pp. 5; 23-24.

[157] See Exhibit C, Controller's Comments on San Mateo IRC, at pp. 52-54 [allowable salaries for nurses and doctors].

[158] See Exhibit C, Controller's Comments on San Mateo IRC, at pp. 48-50 [allowable salaries for and office assistants, apparently on the basis of employee earnings reports].

[159] Exhibit H, Claimants' Comments on Draft Staff Analysis, at p. 12.

[160] Exhibit I, Controller's Comments on Draft Staff Analysis, at pp. 18; 64-108.

and benefit costs…came out of the budget for Health Services," and the "costs claimed were unsupported and unallowable."[161]

However, the Controller appears to rely largely on the title "full-time faculty" to justify its audit adjustment, despite protestations that "additional supporting documentation for certain employees" was considered.[162] In the comments on the draft staff analysis, the Controller states that "additional documentation provided for district employee Arlene Wiltberger indicated that she was *regularly assigned as a faculty member* for the district (Tab 8, page 15); however, it also supported the extent to which she worked as a Counselor in the College of San Mateo's Health Center."[163] The Controller describes this additional documentation as including "Personnel Action Forms, Academic/Administrative Salary Orders, and an Approval of Personnel Actions Form."[164] The record does not contain such documentation for Dee Howard and Ernest Rodriguez, but as discussed above, employee earnings reports indicate that these employees were faculty tasked to Counseling activities in the Health Center as well. In addition, the letter referenced by the Controller "dated August 31, 2004, from Kathy Blackwood, Chief Fiscal Officer," indicated that these two employees were Counselors.[165]

The Commission has no reason to presume the employee earnings records and other documentation in the record are inaccurate or unreliable with respect to the distribution of hours, and the District represented to the Controller's audit staff that the two employees in question were assigned to work in the Health Center as counselors during the audit years. Moreover, the disqualification of Ernest Rodriguez and Dee Howard on the basis of being labeled "full time faculty" is not meaningfully distinguished from the acceptance of a letter stating that Arlene Wiltberger was "*regularly assigned as a faculty member* for the district (Tab 8, page 15)."[166] but also assigned to the Health Center. All of the information and documents were submitted as supporting documentation for San Mateo's reimbursement claim, filed under penalty of perjury~~, and the Controller's disallowance of the subject employees on the basis of the same or similar evidence is not supported~~.

However, Government Code section 17561(b) authorizes the Controller to audit the claims filed by local agencies and school districts and to reduce any claim for reimbursement of state mandated costs that the Controller determines is excessive or unreasonable. Thus, with respect to this issue, the Commission's review is limited to determining whether the Controller's audit decision was arbitrary, capricious, or entirely lacking in evidentiary support. This standard is similar to the standard used by the courts when reviewing an alleged abuse of discretion of a

[161] Exhibit I, Controller's Comments on Draft Staff Analysis, at p. 19.

[162] Exhibit I, Controller's Comments on Draft Staff Analysis, at p. 72 ["Does not appear OK because of job description."].

[163] Exhibit I, Controller's Comments on Draft Staff Analysis, at p. 18.

[164] *Ibid.*

[165] Exhibit I, Controller's Comments on Draft Staff Analysis, at pp. 19; 101-102.

[166] Exhibit I, Controller's Comments on Draft Staff Analysis, at p. 18.

state agency, in the case of an adjudicatory decision for which the agency is not required to hold an evidentiary hearing.[167] Under this standard, the courts have found that:

> When reviewing the exercise of discretion, "[t]he scope of review is limited, out of deference to the agency's authority and presumed expertise: 'The court may not reweigh the evidence or substitute its judgment for that of the agency. [Citation.]'" ... "In general ... the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. . . ." [Citations.] When making that inquiry, the " ' "court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." [Citation.]' "[168]

Thus, with respect to the Controller's authority and responsibility over state audits, the Commission exercises "very limited review 'out of deference to…the legislative delegation of administrative authority of the agency, and to the presumed expertise of the agency within its scope of authority.'"[169] The Commission "may not reweigh the evidence or substitute it's judgment for that of" the Controller[170]. The Commission must also review the Controller's audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.[171]

Here, the Controller has explained that the evidence available to substantiate costs was sufficient for some employees, but not for others. The Controller has detailed its efforts to work with the claimant, and its acceptance of less-thorough documentation than that required by the plain language of the parameters and guidelines.

Based on the foregoing, the Commission finds that the Controller's disallowance of salaries and benefits for Dee Howard and Ernest Rodriguez was not arbitrary, capricious, or entirely lacking in evidentiary support, and the audit adjustment is correct~~costs claimed for these two employees should be reinstated~~.

2. *There is no evidence in the record to support the benefits claimed by San Mateo and, thus, the Controller's audited benefit rate is not arbitrary, capricious, or entirely lacking in evidentiary support.*

San Mateo disputes the application of an "audited" benefit rate. San Mateo asserts that "[t]he Controller calculated a benefit rate to be applied to the salaries to determine the total allowable salary and employee benefits for each employee." The resulting rates were between 16.62719 percent and 17.66762 percent for the three years subject to audit. San Mateo objects to this calculation, arguing that "[t]he Controller has not indicated why it was necessary to calculate an

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[167] *Johnston v. Sonoma County Agricultural* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

[168] *American Bd. of Cosmetic Surgery, Inc, supra*, 162 Cal.App.4th at pgs. 547-548.

[169] *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, at p. 230.

[170] *American Bd. of Cosmetic Surgery, Inc, supra*, 162 Cal.App.4th at pgs. 547-548.

