



February 13, 2017

Mr. Larry Strong  
San Bernardino Community College District  
114 South Del Rosa Ave  
San Bernardino, CA

Ms. Jill Kanemasu  
Division of Accounting and Reporting  
State Controller's Office  
3301 C Street, Suite 700  
Sacramento, CA 95816

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

**Re: Draft Proposed Decision, Schedule for Comments, and Notice of Hearing**

*Health Fee Elimination*, 10-4206-I-31

Former Education Code Section 72246 (Renumbered as 76355)<sup>1</sup>

Statutes 1984, Chapter 1 (1983-1984 2nd Ex. Sess.) (AB2X 1);

and Statutes 1987, Chapter 1118 (AB 2336)

Fiscal Years: 2003-2004, 2004-2005, 2005-2006, and 2006-2007

San Bernardino Community College District, Claimant

Dear Mr. Strong and Ms. Kanemasu:

The Draft Proposed Decision for the above-captioned matter is enclosed for your review and comment.

**Written Comments**

Written comments may be filed on the Draft Proposed Decision by **March 6, 2017**. Please note that all representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief. (Cal. Code Regs., tit. 2, § 1187.5.) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over an objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5.) The Commission's ultimate findings of fact must be supported by substantial evidence in the record.<sup>2</sup>

You are advised that comments filed with the Commission on State Mandates (Commission) are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Refer to [http://www.csm.ca.gov/dropbox\\_procedures.php](http://www.csm.ca.gov/dropbox_procedures.php) on the Commission's website for electronic filing instructions. (Cal. Code Regs., tit. 2, § 1181.3.)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

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<sup>1</sup> Statutes 1993, chapter 8.

<sup>2</sup> Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

Mr. Strong and Ms. Kanemasu  
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**Hearing**

This matter is set for hearing on **Friday, May 26, 2017**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The Proposed Decision will be issued on or about May 12, 2017. 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 1187.9(b) of the Commission's regulations.

Sincerely,



Heather Halsey  
Executive Director

**ITEM \_\_**  
**INCORRECT REDUCTION CLAIM**  
**DRAFT PROPOSED DECISION**

Former Education Code Section 72246 (Renumbered as 76355)<sup>1</sup>  
Statutes 1984, Chapter 1 (1983-1984 2nd Ex. Sess.) (AB2X 1); and  
Statutes 1987, Chapter 1118 (AB 2336)

*Health Fee Elimination*

Fiscal Years 2003-2004, 2004-2005, 2005-2006, and 2006-2007

10-4206-I-31

San Bernardino Community College District, Claimant

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**EXECUTIVE SUMMARY**

**Overview**

This analysis addresses the Incorrect Reduction Claim (IRC) filed by San Bernardino Community College District (claimant) regarding reductions made by the State Controller's Office (Controller) to reimbursement claims for costs incurred during fiscal years 2003-2004 through 2006-2007 under the *Health Fee Elimination* program.

The following issues are in dispute:

- Whether the audit of the fiscal year 2003-2004 reimbursement claim was timely;
- Reduction of costs claimed for services and supplies (gift certificates, food, and other promotional items for health fairs), which the Controller found were outside the scope of the mandate;
- The reduction of indirect costs claimed based on asserted faults in the calculation of indirect cost rates; and
- The reduction based on offsetting health service fees which the district was authorized to collect.<sup>2</sup>

**Health Fee Elimination Program**

Prior to 1984, former Education Code section 72246 authorized community college districts that voluntarily provided health supervision and services, direct and indirect medical and hospitalization services, or operation of student health centers to charge almost all students a

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<sup>1</sup> Statutes 1993, chapter 8.

<sup>2</sup> The IRC cover page states the amount in dispute as \$895,614. However, the reductions in dispute total \$737,979 (\$1,531 for services and supplies, plus \$252,577 in indirect costs, plus \$483,871 in understated health service fees).

health service fee not to exceed \$7.50 for each semester or \$5 for each quarter or summer session, to fund these services.<sup>3</sup> In 1984, the Legislature repealed the community colleges' fee authority for health services.<sup>4</sup> However, the Legislature also reenacted section 72246, to become operative on January 1, 1988, to reauthorize the fee, at \$7.50 for each semester (or \$5 per quarter or summer session).<sup>5</sup>

In addition to temporarily repealing community college districts' authority to levy a health services fee, the 1984 enactment required any district that provided health services during the 1983-1984 fiscal year, for which districts were previously authorized to charge a fee, to maintain health services at the level provided during the 1983-1984 fiscal year for every subsequent fiscal year until January 1, 1988.<sup>6</sup> 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 until January 1, 1988.

In 1987, the Legislature amended former Education Code section 72246, operative January 1, 1988, to incorporate and extend the maintenance of effort provisions of former Education Code section 72246.5, which became inoperative by its own terms as of January 1, 1988.<sup>7</sup> In addition, Statutes 1987, chapter 1118 restated that the fee would be reestablished at not more than \$7.50 for each semester, or \$5 for each quarter or summer session.<sup>8</sup> As a result, beginning January 1, 1988, all community college districts were required to maintain the same level of health services they provided in the 1986-1987 fiscal year each year thereafter, with limited fee authority to offset the costs of those services. In 1992, section 72246 was amended to provide that the health fee could be increased by the same percentage as the Implicit Price Deflator whenever that calculation would produce an increase of one dollar.<sup>9</sup>

### **Procedural History**

On January 12, 2005, the claimant filed a reimbursement claim for fiscal year 2003-2004 costs with the State Controller's Office.<sup>10</sup> On January 11, 2006, the claimant filed a reimbursement claim for fiscal year 2004-2005 costs.<sup>11</sup> On November 20, 2007, the claimant filed a

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<sup>3</sup> Former Education Code section 72246 (Stats. 1981, ch. 763). Low-income students, students that depend upon prayer for healing, and students attending a college under an approved apprenticeship training program, were exempt from the fee.

<sup>4</sup> Statutes 1984, 2nd Extraordinary Session, chapter 1, section 4, repealing Education Code section 72246.

<sup>5</sup> Statutes 1984, 2nd Extraordinary Session, chapter 1, section 4.5.

<sup>6</sup> Education Code section 72246.5 (Stats. 1984, 2d. Ex. Sess., ch. 1, § 4.7).

<sup>7</sup> Education Code section 72246 (as amended, Stats. 1987, ch. 1118). See also former Education Code section 72246.5 (Stats. 1984, 2d Ex. Sess., ch. 1, § 4.7).

<sup>8</sup> Education Code section 72246 (as amended, Stats. 1987, ch. 1118).

<sup>9</sup> Education Code section 72246 (as amended, Stats. 1992, ch. 753). In 1993, former Education Code section 72246, was renumbered as Education Code section 76355 (Stats. 1993, ch. 8).

<sup>10</sup> Exhibit A, IRC, page 27.

<sup>11</sup> Exhibit A, IRC, page 106.

reimbursement claim for fiscal year 2005-2006 costs.<sup>12</sup> On December 11, 2008, the audit entrance conference took place.<sup>13</sup> On January 9, 2009, the claimant filed an amended reimbursement claim for fiscal year 2006-2007 costs.<sup>14</sup> On March 18, 2010, the Controller issued its final audit report.<sup>15</sup> On July 16, 2010, the claimant filed this IRC.<sup>16</sup> On December 2, 2014, the Controller submitted late comments on the IRC.<sup>17</sup>

Commission on State Mandates (Commission) staff issued the Draft Proposed Decision on February 8, 2017.<sup>18</sup>

### **Commission Responsibilities**

Government Code section 17561(d) 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 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 1185.9 of the Commission's regulations requires the Commission to send the decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of parameters and guidelines, 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 of the California Constitution.<sup>19</sup> 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

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<sup>12</sup> Exhibit A, IRC, page 115.