[171] *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

average benefit rate when the District reported actual benefit costs in its general ledger, that is, why an average rate is better than actual benefit costs." San Mateo also asserts that the claiming instructions provide for a "default" benefit rate of 21 percent, which can be added to hourly payroll costs.[172]

The Controller maintains that the 21 percent rate asserted by the district applies to the *Collective Bargaining* program, and is not applicable to these claiming instructions.[173] Accordingly, the claiming instructions submitted to the Commission by both parties contain no default benefit rate applicable to this mandate.[174]

The Controller also argues that the district disputes the audited rate "but fails to provide any alternative." The Controller maintains that San Mateo "failed to provide any documentation supporting actual benefit amounts paid to each employee, so the auditor calculated a benefit rate by dividing total benefits claimed by total salaries claimed."[175] San Mateo makes reference to its "general ledger," but no such document is found in the record, and the existence of "actual benefit costs," assertedly provided to the Controller, cannot be verified.[176]

There is no evidence in the record of actual benefit amounts paid to each employee, only the benefit totals included in San Mateo's worksheets.[177] The only benefit amounts in the record are the audited benefit amounts in the Controller's "schedule of allowable salaries and benefits."[178] Absent any documentation substantiating the benefit amounts claimed, the Controller's reductions cannot be evaluated; however, neither can the district's claims be supported.

Based on the foregoing, the Controller's audited benefit rate is not arbitrary, capricious, or entirely lacking in evidentiary support. In comments submitted on the draft staff analysis the claimant concedes this issue.[179]

E. Disallowance of Other Outgoing Expenses Claimed by San Mateo: Controller's Reduction was not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.

In its audit of San Mateo's reimbursement claims the Controller identified unallowable costs for "other outgoing expenses" for fiscal year 2001-2002, in the amount of $41,375, "recorded on three separate journal transactions." The Controller found that these transactions were not

[172] Exhibit A, San Mateo IRC, at p. 12.

[173] Exhibit C, Controller's Comments on San Mateo IRC, at p. 14.

[174] See Exhibit A, San Mateo IRC, at pp. 40-42; Exhibit C, Controller's Comments on San Mateo IRC, at pp. 35-37.

[175] Exhibit C, Controller's Comments on San Mateo IRC, at p. 2.

[176] Exhibit A, San Mateo IRC, at p. 12.

[177] Exhibit A, San Mateo IRC, at pp. 89; 104; 119.

[178] Exhibit C, Controller's Comments on San Mateo IRC, at pp. 52-54.

[179] Exhibit H, Claimants' Comments on Draft Staff Analysis, at p. 12.

supported by documentation, "e.g., in invoices or other source documentation." The district did not respond to that finding prior to issuance of the final audit report.[180]

San Mateo disputes the disallowance of "other outgoing expense costs," and challenges the Controller to explain what is meant by these terms. San Mateo argues that "the Controller should provide the derivation of "outgoing expense costs," which is not described in generally accepted accounting principles." The district argues that "there is no documentation standard for which the district was on notice that requires journal voucher transactions to comply with any documentation standard other than the financial reporting standards mandated by the state for community colleges."[181]

The Controller counters that "expenses" and "costs" are synonymous, and that the district "makes no mention whatsoever as to the factual nature of the finding nor does it offer any documentation that supports the three journal voucher entries."[182] In rebuttal comments, San Mateo maintains that the Controller "does not state why these costs are not mandate-related, excessive, or unreasonable."[183]

As discussed above, the parameters and guidelines requires that all costs claimed must be traceable to source documents that show evidence of the validity of such costs. Those documents, in turn are required to be certified under penalty of perjury, but certification alone cannot substitute for probative value. It is not necessary, under the parameters and guidelines, and consistent with *Clovis Unified*, as discussed above, that claimants produce unimpeachable proof of costs incurred, produced at or near the time the costs were incurred so as to reinforce the reliability of those documents. However, the documentation must show some evidence that costs are related to the mandate, and the term "other outgoing expenses," even if claimed and certified to be related to the mandate, is not sufficient to show the validity of the costs. The record indicates that the Controller offered the district an opportunity to substantiate these costs, and the district declined to do so, instead asserting that the burden should be on the Controller to show that the costs are not mandate-related. A claimant's certification that costs are related to the mandate is not sufficient in itself to substantiate the costs.

Based on the foregoing, the Commission finds that the Controller's finding regarding "other outgoing expenses" was not arbitrary, capricious, or entirely lacking in evidentiary support, and a reduction of San Mateo's claim in the amount of $41,375 is therefore supported. In comments submitted on the draft staff analysis the claimant concedes this issue.[184]

F. Disallowance of Health Services Not Substantiated in the Base Year in the Reimbursement Claims of San Bernardino

The scope of allowable health services costs for this test claim is defined and limited by the so-called "maintenance of effort" requirement: community college districts are required by the test claim statute to continue providing health services "at the level provided" during the base year,

[180] Exhibit A, San Mateo IRC, at p. 54.

[181] Exhibit A, San Mateo IRC, at p. 15.

[182] Exhibit C, Controller's Comments on San Mateo IRC, at p. 17.

[183] Exhibit E, San Mateo Rebuttal Comments, at p. 8.

[184] Exhibit H, Claimants' Comments on Draft Staff Analysis, at p. 12.

1986-87. The parameters and guidelines and claiming instructions provide a long list of services that may be eligible for reimbursement in the claim year to the extent those services were provided in the base year. The analysis below determines that the list is illustrative, not exhaustive, and a too-narrow reading of the "maintenance of effort" requirement is not warranted. The analysis below also concludes that the Controller's reductions for two of the disallowed services were plainly inconsistent with the record, reduction for one of the disallowed services was incorrect because it was based on a too-narrow reading of the test claim statute and parameters and guidelines, and reductions for two other disallowed services were correctly made, based on the record. Finally, the analysis below approves of the Controller's proportional reductions for the correctly disallowed services.

San Bernardino claimed a total of $545,964 in health services direct costs for fiscal year 2001-2002, and $622,237 in health services direct costs for fiscal year 2002-2003.[185] The Controller reduced health services costs claimed by San Bernardino in amounts of $41,389 for fiscal year 2001-2002, and $61,739 for fiscal year 2002-2003, on grounds that the district claimed costs for services not provided in the base year, fiscal year 1986-87. The Controller found that "flu shots, hepatitis shots, pap smears, and outside laboratory services for San Bernardino Valley College, and flu shots, hepatitis shots, outside laboratory services, and marriage therapy for Crafton Hills College," were services not provided in fiscal year 1986-87, and therefore were not reimbursable.[186] San Bernardino asserts that the Controller incorrectly reduced reimbursement for health services costs claimed, because the *Controller could not show* that services claimed were not provided in the base year, and the Controller interpreted the maintenance of effort requirement too narrowly. In addition, San Bernardino argues that the Controller improperly compared the audit years to the District's reimbursement claim from the 1997-98 fiscal year, thus establishing an alternate base year in violation of the statute; and that the Controller improperly measured the maintenance of effort requirement with reference to individual campuses, rather than the District as a whole. Finally, San Bernardino argues that the Controller's method of reducing health services costs on the basis of a proportional valuation of services disallowed was arbitrary and capricious.[187]

1. *Costs for flu shots were incorrectly disallowed, and should be reinstated in the full amount reduced, because the District indicated in its claim forms that it provided influenza immunizations in the base year.*

The parameters and guidelines provide a long list of services, which are stated to be "reimbursable to the extent they were provided by the community college district in fiscal year 1986-87." The claiming instructions contain the same list of services, and provide a form with columns for the reimbursement year and the 1986-87 fiscal year (the base year). Claimants are required to mark in those columns the services provided in the claim year, and the services provided in the base year; only those services marked in both columns are reimbursable. Those forms, as a part of the reimbursement claim, are submitted under penalty of perjury.

[185] Exhibit D, SCO Comments on San Bernardino IRC, at pp. 16-17.

[186] Exhibit B, San Bernardino IRC, at p. 53.

[187] *Id*, at pp. 11-13.

The parameters and guidelines provide for reimbursement of "Immunizations," including "Diptheria/Tetanus," "Measles/Rubella," and "Influenza."[188] The claim forms, accordingly, provide columns in which claimants are expected to indicate whether those services were provided in the base year, and in the claim year, and if the services are indicated in both the claim year and the base year, they are reimbursable, consistently with the parameters and guidelines.[189]

Here, San Bernardino indicated in its 2001-2002 and 2002-2003 claim forms that immunizations for "Influenza" were provided in both the base year and the claim years.[190] The Controller determined that "flu shots" were not provided in the base year and therefore reduced the claimant's reimbursement in accordance with the number of flu shots provided as a percentage of total health services provided in the claim years.

The Commission takes official notice that "influenza immunizations" are commonly known also as "flu shots,"[191] and that the claimant therefore correctly indicated in the claim forms that "flu shots" were provided in the base year.[192] Accordingly, the Controller now concedes that reimbursement is required for "flu shots."[193]

Based on the foregoing, the Commission finds that costs for flu shots were incorrectly disallowed and must be reinstated in the full amount reduced.

2. *Costs for outside labs were incorrectly disallowed, and should be reinstated in the full amount reduced, because outside labs were provided in the base year, and inadvertently omitted from the reimbursement claims for the audit years.*

The parameters and guidelines provide that "outside labs" are reimbursable, to the extent that these services were provided in the base year.[194] Accordingly, the claim forms provide an opportunity for a community college district to certify whether "outside labs" were provided in the base year (1986-87), and in the claim year; only services that were provided in both the base year and the claim year are allowable.[195]

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[188] Exhibit B, San Bernardino IRC, at p. 33-34.

[189] Exhibit B, San Bernardino IRC, at pp. 92-94.

[190] Exhibit B, San Bernardino IRC, at pp. 93; 101.

[191] Code of Regulations, title 2, section 1187.5 ["Official notice may be taken in the manner and of such information as is described in Government Code Section 11515."]; Government Code section 11515 ["[O]fficial notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State."]; Evidence Code 451 ["Judicial notice shall be taken of…¶… [f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute."]

[192] Exhibit B, San Bernardino IRC, at pp. 93; 101.

[193] Exhibit I, SCO Comments on Draft Staff Analysis, at pp. 4-5.

[194] Exhibit B, San Bernardino IRC, at p. 33-34.

[195] See, e.g., Exhibit B, San Bernardino IRC, at pp. 92-94.

San Bernardino indicated in its 2001-2002 and 2002-2003 reimbursement claims that "outside labs" were provided in the claim years, but not in the base year.[196] The Controller's audit report indicates that "in an attempt to determine if the health services in question were reported in prior-year mandated cost claims, we asked district personnel to provide the earliest mandated cost claims available." The Controller was "given a copy of [San Bernardino's] FY 1997-98 Health Fee Elimination cost claim." In reviewing that claim, the Controller "observed that the health services in question were not listed."[197] Accordingly the Controller reduced reimbursement for "outside labs," in accordance with the number of outside labs provided as a percentage of total health services provided in the claim years.[198]

However, the record of this IRC indicates that "outside labs" *were provided in the base year* in prior reimbursement claims.[199] Therefore the omission of "outside labs" in the 2001-02 and 2002-03 claims was likely in error. Accordingly, the Controller now concedes that reimbursement is required for "outside labs," stating that "we subsequently re-reviewed the district's FY 1997-98 claim…[and] noted that the district's FY 1997-98 claim does indicate that the district provided outside laboratory services during the 1986-87 base year." Therefore, the Controller stated "for this reason only, the SCO agrees to allow claimed costs attributable to outside laboratory services."[200] The Controller states that it will publish a revised final audit report accounting for the incorrect reduction.