<sup>13</sup> Exhibit A, IRC, page 27; Exhibit B, Controller's Late Comments on the IRC, page 6.

<sup>14</sup> Exhibit A, IRC, page 124.

<sup>15</sup> Exhibit A, IRC, page 61.

<sup>16</sup> Exhibit A, IRC, page 1.

<sup>17</sup> Exhibit B, Controller's Late Comments on the IRC. Note that pursuant to Government Code section 17553(d) "the Controller shall have no more than 90 days after the claim is delivered or mailed to file any rebuttal to an incorrect reduction claim. The failure of the Controller to file a rebuttal to an incorrect reduction claim shall not serve to delay the consideration of the claim by the Commission." However, in this instance, due to the backlog of IRCs, these late comments have not delayed consideration of this item and so have been included in the analysis and Proposed Decision.

<sup>18</sup> Exhibit C, Draft Proposed Decision.

<sup>19</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>20</sup>

With regard to the Controller’s audit decisions, the Commission must determine whether they 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.<sup>21</sup>

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.<sup>22</sup> In addition, sections 1185.1(f)(3) and 1185.2(c) of the Commission’s regulations require that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Commission’s ultimate findings of fact must be supported by substantial evidence in the record.<sup>23</sup>

**Claims**

The following chart provides a brief summary of the claims and issues raised and staff’s recommendation.

Issue	Description	Staff Recommendation
Whether the audit of the fiscal year 2003-2004 reimbursement claim was timely commenced and completed within the deadlines required by Government Code section 17558.5.	<p>The claimant alleges that the Controller failed to timely commence the audit of the fiscal year 2003-2004 reimbursement claim.</p> <p>The Controller alleges that the audit was timely since the claimant received no payment for fiscal year 2003-2004 costs at the time the audit was commenced.</p>	<p><i>The audit is timely commenced and timely completed –</i></p> <p>According to Government Code section 17558.5, “if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.” Here, the fiscal year 2003-2004 reimbursement claim was</p>

<sup>20</sup> *County of Sonoma v. Commission on State Mandates*, (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>21</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space District* (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.

<sup>22</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>23</sup> Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission’s decision is not supported by substantial evidence in the record.

		<p>filed on January 12, 2005, but as of April 4, 2010 no payment had yet been made.</p> <p>In addition, the audit was timely completed. The final audit report was issued March 18, 2010, prior to the expiration of the two year deadline on December 11, 2010.</p>
<p>Reduction of costs claimed for unallowable services and supplies for gift certificates distributed by the claimant during a health services volleyball tournament and food and promotional items distributed during health fairs.</p>	<p>The claimant argues that the costs to purchase food and other promotional items for a student health fair are within the scope of the mandate.</p>	<p><i>Correct</i> – The plain language of the Parameters and Guidelines allows reimbursement to conduct health fairs in order to provide information to students regarding various health issues, <i>to the extent</i> they were conducted in fiscal year 1986-1987. Thus, if the promotional items were not provided by the district in the base year, these costs go beyond the scope of the mandate. The claimant has not argued or submitted any evidence, as required by the Parameters and Guidelines, that it provided these promotional items in the base year as an integral part of its health fairs. Thus, the reduction is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support. .</p>
<p>Reductions based on asserted flaws in the development of indirect cost rates.</p>	<p>The Controller determined that for fiscal year 2003-2004, the claimant calculated indirect costs using the federal OMB A-21 methodology, but did not obtain federal approval of its indirect cost rate. In fiscal years 2004-2005 through 2006-2007, the claimant calculated indirect costs using the FAM 29-C methodology, but did not</p>	<p><i>Correct</i> – To the extent the Controller’s reduction is based on the claimant’s use of the prior year’s CCFS-311 financial reporting, rather than the current year data, the reduction is correct as a matter of law. The prior year</p>

	<p>allocate direct and indirect costs as specified in the claiming instructions and used the expenses from the prior year CCFS-311 report instead of the claim year expenses. The Controller recalculated indirect costs using the FAM-29C.</p> <p>The claimant argues that the claiming instructions are not enforceable, and the recalculation of indirect costs by the Controller was arbitrary and capricious.</p>	<p>financial reporting does not reflect actual costs incurred in the claim year, as required by Government Code sections 17560 and 17564. The Controller’s subsequent recalculation of indirect costs using its preferred FAM-29C methodology is not arbitrary, capricious, or entirely lacking in evidentiary support.</p>
<p>Reductions based on understated offsetting student health fee authority.</p>	<p>The claimant asserts that the Controller incorrectly reduced costs claimed based on fees authorized to be charged, rather than the fee revenue actually collected.</p>	<p><i>Correct</i> – This issue has been conclusively decided by <i>Clovis Unified School District v. Chiang</i> (2010) 188 Cal.App.4th 794, in which the court held that local government is required to identify and deduct the full amount of fees authorized to be charged, and not only the fee revenue actually collected. Therefore, this reduction is correct as a matter of law. In addition, the Controller’s calculation of authorized health service fees, based on student enrollment and BOGG recipient data from the Chancellor’s Office is not arbitrary, capricious, or entirely lacking in evidentiary support.</p>

**Staff Analysis**

**A. The Audit of the 2003-2004 Reimbursement Claim Was Timely Initiated and Completed.**

The claimant argues that the audit of the 2003-2004 reimbursement claim was not timely initiated pursuant to Government Code section 17558.5. Section 17558.5 requires a valid audit to be initiated no later than three years after the date the reimbursement claim is filed or last amended. However, the section also provides that *if no funds are appropriated or no payment is made* “to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the



claim.”<sup>24</sup> “In any case,” section 17558.5 requires the audit to be completed no later than two years after it is commenced.<sup>25</sup>

Here, the fiscal year 2003-2004 reimbursement claim was filed on January 12, 2005, but as the claimant acknowledges, no payment had been made when the audit entrance conference took place on December 11, 2008.<sup>26</sup> Following the audit, the Controller’s Office issued a notice of adjustment for fiscal year 2003-2004, dated April 4, 2010, showing the audit reductions for that fiscal year, and the remaining amount still owed.<sup>27</sup> The notice does not reflect any prior payment for fiscal year 2003-2004. Thus, the April 4, 2010 notice shows that no payment had yet been made on the fiscal year 2003-2004 reimbursement claim.

In addition, the audit was timely completed. The final audit report was issued March 18, 2010, prior to the expiration of the two year deadline on December 11, 2010.

**B. The Controller’s Reduction of Costs for Gift Certificates, Health Fair Food, and Other Promotional Items Is Correct as a Matter of Law and is Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

The Controller reduced \$1,531 claimed for gift certificates distributed by the claimant during a health services volleyball tournament and food and promotional items distributed during health fairs on the ground that these costs go beyond the scope of the mandate and are not reimbursable.<sup>28</sup> The claimant contends that since the Commission has determined that health fair activities are reimbursable, then these costs are necessary. The intent of the promotional items, the claimant asserts, is to induce attendance at the health fair in order for interested students to receive the information.<sup>29</sup>

Based on the evidence in the record, staff finds that this reduction is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support. The Parameters and Guidelines authorize reimbursement for the costs to provide health services to students in the claim year, including the costs for health fairs to distribute information to students, *to the extent* the district provided the service in fiscal year 1986-1987.<sup>30</sup> Thus, to the extent that these promotional items were not provided by the district in the base year, these costs go beyond the scope of the mandate. Here, the record contains invoices supporting the costs incurred in the claim year for a health services volleyball tournament and food and other promotional items distributed during health fairs.<sup>31</sup> However, claimant has not argued or submitted any evidence,

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<sup>24</sup> Government Code section 17558.5 (as amended, Stats. 2002, ch. 1128 (AB 2834)).