Based on the foregoing, the Commission finds that costs for outside labs were incorrectly disallowed and that those costs must be reinstated in the full amount reduced.

3. Costs for pap smears were correctly disallowed, in accordance with the District's certification that these services were not provided in the base year.

The parameters and guidelines provide that "pap smears" are reimbursable, to the extent that these services were provided in the base year.[201] Accordingly, the claim forms provide an opportunity for a community college district to certify whether "pap smears" were provided in the base year (1986-87), and in the claim year; only services that were provided in both the base year and the claim year are allowable.[202]

San Bernardino certified in its reimbursement claims for fiscal years 2001-2002 and 2002-2003 that pap smears were a service provided in the claim years, but not in the base year.[203] However, the District nevertheless included costs for pap smears in its total reimbursement claim.[204] The

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[196] Exhibit B, San Bernardino IRC, at pp. 93; 101.

[197] Exhibit B, San Bernardino IRC, at p. 54.

[198] Exhibit D, SCO Comments on San Bernardino IRC, at pp. 16-17.

[199] Exhibit I, SCO Comments on Draft Staff Analysis, at p. 110.

[200] Exhibit I, SCO Comments on Draft Staff Analysis, at p. 21.

[201] Exhibit B, San Bernardino IRC, at p. 33-34.

[202] See, e.g., Exhibit B, San Bernardino IRC, at pp. 92-94.

[203] Exhibit B, San Bernardino IRC, at pp. 93; 101.

[204] Exhibit D, SCO Comments on San Bernardino IRC, at pp. 16-17.

Controller reduced reimbursement for pap smears, in accordance with the District's certification that these costs were not provided in the base year.[205]

Based on the foregoing, the Commission finds that costs for pap smears were correctly disallowed, and in accordance with the parameters and guidelines and claiming instructions, for claim years 2001-2002 and 2002-2003.

4. *Costs for hepatitis shots were incorrectly disallowed, and should be reinstated in the full amount reduced, because the District certified that immunization services were provided in the base year.*

San Bernardino argues that the Controller is interpreting the scope of reimbursable activities pursuant to the maintenance of effort requirement too narrowly, and that the District's claim forms "accurately reflect that immunization services were available in FY 1986-87." San Bernardino asserts that "Hepatitis B vaccinations and flu shots are just a part of the whole scope of services which may comprise immunization services."[206] Based on the analysis below, the Commission agrees that the scope of reimbursable services under the parameters and guidelines and claiming instructions should be viewed in terms of classes of services, rather than focusing on distinctions within those classes, particularly with respect to services that can be classified within a fairly narrow scope, such as immunizations.

In the test claim statement of decision, the Commission found that the statute imposed a "maintenance of effort" requirement on community college districts requiring them to continue to provide health services "at the level provided" in the base year, while suspending authority until January 1, 1988 to levy health service fees previously allowed.[207] The statute was amended in 1987 to expressly reinstate the suspended fee authority with a cap indexed to inflation, and to provide that community colleges must continue to maintain services, now at the level provided in fiscal year 1986-87.[208] The parameters and guidelines were amended in 1989 to reflect the later statute and the maintenance of effort requirement based on the 1986-87 fiscal year.[209]

The parameters and guidelines provide a long list of services, which are stated to be "reimbursable to the extent they were provided by the community college district in fiscal year 1986-87," but the origin of the list is not apparent from the record, or discussed in the staff analysis accompanying the parameters and guidelines.[210] The list includes some services that are stated in general terms, such as "Birth Control," and "Dental Services," while others are couched in terms of varying specificity, such as "Antacids," "Antidiarrheal," and "Aspirin, Tylenol, etc." Government Code section 17558, at all times relevant to this IRC, required that "claiming instructions shall be derived from the statute or executive order creating the mandate and the

[205] Exhibit B, San Bernardino IRC, at p. 53.

[206] Exhibit B, San Bernardino IRC, at p. 17.

[207] Exhibit X, Test Claim Decision CSM-4206.

[208] Education Code section 72246 (Stats. 1987, ch. 1118).

[209] See Health Fee Elimination Parameters and Guidelines, Exhibit A, San Mateo IRC, at p. 32.

[210] Exhibit X, Commission Hearing Binder for Item 6, Parameters and Guidelines, August 27, 1987.

parameters and guidelines adopted by the commission…"[211] Accordingly, the claiming instructions contain the same list of services adopted in the parameters and guidelines (though the origin of the list is uncertain), with columns for the current reimbursement year and the 1986-87 fiscal year. Claimants are required to mark in those columns the services provided in the current claim year, and the services provided in the base year; only those services marked in both columns are reimbursable. Those forms, as a part of the reimbursement claim, are submitted under penalty of perjury.

Neither the claim forms, nor the parameters and guidelines expressly name hepatitis immunizations as one of the reimbursable services within the scope of the mandate. There is no place on the claim form for a district to indicate that it provided hepatitis immunizations in the base year. Accordingly, San Bernardino did not indicate on the claim forms that it provided hepatitis immunizations in the base year.[212] San Bernardino nevertheless included costs for hepatitis immunizations in its total direct cost claim, and now argues that hepatitis immunizations are "just a part of the whole scope of services which may comprise immunization services."[213]

The Controller, relying on the claim forms and the list contained within the parameters and guidelines, disallowed costs for "hepatitis shots," and adjusted San Bernardino's reimbursement claim in accordance with the number of hepatitis shots provided as a percentage of total health services provided in the claim years. San Bernardino argues that services provided in the base year should be viewed in terms of classes of services, rather than focusing on distinctions within those classes. For example, San Bernardino argues that the Controller disallowed "Hepatitis B shots," finding that hepatitis vaccinations were not provided in the base year.[214] But San Bernardino argues that "*immunization services* were available in FY 1986-87," and points to the services listed in the claiming instructions, which include "Immunizations." Hepatitis vaccinations, the claimant argues, "are just a part of the whole scope of services which may comprise immunization services."[215]

The Commission agrees with claimant's interpretation, particularly with respect to services that can be classified within a fairly narrow scope, such as immunizations. The maintenance of effort requirement of the test claim statute cannot be read so narrowly as to limit the provision of reimbursable health services to the state of medical technology and knowledge available in 1986-1987 since this would lead to absurd results.[216] The narrow reading of maintenance of effort as

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[211] Government Code section 17558 (Added, Stats. 1995, ch. 945 (SB 11); amended, Stats. 1996, ch. 45 (SB 19)).

[212] See Exhibit B, San Bernardino IRC, at pp. 93; 101.

[213] Exhibit B, San Bernardino IRC, at p. 17.

[214] Exhibit B, San Bernardino IRC, at p. 12.

[215] Exhibit B, San Bernardino IRC, at p. 17.

[216] See *Lopez v. Superior Court* (2010) 50 Cal.4th 1055 ["If the language is susceptible of multiple interpretations, the court looks to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. After considering these extrinsic aids, we must select the construction that comports most

applied by the Controller here could endanger student health, especially with respect to services such as immunizations.

Lending further support to the reasoning above is a letter dated March 16, 1984, approximately seven weeks after the enactment of the test claim statute, and signed by Gerald C. Hayward, then Chancellor of the California Community Colleges. This letter shows that the maintenance of effort requirement was interpreted by the Chancellor's Office in terms of the scale of a district's health services program, rather than a requirement that the exact services provided in the base year be continued in the next. The letter was written to "respond to numerous requests for this agency to interpret the student fee portions of [the test claim statute," and states, with respect to the "maintenance of effort requirement," as follows:

> We interpret the words "maintain health services at the same level provided during the 1983-84 fiscal year" to mean the actual level of services provided. However, because of the difficulty of quantifying such a concept, we believe that the law would allow districts to substitute dollars spent as a proxy…[217]

As the administrative agency responsible for overseeing the community college system, the interpretation of the Chancellor of the California Community Colleges office is entitled to great weight; the courts have long held that "[a]n agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts."[218] The general approach to the concept of *health services provided in the base year* is also consistent with the parameters and guidelines, which describes many of the services in general terms, such as "dental services," "lab reports," and "birth control." The list does not provide specific dental services or lab reports that are reimbursable, nor limit birth control to any specific methods or treatments. The list does provide expressly for certain immunizations, including "influenza," "measles/rubella," and "diphtheria/tetanus,"[219] but given the general nature of many of the other items listed in the parameters and guidelines, and the fact that there is no indication in the record of where the list came from, or whether it represents all of the services provided by all community college districts in the base year, it is reasonable to conclude that the Commission intended, when it adopted the parameters and guidelines, that immunizations named in the parameters and guidelines would be illustrative in nature, as suggested by the claimant, rather than exhaustive, as suggested by the Controller.[220]

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closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (internal citations and quotations omitted)].

[217] Exhibit X, Letter from Chancellor of California Community Colleges.

[218] *Yamaha Corp. of America v. State Bd. of Equalization*, (1998) 19 Cal.4th 1.

[219] Exhibit B, San Bernardino IRC, at p. 34.

[220] In comments on the draft staff analysis, (Exhibit I, page 122) the Controller submitted an email referencing a phone conversation with a person alleged to be a nurse at San Bernardino Valley College in 1986-87, who recalled that the college provided "immunizations (Tb [illegible] tests, Tetanus/Dyptheria [sic], Measles/Mumps/Rubella)" in the base year. This new item of evidence (albeit highly suspect hearsay) does not indicate that influenza immunizations were provided in the base year, which is inconsistent with the claim forms in the record and

The Controller argues, in comments submitted on the draft staff analysis, that basing a Commission decision on a policy argument is "beyond the scope of the Commission's authority." However, the Commission does have the authority to interpret the parameters and guidelines, and the requirements of the test claim statute using the canons of statutory construction. The "maintenance of effort requirement" is not, by its terms, or in accordance with earlier Commission findings, limited to discrete medical procedures or services that were provided in the base year. The test claim statute has been interpreted by the agency responsible for oversight of the community colleges to require that a community college district maintain a health services program *on the same scale* as it did in 1986-87. And, "the difficulty of quantifying such a concept," as pointed out by the Chancellor, most likely explains the list of services found in the parameters and guidelines: the list of services adopted by the Commission in the parameters and guidelines appears, from the record, to have been first proposed by the test claimant, Rio Hondo Community College District, but there is no other explanation of the origin of the list. Thus, the Commission finds that the parameters and guidelines are *illustrative* of the types of services provided in the base year which are subject to the maintenance of effort requirement.

Based on the foregoing, the Commission finds that costs for hepatitis immunizations were incorrectly disallowed, and should be reinstated in the full amount reduced.

5. *Costs for marriage therapy were correctly disallowed, based on the District's failure to substantiate services provided in the base year.*

The parameters and guidelines, and the claiming instructions, provide for reimbursement for a number of different types of counseling services, including "Stress Counseling," "Crisis Intervention," "Child Abuse Reporting and Counseling," "Substance Abuse Identification and Counseling," and "Eating Disorders," among other things. However, neither the claim forms, nor the parameters and guidelines, expressly name marriage therapy as one of the reimbursable services within the scope of the mandate. There is no place on the claim form for a district to indicate that it provided marriage therapy in the base year, and, accordingly, San Bernardino did not indicate on the claim forms that it provided marriage therapy in the base year.[221] Nevertheless, San Bernardino included costs for marriage therapy in its total direct cost claim.