<sup>25</sup> Government Code section 17558.5 (as amended, Stats. 2004, ch. 890 (AB 2856)).

<sup>26</sup> Exhibit A, IRC, pages 5; 81.

<sup>27</sup> Exhibit A, IRC, page 34.

<sup>28</sup> Exhibit A, IRC, pages 69-70; Exhibit B, Controller’s Late Comments on the IRC, page 12.

<sup>29</sup> Exhibit A, IRC, page 11-12.

<sup>30</sup> Exhibit A, IRC, page 40, emphasis added.

<sup>31</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 70-91.

as required by the Parameters and Guidelines, that it provided these promotional items in the base year as an integral part of its health fairs.

Accordingly, the Controller's reduction of costs for gift certificates, health fair food, and other promotional items is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

**C. The Controller's Reduction and Recalculation of Indirect Costs Is Correct as a Matter of Law and Is Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

For fiscal year 2003-2004, indirect costs were claimed based on a rate calculated pursuant to the federal OMB Circular A-21 method, which was authorized under the claiming instructions at that time. However, the Controller found that the claimant did not obtain federal approval for its claimed rate, which is required by the OMB Circular. For fiscal years 2004-2005 through 2006-2007, the claimant calculated indirect costs using the FAM 29-C methodology, but did not allocate direct and indirect costs as specified in the claiming instructions and used the expenses from the prior year CCFS-311 report instead of the claim year expenses. The Controller therefore recalculated indirect costs based on the state FAM-29C method, using data available from the claimant's claim year expenses reported on the CCFS-311.<sup>32</sup>

Staff finds that the reduction of indirect costs claimed for fiscal year 2003-2004 for failure to obtain federal approval pursuant to OMB Circular A-21 is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support. If a claimant chooses to use the OMB Circular A-21 methodology, the claimant must obtain federal approval for the rate calculated through formal negotiation, an informal correspondence process or a simplified method which sets the indirect cost rate using a salaries and wage base.<sup>33</sup>

Staff further finds that the reduction of indirect costs for fiscal years 2004-2005 through 2006-2007, based on the claimant's use of expenditures from the prior year's CCFS-311 reports instead of the expenditures incurred in the claim year, is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support. The claimant was required by state law to adopt an annual budget report identifying actual expenditures by September 30 each year – at least four months *before* the reimbursement claims were due. Thus, the actual expenditures for the 2004-2005, 2005-2006, and 2006-2007 claim years were known and were required to be made available to the public before the deadline for filing the reimbursement claims at issue in this case. Moreover, Government Code sections 17560 and 17564, and the Parameters and Guidelines for this program require school districts to claim reimbursement for the costs incurred for the fiscal year being claimed.

Finally, staff finds that the Controller's recalculation of indirect costs using the FAM-29C is not arbitrary, capricious, or entirely lacking in evidentiary support. The Controller recalculated the indirect cost rate for the four fiscal years using the FAM-29C methodology in accordance with the claiming instructions. There is no evidence in the record that the Controller's recalculation is arbitrary, capricious, or totally lacking in evidentiary support.

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<sup>32</sup> Exhibit A, IRC, pages 71-74; Exhibit B, Controller's Late Comments on the IRC, pages 12-20.

<sup>33</sup> Exhibit X, OMB Circular A-21, pages 37-39.

Accordingly, staff finds the recalculation of indirect costs for fiscal years 2003-2004, 2004-2005, 2005-2006, and 2006-2007 is not arbitrary, capricious, or entirely lacking in evidentiary support.

**D. The Controller's Reduction for Understated Offsetting Fee Authority Is Correct as a Matter of Law, and the Recalculation of Authorized Fees Is Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

The Controller determined that the claimant understated its offsetting health fee authority by \$483,871 over the four fiscal years at issue.<sup>34</sup> The Controller found that the claimant reported actual receipts, rather than the health service fees authorized to be charged. The reduction was made on the basis of the fee authority available to claimant, multiplied by the number of students subject to the fee, less the amount of offsetting revenue claimed.

Staff finds that the Controller's reduction based on the claimant's unreported offsetting fee authority is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support. This issue has been conclusively decided in *Clovis Unified School District*,<sup>35</sup> in which the court held that local government is required to identify and deduct the total amount of fees authorized to be charged, and not only the fee revenue actually collected. The court stated that local government could choose not to exercise statutory fee authority to its maximum extent, but not at the state's expense.

Staff further finds that the Controller's calculation of the claimant's authorized offsetting fee revenue is not arbitrary, capricious, or entirely lacking in evidentiary support, since the Controller used the enrollment data available and reported by the claimant. The Controller obtained student enrollment and Board of Governors Grant (BOGG) recipient data from the California Community College's Chancellor's Office and calculated the authorized health service fees using the authorized rates approved by the Chancellor's Office for the fiscal years at issue.<sup>36</sup>

**Conclusion**

Staff finds that the Controller's reduction of costs is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

**Staff Recommendation**

Staff recommends that the Commission adopt the Proposed Decision to deny this IRC, and authorize staff to make any technical, non-substantive changes following the hearing.

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<sup>34</sup> Exhibit A, IRC, page 75.

<sup>35</sup> *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794.

<sup>36</sup> Exhibit A, IRC, page 75.

BEFORE THE  
 COMMISSION ON STATE MANDATES  
 STATE OF CALIFORNIA

**IN RE INCORRECT REDUCTION CLAIM  
 ON:**

Former Education Code Section 72246  
 (Renumbered as 76355)<sup>37</sup>

Statutes 1984, Chapter 1 (1983-1984 2nd Ex.  
 Sess.) (AB2X 1) and Statutes 1987, Chapter  
 1118 (AB 2336)

Fiscal Years 2003-2004, 2004-2005, 2005-  
 2006, and 2006-2007

San Bernardino Community College District,  
 Claimant

Case No.: 10-4206-I-31

*Health Fee Elimination*

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

*(Adopted May 26, 2017)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on May 26, 2017. [Witness list will be included in the adopted Decision.]

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

The Commission [adopted/modified] the Proposed Decision to [approve/partially approve/deny] the IRC by a vote of [vote count will be included in the adopted Decision].

<b>Member</b>	<b>Vote</b>
Ken Alex, Director of the Office of Planning and Research	
Richard Chivaro, Representative of the State Controller, Vice Chairperson	
Mark Hariri, Representative of the State Treasurer	
Sarah Olsen, Public Member	
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	
Carmen Ramirez, City Council Member	
Don Saylor, County Supervisor	

<sup>37</sup> Statutes 1993, chapter 8.

## **Summary of the Findings**

This Decision addresses the IRC filed by San Bernardino Community College District (claimant) regarding reductions made by the State Controller's Office (Controller) to reimbursement claims for costs incurred during fiscal years 2003-2004 through 2006-2007 under the *Health Fee Elimination* program. Over the four fiscal years in question, reductions totaling \$737,979 were made based on unallowable costs for services and supplies (gift certificates, food, and other promotional items for health fairs); understated offsetting health fees authorized to be collected; and disallowed indirect cost rates.