The Controller, relying on the claim forms and the parameters and guidelines, disallowed costs for marriage therapy and adjusted San Bernardino's reimbursement claim in accordance with the units of service of marriage therapy provided as a percentage of total health services provided in the claim years.[222]

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inconsistent with the Controller's concession at page 4 of Exhibit I. Furthermore, the statement above is inconsistent with the claim forms indicating that tetanus and measles immunizations *were not* provided in the base year. Nevertheless, the Commission agrees with the claimant's interpretation of immunization services as constituting a class of services, rather than a menu of services limited by the list originating in the parameters and guidelines, and the analysis is unchanged.

[221] See Exhibit B, San Bernardino IRC, at pp. 93; 101.

[222] Exhibit D, SCO Comments on San Bernardino IRC, at pp. 16-17.

As discussed above, the maintenance of effort requirement need not be read so narrowly as to constrain minor modifications within a class of services provided by a community college district's health services program in the base year, based on advances in medicine and current health concerns. However, no argument is advanced that marriage therapy is derivative of, related to, or otherwise part and parcel of any services provided in the base year. The District has made no attempt to substantiate the provision of marriage therapy services in the base year, or to argue the inclusion of marriage therapy within any of the enumerated services. In addition, the Controller has stated that "[t]hroughout the audit fieldwork and up until October 22, 2004 (the date of this response), the district did not provide us with any documentation to substantiate its assertion that the health services in question were provided at the San Bernardino Valley College and/or Crafton Hills College in FY 1986-87."

Based on the foregoing, the Commission finds that costs for marriage therapy were properly disallowed in accordance with the parameters and guidelines and claiming instructions.

6. The Controller did not establish an alternate base year for substantiation of the maintenance of effort requirement, or require proof that health services were rendered *in the base year in order to substantiate reimbursement in the claim years.*

San Bernardino argues that the inventory of available services for the audit years "was compared to the health services inventory for FY 1997-98," and the services listed in the inventory for the audit years but not also listed in fiscal year 1997-1998 were "assumed to be 'new services not offered in 86/87.'" San Bernardino argues that this comparison "established FY 1997-98 as an alternative base year, contrary to the Education Code and the parameters and guidelines."[223] In addition, San Bernardino argues that "[t]he Controller is endeavoring to compare the student health services rendered during the fiscal years claimed (audit years) to those services *rendered* during the 1986-87 fiscal year." San Bernardino maintains that "[t]he statutory requirement is that at least the same level of services be provided…[and that] [t]here is no basis in law or fact which requires the entire variety of health care services available each year to actually have been utilized, which is to say rendered, each year in order to prove that the same services are provided."

San Bernardino is correct that the Controller may not establish an alternate base year; the services provided in 1986-87 are mandated under the plain language of the test claim decision and the parameters and guidelines, and to the extent those services are not offset by student health fees, costs to provide those services are reimbursable.[224] However, the Controller explains in its comments on the draft staff analysis that it "never attempted to use the 1997-98 inventory as a restrictive document, rather it was used as an attempt to prove that a service was rendered in the reviewed year and reimbursed, which provides some evidence that it was available in the base year."[225] The Controller's explanation is persuasive: the Controller was not attempting to establish an alternate base year, but rather attempting to *include* additional reimbursable services by comparing the district's more recent certifications of services provided

[223] Exhibit B, San Bernardino IRC, at p. 13.

[224] See Exhibit B, San Bernardino IRC, at p. 33.

[225] Exhibit I, Controller's Comments on Draft Staff Analysis, at p. 7.

in the base year with earlier certifications of the services provided in the base year, to determine if the district might have left certain services out inadvertently.[226]

Moreover, San Bernardino's reasoning with respect to the distinction between services *rendered* and services *available* is sound, but it is not clear that the Controller's audit adjustments in any way relied upon an interpretation of services "provided." The district's interpretation of services *provided* being equivalent to services *available* is consistent with the purpose and intent of the maintenance of effort requirement, and the Controller agrees that "the term 'provided,' as used in the parameters and guidelines, is synonymous to 'available.'" However, the Controller argues that the distinction is "irrelevant to analyzing the factual accuracy of the audit finding."[227]

The record of this IRC indicates that the Controller has accepted the claim forms as evidence that a service was *provided* in the base year. For example, with respect to "outside labs," which were apparently left out of the reimbursement claims that are the subject of this IRC (2001-02 and 2002-03), the Controller was satisfied that these services were provided in the base year after comparing the claim years to the 1997-98 reimbursement claims filed. The Controller concluded that the omission in 2001-02 and 2002-03 was inadvertent. There is no indication that the services that the claimant alleged in the claim forms were limited to those *rendered*, or that the claim forms were rejected because claimant's broad interpretation of services *provided* was employed to complete the forms.

Based on the foregoing, the Commission finds that the Controller did not establish an alternate base year for substantiation of the maintenance of effort requirement, or require proof that health services were *rendered* in the base year in order to substantiate reimbursement in the claim years.

7. The Controller's method of adjusting costs for overstated health services was not arbitrary or capricious, in light of the absence of cost information provided by the district for the specific services disallowed.

San Bernardino argues that the "audit report does not explain how the adjustments were calculated." San Bernardino argues that "it appears that the Controller generated the disallowance by first assigning some type of numeric unit of service provided for each health service activity listed in the audit year health service inventories." Then, "a percentage of the total services was assigned based on the number of units of service for that particular service divided by the total number of services for the audit year." San Bernardino argues that "this method assumes that the cost of each type of service is the same, that is, for example, the cost of a cardiogram is the same as the cost of an eye exam." San Bernardino argues that "the percentage amounts for each of the 'new' activities in the audit years (flu shots, Hepatitis B shots, outside lab services, and pap smears) were added to determine a total percentage for each year of unallowable new services." Then, the percentage of unallowable services was multiplied by total services costs to determine a dollar amount of the disallowance.[228]

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[226] Note, as discussed above, that "outside labs" were left out of the audit year claims, but claimed in the 1997-98 fiscal year, and for that reason the Controller found that those services were reimbursable.