The Commission finds that the Controller timely initiated and completed the audit for fiscal year 2003-2004 pursuant to Government Code section 17558.5, since no payment had yet been made on that reimbursement claim at the time the audit was initiated. The Commission further finds that the Controller's reductions are correct as a matter of law, and are not arbitrary, capricious, or entirely lacking in evidentiary support. Specifically, the Commission finds:

- The Parameters and Guidelines authorize reimbursement for the costs to provide health services to students in the claim year, including the costs for health fairs to distribute information to students, *to the extent* the district provided the service in fiscal year 1986-1987.<sup>38</sup> Thus, to the extent that these promotional items were not provided by the district in the base year, these costs go beyond the scope of the mandate. Here, the record contains invoices supporting the costs incurred in the claim year for a health services volleyball tournament and food and promotional items distributed during health fairs.<sup>39</sup> However, claimant has not argued or submitted any evidence, as required by the Parameters and Guidelines, that it provided these promotional items in the base year as an integral part of its health fairs. Accordingly, the Controller's reduction of costs for gift certificates, health fair food, and other promotional items is correct as a matter of law, and is not arbitrary, capricious, or without evidentiary support.
- The reduction of indirect costs claimed for fiscal year 2003-2004 for failure to obtain federal approval pursuant to OMB Circular A-21 is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support. If a claimant chooses to use the OMB Circular A-21 methodology, claimant must obtain federal approval for the rate calculated through formal negotiation, an informal correspondence process or a simplified method which sets the indirect cost rate using a salaries and wage base.<sup>40</sup> The Commission further finds that the reduction of indirect costs for fiscal years 2004-2005 through 2006-2007, based on the claimant's use of expenditures from the prior year's CCFS-311 reports instead of the expenditures incurred in the claim year, is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support. The claimant was required by state law to adopt an annual budget report identifying actual expenditures by September 30 each year – at least four months *before* the reimbursement claims were due. Thus, the actual expenditures for the 2004-2005, 2005-2006, and 2006-2007 claim years were known and were required to be made available to

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<sup>38</sup> Exhibit A, IRC, page 40, emphasis added.

<sup>39</sup> Exhibit B, Controller's Late Comments on the IRC, pages 70-91.

<sup>40</sup> Exhibit X, OMB Circular A-21, pages 37-39.

the public before the deadline for filing the reimbursement claims at issue. Moreover, Government Code sections 17560 and 17564, and the Parameters and Guidelines for this program require school districts to claim reimbursement for the costs incurred for the fiscal year being claimed. Additionally, the Controller's recalculation of indirect costs using the FAM-29C was not arbitrary, capricious, or entirely lacking in evidentiary support. The Controller recalculated the indirect cost rate for the four fiscal years using the FAM-29C methodology in accordance with the claiming instructions. Accordingly, the Commission finds the recalculation of indirect costs for fiscal years 2003-2004, 2004-2005, 2005-2006, and 2006-2007 is not arbitrary, capricious, or entirely lacking in evidentiary support.

- The Controller's reduction based on the claimant's unreported offsetting fee authority is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support. This issue has been conclusively decided in *Clovis Unified School District*<sup>41</sup>, in which the court held that local government is required to identify and deduct the total amount of fees authorized to be charged, and not only the fee revenue actually collected. The court stated that local government could choose not to exercise statutory fee authority to its maximum extent, but not at the state's expense. The Commission further finds that the Controller's calculation of the claimant's authorized offsetting fee revenue is not arbitrary, capricious, or entirely lacking in evidentiary support, since the Controller used the enrollment data available and reported by the claimant. The Controller obtained student enrollment and Board of Governors Grant (BOGG) recipient data from the California Community College's Chancellor's Office and calculated the authorized health service fees using the authorized rates approved by the Chancellor's Office for the fiscal years at issue.<sup>42</sup>

The Commission, therefore, denies this IRC.

## COMMISSION FINDINGS

### I. Chronology

01/12/2005	Claimant filed a reimbursement claim for fiscal year 2003-2004 costs. <sup>43</sup>
01/11/2006	Claimant filed reimbursement claim for fiscal year 2004-2005 costs. <sup>44</sup>
11/20/2007	Claimant filed reimbursement claim for fiscal year 2005-2006 costs. <sup>45</sup>
12/11/2008	The audit entrance conference took place. <sup>46</sup>

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<sup>41</sup> *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794.

<sup>42</sup> Exhibit A, IRC, page 75.

<sup>43</sup> Exhibit A, IRC, page 27.

<sup>44</sup> Exhibit A, IRC, page 106.

<sup>45</sup> Exhibit A, IRC, page 115.

<sup>46</sup> Exhibit A, IRC, page 27; Exhibit B, Controller's Late Comments on the IRC, page 6.

01/09/2009 Claimant filed an amended reimbursement claim for fiscal year 2006-2007 costs.<sup>47</sup>

03/18/2010 Controller issued its final audit report for fiscal years 2003-2004 through 2006-2007.<sup>48</sup>

07/16/2010 Claimant filed the IRC.<sup>49</sup>

12/02/2014 Controller submitted late comments on the IRC.<sup>50</sup>

02/08/2017 Commission staff issued the Draft Proposed Decision.<sup>51</sup>

## II. Background

### A. The Health Fee Elimination Program

Prior to 1984, former Education Code section 72246 authorized community college districts that voluntarily provided health supervision and services, direct and indirect medical and hospitalization services, or operation of student health centers to charge almost all students a health service fee not to exceed \$7.50 for each semester or \$5 for each quarter or summer session, to fund these services.<sup>52</sup> In 1984, the Legislature repealed the community colleges' fee authority for health services.<sup>53</sup> However, the Legislature also reenacted section 72246, to become operative on January 1, 1988, to reauthorize the fee at \$7.50 for each semester (or \$5 per quarter or summer session).<sup>54</sup>

In addition to temporarily repealing community college districts' fee authority, Statutes 1984, chapter 1 required any district that provided health services during the 1983-1984 fiscal year, for which districts were 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.<sup>55</sup> 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 until January 1, 1988.

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<sup>47</sup> Exhibit A, IRC, page 124.

<sup>48</sup> Exhibit A, IRC, pages 4, 61.

<sup>49</sup> Exhibit A, IRC, page 1.

<sup>50</sup> Exhibit B, Controller's Late Comments on the IRC.

<sup>51</sup> Exhibit C, Draft Proposed Decision.

<sup>52</sup> Former Education Code section 72246 (Stats. 1981, ch. 763). Low-income students, students that depend upon prayer for healing, and students attending a college under an approved apprenticeship training program, were exempt from the fee.

<sup>53</sup> Statutes 1984, 2nd Extraordinary Session 1984, chapter 1, section 4, repealing Education Code section 72246.

<sup>54</sup> Statutes 1984, 2nd Extraordinary Session 1984, chapter 1, section 4.5.

<sup>55</sup> Education Code section 72246.5 (Stats. 1984, 2d. Ex. Sess., ch. 1, § 4.7).

In 1987,<sup>56</sup> the Legislature amended former Education Code section 72246, operative January 1, 1988, to incorporate and extend the maintenance of effort provisions of former Education Code section 72246.5, which became inoperative by its own terms as of January 1, 1988.<sup>57</sup> In addition, Statutes 1987, chapter 1118 restated that the fee would be reestablished at not more than \$7.50 for each semester, or \$5 for each quarter or summer session.<sup>58</sup> As a result, beginning January 1, 1988, all community college districts were required to maintain the same level of health services they provided in the 1986-1987 fiscal year each year thereafter, with a limited fee authority to offset the costs of those services.<sup>59</sup> In 1992, section 72246 was amended to provide that the health fee could be increased by the same percentage as the Implicit Price Deflator whenever that calculation would produce an increase of one dollar.<sup>60</sup>

On November 20, 1986, the Commission determined that Statutes 1984, chapter 1 imposed a reimbursable state-mandated new program upon community college districts. On August 27, 1987, the Commission adopted the Parameters and Guidelines for the *Health Fee Elimination* program. On May 25, 1989, the Commission adopted amendments to the Parameters and Guidelines to reflect amendments made by Statutes 1987, chapter 1118.

The Parameters and Guidelines generally provide that eligible community college districts shall be reimbursed for the costs of providing a health services program, and that only services specified in the Parameters and Guidelines and provided by the community college district in the 1986-1987 fiscal year may be claimed.

#### B. Controller's Audit and Summary of the Issues

The Controller reduced \$895,614 from the costs claimed for fiscal years 2003-2004 through 2006-2007, \$737,979 of which is in dispute as follows:

- Reduction of asserted unallowable costs of \$1,531 for services and supplies for gift certificates distributed by the claimant during a health services volleyball tournament and food and promotional items distributed during health fairs.
- Reduction of \$252,577 in indirect costs based on asserted faults in the development and application of indirect cost rates. For fiscal year 2003-2004, the claimant calculated indirect costs using the federal OMB A-21 methodology, but did not obtain federal

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<sup>56</sup> Statutes 1987, chapter 1118.

<sup>57</sup> Education Code section 72246 (as amended, Stats. 1987, ch. 1118). See also former Education Code section 72246.5 (Stats. 1984, 2d Ex. Sess., ch. 1, § 4.7).

<sup>58</sup> Education Code section 72246 (as amended, Stats. 1987, ch. 1118).

<sup>59</sup> In 1992, section 72246 was amended to provide that the health fee could be increased by the same percentage as the Implicit Price Deflator whenever that calculation would produce an increase of one dollar. (Education Code section 72246 (as amended, Stats. 1992, ch. 753). In 1993, former Education Code section 72246, was renumbered as Education Code section 76355 (Stats. 1993, ch. 8).

<sup>60</sup> Education Code section 72246 (as amended, Stats. 1992, ch. 753). In 1993, former Education Code section 72246, was renumbered as Education Code section 76355 (Stats. 1993, ch. 8).



approval of its indirect cost rate. For fiscal years 2004-2005 through 2006-2007, the claimant calculated indirect costs using the FAM 29-C methodology, but did not allocate direct and indirect costs as specified in the claiming instructions and used the expenses from the prior year CCFS-311 report instead of the claim year expenses.

- Reduction of \$483,871 for understated offsetting health service fees the claimant was authorized by law to collect.<sup>61</sup>

The claimant also contends that the Controller did not timely initiate the audit of the 2003-2004 reimbursement claim and, thus asserts that the Controller's audit of that reimbursement claim is void.

### **III. Positions of the Parties**

#### **A. San Bernardino Community College District**

The claimant asserts that the Controller incorrectly reduced costs claimed for fiscal years 2003-2004 through 2006-2007, totaling \$737,979 (\$1,531 for services and supplies, plus \$252,577 in indirect costs, and \$483,871 in understated health service fees).<sup>62</sup> The claimant does not dispute the Controller's findings with respect to unallowable student athletic insurance premiums or duplicate offsetting savings claimed.<sup>63</sup>

The claimant contends that the Controller incorrectly reduced costs claimed for promotional items intended to induce attendance at the health fair in order for interested students to receive information. The claimant argues that disseminating information about the college's health program was the essential purpose of the health fairs, and that absent a finding that the costs claimed were excessive or unreasonable, the costs are reimbursable.<sup>64</sup>

With respect to the reduction of indirect costs claimed, the claimant argues that the claiming instructions are not enforceable, that there is no requirement that a federal rate be federally approved, and that the Controller's unilateral changes in policy with respect to certain inclusions and exclusions in the calculation of indirect cost rates are not enforceable.<sup>65</sup> The claimant also contends that its current year expenses are often not available when the reimbursement claims are required to be filed and, thus, it used the prior year's expenses when calculating indirect costs.<sup>66</sup> Moreover, the claimant argues that the Controller did not make findings that the claimant's rate was excessive or unreasonable.<sup>67</sup>

Additionally, the claimant argues that the reduction based on understated authorized health service fees is incorrect because the Parameters and Guidelines require claimants to state

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<sup>61</sup> Exhibit A, IRC, page 60.

<sup>62</sup> Exhibit A, IRC, pages 10-20.

<sup>63</sup> Exhibit A, IRC, pages 10-11; 20.

<sup>64</sup> Exhibit A, IRC, page 11-12.

<sup>65</sup> Exhibit A, IRC, pages 12-16.

<sup>66</sup> Exhibit A, IRC, page 17.

<sup>67</sup> *Ibid.*

offsetting savings “experienced,” and claimant did not experience offsetting savings for fees that it did not actually receive.<sup>68</sup>

Finally, the claimant argues that the Controller’s audit of the reimbursement claim for fiscal year 2003-2004 was not timely; that the period of limitation for this claim expired on January 12, 2008, based on the filing date of January 12, 2005,<sup>69</sup> but the audit entrance conference did not occur until December 11, 2008.<sup>70</sup> Although the audit report states that the audit was timely because no payment was made on the 2003-2004 claim, the claimant argues that this open-ended time period, as authorized in Government Code section 17558.5, is impermissibly vague, and is contrary to the purpose of a statute of limitations.<sup>71</sup>

#### B. State Controller’s Office

The Controller contends that the reductions are correct and should be upheld. The Controller determined that the claimant stated unallowable costs of \$1,531 for “food, and promotional items” for a student health fair. The Controller found that while a health fair for the dissemination of health information to students was an approved activity under the Parameters and Guidelines, the district was “not required to purchase food and promotional items...to complete the activity of providing health information to those who inquire.”<sup>72</sup>

The Controller further contends that the claimant overstated its indirect costs for fiscal year 2003-2004, finding that the claimant did not obtain federal approval for its indirect cost rate developed pursuant to OMB Circular A-21 guidelines. And, the Controller found that the claimant understated its indirect costs for fiscal years 2004-2005, 2005-2006, and 2006-2007 based on recalculation pursuant to the Controller’s FAM-29C method.<sup>73</sup>

The Controller also found that the claimant understated its authorized health service fees for the audit period. Using enrollment and exemption data obtained from the California Community Colleges Chancellor’s Office, the Controller recalculated the health fees that the claimant was authorized to collect, and reduced the claim by the amount not stated as offsetting revenues. The Controller concludes that to the extent that districts have authority to charge a fee, they are not required to incur a cost.<sup>74</sup>

#### IV. Discussion

Government Code section 17561(d) 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.

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<sup>68</sup> Exhibit A, IRC, pages 20-22.

<sup>69</sup> Exhibit A, IRC, page 27.

<sup>70</sup> *Ibid.*

<sup>71</sup> Exhibit A, IRC, pages 27-30.

<sup>72</sup> Exhibit B, Controller’s Late Comments on the IRC, page 12.

<sup>73</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 12-20.

<sup>74</sup> Exhibit A, IRC, page 79.

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 1185.9 of the Commission's regulations requires the Commission to send the decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of the parameters and guidelines, de novo, without consideration of legal 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 of the California Constitution.<sup>75</sup> 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."<sup>76</sup>

With regard to the Controller's audit decisions, the Commission must determine whether they 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.<sup>77</sup> 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.]' "<sup>78</sup>

The Commission must review also 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.<sup>79</sup> In addition, sections 1185.1(f)(3) and 1185.2(c) of the Commission's regulations require that any assertions

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<sup>75</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>76</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>77</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space District* (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.

<sup>78</sup> *American Bd. of Cosmetic Surgery, Inc., v. Medical Bd. of California*, 162 Cal.App.4th 534, 547-548.