[227] Exhibit I, Controller's Comments on Draft Staff Analysis, at p. 20.

[228] Exhibit B, San Bernardino IRC, at pp. 11-12.

The Controller explains the disallowance calculation in its audit report and comments on the IRC, stating that "the district did not maintain information identifying the costs of the [disallowed services]." The Controller continued: "Consequently, the SCO calculated the fiscal year audit adjustments by applying the percentage of new units of services provided annually by colleges to total health services costs, net of SCO insurance adjustments."[229] In comments on the draft staff analysis, the Controller further explained that "the district did not present any documentation or alternative methodology to identify the costs attributable to the unallowable services." The Controller states that in the absence of any documentation of the actual costs attributable to the unallowable health services, it "concluded that it is reasonable to identify unallowable costs based on a percentage of unallowable services provided to total services provided."[230]

The Commission finds that absent any documentation identifying costs attributable to the disallowed services, the Controller's method of calculating the adjustments for pap smears and marriage therapy was not arbitrary, capricious, or entirely lacking in evidentiary support.

G. Controller's Reduction Based on Disallowance of Insurance Premiums Claimed by San Bernardino was not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.

The Controller reduced amounts claimed by San Bernardino for "services and supplies" in amounts of $37,348 for fiscal year 2001-2002, and $38,322 for fiscal year 2002-2003, on grounds that athletic insurance costs are beyond the scope of the mandate.[231]

San Bernardino disputes the disallowance of "overstated services and supplies," arguing that the Controller inappropriately disallowed costs for student insurance premiums.

The Controller explains that the district carried three types of insurance coverage in fiscal years 2001-2002 and 2002-2003: basic coverage for students as well as athletes, super catastrophic coverage for athletes, and catastrophic coverage for students. The Controller asserts that the disallowed costs are only the "intercollegiate athletes' portion of the basic coverage and the intercollegiate athletes' portion of the super catastrophic coverage," along with a small amount of costs that the Controller finds unsupported. The maintenance of effort requirement, pursuant to section 76355, applies only to those health services for which community college districts are permitted to charge a fee; and because section 76355(d) prohibits expenditures of health fees on athletic-related costs, the costs of athletic insurance are not mandated, and must be disallowed.[232]

The Controller submitted a worksheet detailing the disallowed portions of insurance, showing that only the portions of basic coverage and catastrophic coverage attributable to intercollegiate

[229] Exhibit D, Controller's Comments on San Bernardino IRC, at pp. 16-17.

[230] Exhibit I, Controller's Comments on Draft Staff Analysis, at pp. 23-24.

[231] Exhibit B, San Bernardino IRC, at p. 55.

[232] Exhibit D, Controller's Comments on San Bernardino IRC, at pp. 17-19.

athletes were disallowed.[233] The amounts disallowed were $37,348 for fiscal year 2001-2002, and $35,206 for fiscal year 2002-2003,[234] and in addition $3,116 in "unsupported costs."[235]

San Bernardino argues that "the adjustment is inappropriate since student athletes are part of the student population for purpose of the general student population insurance premium." San Bernardino reasons that the athletic insurance premiums "[pertain] to coverage while participating in intercollegiate sports, not while they are attending class or on campus in their capacity [as] a member of the general student population."[236]

San Bernardino has not disputed the Controller's argument that costs related to athletics are not included within the maintenance of effort requirement, nor submitted any documentation in answer to the Controller's worksheet attributing the disallowed costs to portions of insurance premiums applicable to collegiate athletic programs. San Bernardino's assertion that intercollegiate athletes are covered by the college's general student population insurance premiums "while they are attending class" is logically true and correct, but the idea that the disallowed costs extend to any portion of the general student population premiums is not substantiated by any documentation in the record.

The Controller's documentation clearly supports the disallowance, and nothing in the record supports the additional $3,116 that the Controller found was "unsupported." Based on the foregoing, the Commission finds that the disallowance of costs related to insurance premiums for intercollegiate athletes not arbitrary, capricious, or entirely lacking in evidentiary support. In comments submitted on the draft staff analysis the claimant concedes this issue.[237]

IV. Conclusion

Pursuant to Government Code section 17551(d) and section 1185.7 of the Commission's regulations, the Commission finds that the following reductions by the Controller's Office are incorrect and that the costs, as specified, should be reinstated:

- Reduction of San Bernardino's reimbursement claims based on understated health fee revenues, in the amount of $150,031, ~~absent an attempt to establish the number of students exempt from the fee was arbitrary, capricious, or entirely lacking in evidentiary support; reductions made on the basis of understated fee revenues~~ should be reinstated pending reevaluation based on the total number of students enrolled less those exempt from the fee. On remand, the Controller should reexamine the health fees authorized based on the total number of *enrolled students less those exempt from the fee*. If San Bernardino is unable to assist the Controller and provide documentation of the number of exempt students for whom fees cannot legally be charged, the Controller may apply the Health Fee Rule using any reasonable source available to obtain enrollment and exemption information.

[233] Exhibit D, Controller's Comments on San Bernardino IRC, at pp. 79-82.

[234] Ibid.

[235] Exhibit B, San Bernardino IRC, at p. 55.

[236] Exhibit B, San Bernardino IRC, at pp. 16-17.

[237] Exhibit H, Claimants' Comments on Draft Staff Analysis, at p. 13.