<sup>79</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

of fact by the parties to an IRC must be supported by documentary evidence. The Commission's ultimate findings of fact must be supported by substantial evidence in the record.<sup>80</sup>

**A. The Audit of the 2003-2004 Reimbursement Claim Was Timely Initiated and Completed.**

The claimant argues that the audit of the 2003-2004 reimbursement claim was not timely initiated pursuant to Government Code section 17558.5. Section 17558.5 requires a valid audit to be initiated no later than three years after the date the reimbursement claim is filed or last amended. However, the section also provides that *if no funds are appropriated or no payment is made* "to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim."<sup>81</sup> "In any case," section 17558.5 requires the audit to be completed no later than two years after it is commenced.<sup>82</sup>

1. The Audit Was Timely Initiated.

The claimant asserts that the audit of the 2003-2004 reimbursement claim was not timely initiated based on the date that the claim was "filed or last amended" (January 12, 2005), and the date that the audit entrance conference took place (December 11, 2008). However, the Controller points out that the claimant had not received payment for the fiscal year 2002-2003 when the audit was initiated, and that therefore the Controller's initiation of the audit with the entrance conference on December 11, 2008, was timely.<sup>83</sup>

Government Code section 17558.5 states that "[a] reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter 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 ...." However, if funds are not appropriated or no payment is made to the claimant for a given year, section 17558.5 states the "time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim."<sup>84</sup>

The claimant argues that this provision "is void because it is impermissibly vague," and that "the only specific and enforceable time limitation to commence an audit is three years from the date the claim was filed."<sup>85</sup> The claimant argues that "the annual reimbursement claims for FY 2003-04 were past this time period when the audit was commenced on December 11, 2008."<sup>86</sup>

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<sup>80</sup> Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

<sup>81</sup> Government Code section 17558.5 (as amended, Stats. 2002, ch. 1128 (AB 2834)).

<sup>82</sup> Government Code section 17558.5 (as amended, Stats. 2004, ch. 890 (AB 2856)).

<sup>83</sup> Exhibit B, Controller's Late Comments on the IRC, page 29.

<sup>84</sup> Government Code section 17558.5 (as amended, Stats. 2002, ch. 1128 (AB 2834)).

<sup>85</sup> Exhibit A, IRC, page 30.

<sup>86</sup> Exhibit A, IRC, page 30.

Article III, section 3.5 of the California Constitution states that an administrative agency has no power “[t]o declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional...”<sup>87</sup> Here, the fiscal year 2003-2004 reimbursement claim was on January 12, 2005,<sup>88</sup> but, as claimant acknowledges, no payment had been made when the audit entrance conference took place on December 11, 2008.<sup>89</sup> Following the audit, the Controller’s Office issued notice of adjustment for fiscal year 2003-2004, dated April 4, 2010, showing the audit reductions for that fiscal year, and the remaining amount still owing.<sup>90</sup> The notice does not reflect any prior payment for fiscal year 2003-2004. Thus, the April 4, 2010 notice showed that no payment had yet been made. Therefore, since no payment was made to the claimant for the 2003-2004 reimbursement claim, the Controller timely initiated the audit.

## 2. The Audit Was Timely Completed.

Government Code section 17558.5 also prescribes the time in which an audit must be completed: “In any case, an audit shall be completed not later than two years after the date that the audit is commenced.”<sup>91</sup> As indicated above, the audit was initiated no later than December 11, 2008, the date of the entrance conference and, thus, had to be completed no later than December 11, 2010. An audit is completed when the Controller issues the final audit report to the claimant. The final audit report constitutes the Controller’s final determination on the subject claims and provides written notice of the claim components adjusted, the amounts adjusted, and the reasons for the adjustment, as required by Government Code section 17558.5(c), allowing the claimant to thereafter file an IRC. Here, the final audit report was issued March 18, 2010, prior to the expiration of the two year deadline on December 11, 2010.

Based on the foregoing, the Commission finds that the Controller’s audit of the fiscal year 2003-2004 reimbursement claim was timely initiated and timely completed in accordance with Government Code section 17558.5.

### **B. The Controller’s Reduction of Costs for Gift Certificates, Health Fair Food, and Other Promotional Items Is Correct as a Matter of Law and Is Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

The Controller reduced \$1,531 claimed for gift certificates distributed by the claimant during a health services volleyball tournament and food and promotional items distributed during health fairs on the ground that these costs go beyond the scope of the mandate and are not reimbursable. The Controller contends that these costs are not required to complete the reimbursable activity of “providing health information to those who inquire.”<sup>92</sup>

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<sup>87</sup> California Constitution, article III, section 3.5 (added June 6, 1978, by Proposition 5).

<sup>88</sup> Exhibit A, IRC, page 27.

<sup>89</sup> Exhibit A, IRC, pages 5; 81.

<sup>90</sup> Exhibit A, IRC, page 34.

<sup>91</sup> Government Code section 17558.5 (Stats. 2004, ch. 890).

<sup>92</sup> Exhibit A, IRC, pages 69-70; Exhibit B, Controller’s Late Comments on the IRC, page 12.

The claimant contends that since the Commission has determined that health fair activities are reimbursable, then these costs are necessary. The claimant further contends that the Controller has not determined that these costs are excessive or unreasonable. The intent of the promotional items, the claimant asserts, is to induce attendance at the health fair in order for interested students to receive the information. The claimant argues as follows:

Disseminating information is the essential purpose of the health fair. Absent a fact-finding that the food (purchased at a supermarket), for example, was too expensive or some similar finding, there is no basis for the adjustment on the grounds that the claimed costs were excessive.<sup>93</sup>

Based on the evidence in the record, the Commission finds that the reduction is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

The Parameters and Guidelines for the *Health Fee Elimination* program authorize reimbursement for the costs of providing health supervision and services and direct and indirect medical and hospitalization services to students, and the operation of student health centers, *to the extent* the community college provided these services in fiscal year 1986-1987. Section V. lists types of services and costs that are eligible for reimbursement to the extent they were provided in fiscal year 1986-1987, including “health talks or fairs – information,” as follows:

#### HEALTH TALKS OR FAIRS – INFORMATION

- Sexually Transmitted Disease
- Drugs
- Aids
- Child Abuse
- Birth Control/Family Planning
- Stop Smoking
- Etc.
- Library – videos and cassettes

Section VI.B.2 of the parameters and guidelines, which governs Claim Preparation for services and supplies, states that “[o]nly expenditures which can be identified as a direct cost of the mandate can be claimed.”

And, Section VII governs the supporting data for the claim, which states the following:

For auditing purposes, all costs claimed must be traceable to source documents and/or worksheets that show evidence of the validity of such costs. *This would include documentation for the fiscal year 1986-87 program to substantiate a maintenance of effort.* 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 of his agent.<sup>94</sup>

The plain language of the Parameters and Guidelines allows reimbursement to provide health talks and fairs to distribute information to students regarding various health issues, but is silent

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<sup>93</sup> Exhibit A, IRC, page 11-12.

<sup>94</sup> Exhibit A, IRC, pages 39-45.

regarding reimbursement for the cost of gift certificates, food, and other promotional items given away by the district to encourage attendance. However, the Parameters and Guidelines do specify that approved cost items listed in section V. B. “are reimbursable *to the extent* they were provided by the community college district in fiscal year 1986-87.”<sup>95</sup> Thus, to the extent that these promotional items were not provided by the district in the base year, these costs go beyond the scope of the mandate. Here, the record contains invoices supporting the costs incurred in the claim year for a health services volleyball tournament and food and promotional items distributed during health fairs.<sup>96</sup> However, claimant has not argued or provided any evidence, as required by the Parameters and Guidelines, that it provided these promotional items in the base year as an integral part of its health fairs.

Accordingly, the Controller’s reduction of costs for gift certificates, health fair food, and other promotional items is correct as a matter of law and not arbitrary, capricious or entirely lacking in evidentiary support.