- ~~Disallowance of salaries and benefits for Ernest Rodriguez and Dee Howard in San Mateo's reimbursement claims was arbitrary, capricious, or entirely lacking in evidentiary support, in light of costs allowed for other employees based on the same or similar documentation; costs for the salaries and benefits of Ernest Rodriguez and Dee Howard should be reinstated, to the extent those costs are supported by the district's accounting records substantiating amounts paid from health services accounts.~~

- Disallowance of costs for hepatitis and influenza immunizations, and outside lab services was arbitrary, capricious, or entirely lacking in evidentiary support; costs claimed for these services should be reinstated in the full amount reduced.

The Commission further finds that the following reductions were reasonable and supported by the law, the parameters and guidelines, the claiming instructions, and the record:

- Reduction of San Mateo's reimbursement claims, on the basis of understated health fee revenues, in the amount of $70,603.

- The reduction of indirect costs claimed by San Mateo, in the amount of $112,243, based on the district's incorrect application of its approved 30% indirect cost rate to direct costs other than the distribution base of salaries and benefits.

- The reduction of indirect costs claimed by San Bernardino, in the amount of $281,494, based on the district's failure to comply with the claiming instructions in the development of its indirect cost rate, and the Controller's reasonable use of an alternative method to calculate indirect costs.

- <u>The disallowance of salaries and benefits for Ernest Rodriguez and Dee Howard, based on an absence of employee time records or other documentation as required by the parameters and guidelines.</u>

- The reduction of benefits claimed by San Mateo, in the amount of $88,633, based on the district's failure to support its claimed benefit amounts.

- The reduction of costs claimed for "other outgoing expenses" by San Mateo, in the amount of $41,375, based on the district's failure to support claimed expenses.

- The reduction of health insurance costs and other overstated services and supplies in San Bernardino's reimbursement claims, in the amounts of $37,348 for fiscal year 2001-2001, and $38,322 for fiscal year 2002-2003, based on the documentation submitted by the Controller.

- The reduction of health services costs for pap smears and marriage therapy, on the basis of San Bernardino's reimbursement claims failing to substantiate that these services were provided in the base year.

The Commission hereby remands the subject claims to the Controller, with instructions to reinstate the incorrect reductions specified above consistent with these findings.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On January 7, 2014, I served the:

Proposed Statement of Decision and Notice of Hearing
Health Fee Elimination, 05-4206-I-04 and 05-4206-I-08
Education Code Section 76355
Statutes 1984, Chapter 1, 2nd E.S.; Statutes 1987, Chapter 1118
Fiscal Years 1999-2000, 2000-2001, 2001-2002, and 2002-2003
San Mateo County Community College District and San Bernardino Community College District, Claimants

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 7, 2014 at Sacramento, California.

Heidi J. Palchik
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 12/31/13

Claim Number: 05-4206-I-04 and 05-4206-I-08

Matter: Health Fee Elimination

Claimants: San Bernardino Community College District
San Mateo County Community College District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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.)

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Lacey Baysinger, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
lbaysinger@sco.ca.gov

Kathy Blackwood, *San Mateo County Community College District*
3401 CSM Dr., San Mateo, CA
Phone: (650) 574-6550
blackwoodk@smccd.edu

Steve Bruckman, *California Community Colleges*
Chancellor's Office, 1102 Q Street, 1102 Q Street, Sacramento, CA 95814-6511
Phone: (916) 323-7007
sbruckman@cccco.edu

Michael Byrne, *Department of Finance*
915 L Street, 8th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
michael.byrne@dof.ca.gov

Gwendolyn Carlos, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-5919
gcarlos@sco.ca.gov

Marieta Delfin, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-0706
mdelfin@sco.ca.gov

Tom Dyer, *Department of Finance (A-15)*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
tom.dyer@dof.ca.gov

Edwin Eng, *State Center Community College District*
1525 East Weldon Avenue, Fresno, CA 93704-6398
Phone: (559) 244-5901
ed.eng@scccd.edu

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Ed Hanson, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
ed.hanson@dof.ca.gov

Matt Jones, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
matt.jones@csm.ca.gov

Jill Kanemasu, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-9891
jkanemasu@sco.ca.gov

Jean Kinney Hurst, Senior Legislative Representative, Revenue & Taxation, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814-3941
Phone: (916) 327-7500
jhurst@counties.org

Jay Lal, *State Controller's Office (B-08)*
Division of Accounting & Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0256
JLal@sco.ca.gov

Kathleen Lynch, *Department of Finance (A-15)*
915 L Street, Suite 1280, 17th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
kathleen.lynch@dof.ca.gov

Yazmin Meza, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-0328
Yazmin.meza@dof.ca.gov

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Christian Osmena, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-0328
christian.osmena@dof.ca.gov

Keith Petersen, *SixTen & Associates*
Claimant Representative
P.O. Box 340430, Sacramento, CA 95834-0430
Phone: (916) 419-7093
kbpsixten@aol.com

Mollie Quasebarth, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
mollie.quasebarth@dof.ca.gov

Sandra Reynolds, *Reynolds Consulting Group,Inc.*
P.O. Box 894059, Temecula, CA 92589
Phone: (951) 303-3034
sandrareynolds_30@msn.com

Kathy Rios, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-5919
krios@sco.ca.gov

Nicolas Schweizer, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
nicolas.schweizer@dof.ca.gov

Lee Scott, *Department of Finance*
15 L Street, 8th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
lee.scott@dof.ca.gov

David Scribner, *Max8550*
2200 Sunrise Boulevard, Suite 240, Gold River, CA 95670
Phone: (916) 852-8970
dscribner@max8550.com

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-5849

jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
DSpeciale@sco.ca.gov

Lawrence Strong, *San Bernardino Community College District*
114 South Del Rosa Ave, San Bernardino, CA
Phone: (909) 382-4081
lstrong@sbccd.cc.ca.us