**C. The Controller’s Reduction and Recalculation of Indirect Costs Is Correct as a Matter of Law and Is Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

For fiscal year 2003-2004, the claimant claimed indirect costs based on a rate calculated pursuant to the OMB Circular A-21 method, which was authorized under the claiming instructions at that time. However, the Controller found that the claimant did not obtain federal approval for its claimed rate, which is required by the OMB Circular. For fiscal years 2004-2005 through 2006-2007, the claimant calculated indirect costs using the FAM 29-C methodology, but did not allocate direct and indirect costs as specified in the claiming instructions and used the expenses from the prior year CCFS-311 report instead of the claim year expenses. The Controller therefore recalculated indirect costs based on the state FAM-29C method, using data available from the claimant’s claim year expenses reported on the CCFS-311.<sup>97</sup>

The claimant disputes the enforceability of the claiming instructions as a whole, arguing that “[n]either state law nor the parameters and guidelines make compliance with the Controller’s claiming instructions a condition of reimbursement,” and that the Controller’s claiming instructions are underground regulations.<sup>98</sup> The claimant also asserts that the Controller has not made a determination that the claimed indirect cost rates were either excessive or unreasonable, and that the only available audit standard requires such a determination.<sup>99</sup>

For the reasons below, the Commission finds that the Controller’s reduction and recalculation of indirect of costs is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

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<sup>95</sup> Exhibit A, IRC, page 40, emphasis added.

<sup>96</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 70-91.

<sup>97</sup> Exhibit A, IRC, pages 71-74; Exhibit B, Controller’s Late Comments on the IRC, pages 12-20.

<sup>98</sup> Exhibit A, IRC, pages 13-19.

<sup>99</sup> *Ibid.*

1. The Reduction of Indirect Costs Claimed for Fiscal Year 2003-2004 for Failure to Obtain Federal Approval Pursuant to OMB Circular A-21 Is Correct as a Matter of Law and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.

The Parameters and Guidelines, in addition to identifying the reimbursable activities, provide instructions for eligible claimants to prepare reimbursement claims for the direct and indirect costs of a state-mandated program.<sup>100</sup> The Commission's adoption of parameters and guidelines is quasi-judicial and, therefore, the parameters and guidelines are final and binding on the parties unless set aside by a court pursuant to Government Code section 17559 or amended by the filing of a request pursuant to Government Code section 17557.<sup>101</sup> In this case, the Parameters and Guidelines for the *Health Fee Elimination* program have not been challenged, and no party has requested they be amended. The Parameters and Guidelines are therefore binding and must be applied to the reimbursement claims here.

Section VI. of the Parameters and Guidelines provide that “*indirect costs may be claimed in the manner described by the State Controller in his claiming instructions.*”<sup>102</sup> Claimant argues that the word “may” in the indirect cost language of the Parameters and Guidelines is permissive, and that therefore the Parameters and Guidelines do not require that indirect costs be claimed in the manner described by the Controller.<sup>103</sup>

Claimant's argument is unsound: the Parameters and Guidelines plainly state that “indirect costs may be claimed in the manner described by the State Controller in his claiming instructions.” 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 Parameters and Guidelines and claim indirect costs in the manner described in the Controller's claiming instructions.

The claiming instructions specific to the *Health Fee Elimination* mandate, are found in the Community Colleges Mandated Cost Manual which is revised each year and contains claiming instructions applicable to all school and community college mandated programs. The cost manual issued by the Controller's Office in September 2004 governs the reimbursement claim filed for fiscal year 2003-2004.<sup>104</sup> This cost manual provides two options for claiming indirect costs by either using the OMB Circular A-21, or the FAM-29C:

A community college has the option of using a federally approved rate, utilizing the cost accounting principles from *Office of Management and Budget Circular*

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<sup>100</sup> Government Code section 17557; California Code of Regulations, title 2, section 1183.7.

<sup>101</sup> *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200, which stated the following: “[U]nless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions.” [Citation omitted.] See also, Government Code section 17557.

<sup>102</sup> Exhibit A, IRC, page 44.

<sup>103</sup> Exhibit A, IRC, page 13.

<sup>104</sup> Exhibit B, Controller's Late Comments on the IRC, page 35.



**A-21** “Cost Principles for Educational Institutions,” or the Controller's methodology outlined in the following paragraphs.

The Controller allows the following methodology for use by community colleges in computing an indirect cost rate for state mandates. The objective of this computation is to determine an equitable rate for use in allocating administrative support to personnel that performed the mandated cost activities claimed by the community college. This methodology assumes that administrative services are provided to all activities of the institution in relation to the direct costs incurred in the performance of those activities. *Form FAM-29C* has been developed to assist the community college in computing an indirect cost rate for state mandates. . . .

[¶]

The [FAM-29C] computation is based on total expenditures as reported in “California Community Colleges Annual Financial and Budget Report, Expenditures by Activity (CCFS-311).” Expenditures classified by activity are segregated by the function they serve. Each function may include expenses for salaries, fringe benefits, supplies, and capital outlay. OMB Circular A-21 requires expenditures for capital outlays to be excluded from the indirect cost rate computation.

Generally, a direct cost is one incurred specifically for one activity, while indirect costs are of a more general nature and are incurred for the benefit of several activities. As previously noted, the objective of this computation is to equitably allocate administrative support costs to personnel that perform mandated cost activities claimed by the college. For the purpose of this computation we have defined indirect costs to be those costs which provide administrative support to personnel who perform mandated cost activities. We have defined direct costs to be those indirect costs that do not provide administrative support to personnel who perform mandated costs activities and those costs that are directly related to instructional activities of the college. Accounts that should be classified as indirect costs are: Planning and Policy Making, Fiscal Operations, General Administrative Services, and Logistical Services. If any costs included in these accounts are claimed as a mandated cost, i.e., salaries of employee performing mandated cost activities, the cost should be reclassified as a direct cost. Accounts in the following groups of accounts should be classified as direct costs: Instruction, Instructional Administration, Instructional Support Services, Admissions and Records, Counseling and Guidance, Other Student Services, Operation and Maintenance of Plant, Community Relations, Staff Services, Non-instructional Staff-Retirees’ Benefits and Retirement Incentives, Community Services, Ancillary Services and Auxiliary Operations. A college may classify a portion of the expenses reported in the account Operation and Maintenance of Plant as indirect. The claimant has the option of using a 7% or a higher expense percentage is allowable if the college can support its allocation basis.

The indirect cost rate, derived by determining the ratio of total indirect expenses and total direct expenses when applied to the direct costs claimed, will result in an equitable distribution of the college's mandate related indirect costs. . . .<sup>105</sup>

If a claimant chooses to use the OMB Circular A-21 methodology, claimant must obtain federal approval for the rate calculated through formal negotiation, an informal correspondence process or a simplified method which sets the indirect cost rate using a salaries and wage base.<sup>106</sup> The end result of the negotiation process is a sponsored agreement in which final approval lies with the federal government negotiating the rate and must be supported by "adequate documentation to support costs charged to sponsored agreements."<sup>107</sup> The OMB Circular A-21 establishes principles for determining costs applicable to grants, contracts, and other agreements between the federal government and educational institutions. Section G(11) of the OMB Circular A-21 governs the determination of indirect cost rates and requires the federal approval of a proposed rate by the "cognizant federal agency," which is normally either the federal Department of Health and Human Services or the Department of Defense's Office of Naval Research.<sup>108</sup> Thus, a claimant that has received federal approval for their indirect cost rate has negotiated specific direct costs with the relevant federal approving agency.

Here, claimant used the methodology in the OMB Circular A-21 for fiscal year 2003-2004, and asserts that that the Controller has the burden to show that the rates were excessive or unreasonable, and not to recalculate the rate according to its unenforceable ministerial preferences.<sup>109</sup> That assertion is in essence a challenge to the Controller's entire claiming instructions as an underground regulation adopted without complying with the APA.

However, the Commission does not need to reach the alleged underground regulation issue in this case because the claimant failed to obtain federal approval for its use of the OMB Circular A-21 methodology as required by the OMB Circular A-21 itself.

As claimant did not negotiate with a federal agency to determine appropriate direct costs used to calculate the indirect costs rate, it cannot be determined whether the claimed rates would have received federal approval. Moreover, federal approval is clearly required by both the claiming instructions and the OMB methodology itself, but the Controller has no power to grant federal approval for an OMB-calculated rate.

Thus, the reduction of indirect costs claimed for fiscal year 2003-2004 for failure to obtain federal approval pursuant to OMB Circular A-21 is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

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<sup>105</sup> Exhibit B, Controller's Late Comments on the IRC, page 35.

<sup>106</sup> Exhibit X, OMB Circular A-21, pages 37-39.

<sup>107</sup> Exhibit X, OMB Circular A-21, page 6.

<sup>108</sup> Exhibit X, OMB Circular A-21.

<sup>109</sup> Exhibit A, IRC, pages 14, 19.

2. The Reduction of Indirect Costs Claimed for Fiscal Years 2004-2005, 2005-2006, and 2006-2007 Based on the Claimant's Use of Expenditures from the Prior Year's CCFS-311 Reports, Instead of the Expenditures Incurred in the Claim Year, Is Correct as a Matter of Law and Is Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.

The mandated cost manual and claiming instructions issued for 2004-2005, 2005-2006, and 2006-2007 fiscal year reimbursement claims provide, in pertinent part the following:

A CCD may claim indirect costs using the Controller's methodology (FAM-29C) outlined in the following paragraphs. If specifically allowed by a mandated program's P's & G's, a district may alternately choose to claim indirect costs using either (1) a federally approved rate prepared in accordance with Office of Management and Budget (OMB) Circular A-21, *Cost Principles for Educational Institutions*; or (2) a flat 7% rate.

The SCO developed FAM-29C to be consistent with OMB Circular A-21, cost accounting principles as they apply to mandated cost programs. The objective is to determine an equitable rate to allocate administrative support to personnel who performed the mandated cost activities. The FAM-29C methodology uses a direct cost base comprised of salary and benefit costs and operating expenses. Form FAM-29C provides a consistent indirect cost rate methodology for all CCD's mandated cost programs.

*FAM-29C uses total expenditures that districts report in their California Community Colleges Annual Financial and Budget Report (CCFS-311), Expenditures by Activity for the General Fund – Combined. The computation excludes Capital Outlay and Other Outgo in accordance with OMB Circular A-21. The indirect cost rate computation includes any depreciation or use allowance applicable to district buildings and equipment. Districts calculate depreciation or use allowance costs separately from the CCFS-311 report and should calculate them in accordance with OMB Circular A-21.<sup>110</sup>*

The claimant used the FAM-29C methodology to calculate indirect costs. The Controller, however, reduced indirect costs because the claimant did not allocate direct and indirect costs as specified in the claiming instructions and used expenditures from the prior year's CCFS-311 annual financial and budget report instead of the claim year's expenses. The claimant also contends that the law does not support the Controller's insistence that the current year CCFS-311 report must be used. The claimant asserts that the current year CCFS-311 is often not available at the time the mandate reimbursement claims are due, so the prior year CCFS-311 must be used to determine the indirect cost rate.<sup>111</sup>

For the reasons below, the Commission finds that the Controller's reduction, based on the claimant's use of expenditures from the prior year's CCFS-311 reports instead of the

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<sup>110</sup> Exhibit B, Controller's Late Comments on the IRC, pages 41-42; Exhibit X, Community Colleges Mandated Costs Manual excerpt 2005-2006, pages 17-18; Community Colleges Mandated Costs Manual excerpt 2006-2007, page 17.

<sup>111</sup> Exhibit A, IRC, pages 16-18.

expenditures incurred in the claim year, is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

Regulations governing “Budgets and Reports” adopted by the Chancellor’s Office require the governing board of each community college district, by September 15 of each year, to prepare and keep on file for public inspection a statement of all receipts and expenditures for the *preceding fiscal year* and a statement of the estimated expenses for the current fiscal year.<sup>112</sup> After a public hearing, the district is required to adopt a final budget on or before September 15, and complete and adopt the annual financial and budget report (CCFS-311) by September 30 of each year. The annual financial and budget report (CCFS-311) identifies all the district’s actual revenues and expenditures from *the preceding fiscal year* and the estimated revenues and expenditures for the current fiscal year, and is considered a public record pursuant to the Government Code.<sup>113</sup> By October 10th of each year, the district is required to submit a copy of the adopted annual financial and budget report (CCFS-311) to the Chancellor. In this case, the Controller contends that the claimant submitted its CCFS-311 report identifying 2004-2005 actual expenditures on September 15, 2005, its CCFS-311 report identifying 2005-2006 actual expenditures on October 2, 2006, and its CCFS-311 report identifying 2006-2007 actual expenditures on September 14, 2007.<sup>114</sup> The claimant has not disputed these allegations and, in any event, the claimant was required by the regulations to adopt the annual report identifying actual expenditures for these fiscal years by September 30 – at least four months *before* the reimbursement claims were due. Reimbursement claims for fiscal years 2004-2005 and 2005-2006 were due to the Controller by January 15, 2006 and January 15, 2007. Reimbursement claims for fiscal year 2006-2007 were due to the Controller by February 15, 2008.<sup>115</sup> Thus, the actual expenditures for each of the claim years were known and were required to be made available to the public before the deadline for filing the reimbursement claims at issue.

Moreover, the Government Code and Parameters and Guidelines for this program require school districts to claim reimbursement for the costs incurred for the fiscal year being claimed. Government Code section 17560 authorizes local agencies and school districts to file an annual reimbursement claim “that details the costs actually incurred *for that fiscal year*....” Government Code section 17564(b) states that “[c]laims for direct and indirect costs filed pursuant to Section 17561 shall be in the manner described in the parameters and guidelines....” Further, the Parameters and Guidelines require that “[a]ctual costs for one fiscal year should be included in each claim.”<sup>116</sup> Thus, the requirement to calculate indirect costs for the claim year

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<sup>112</sup> California Code of Regulations, title 5, section 58300.

<sup>113</sup> California Code of Regulations, title 5, section 58305; California Community Colleges, Budget and Accounting Manual (2012), pages 1-8.

<sup>114</sup> Exhibit B, Controller’s Late Comments on the IRC, page 18.

<sup>115</sup> Former Government Code section 17560 (as amended, Stats. 1998, ch. 681 (AB 1963)). Government Code section 17560 was amended by Statutes 2007, chapter 179, to change the deadline for filing reimbursement claims from January 15 to February 15, effective August 24, 2007, which affected the reimbursement claims for costs incurred in fiscal year 2006-2007.

<sup>116</sup> Exhibit A, IRC, page 40.

based on that year's actual expenses, which are known by the claimant, is supported by the law and evidence in the record.

The Commission finds that the Controller's reduction of indirect costs is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

3. The Controller's Recalculation of Indirect Costs Using the FAM-29C Is Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.

Even though the claimant incorrectly calculated indirect costs, the Controller did not reduce indirect costs to \$0. Instead, the Controller recalculated the indirect cost rate for the four fiscal years using the FAM-29C methodology in accordance with the claiming instructions.<sup>117</sup> The Controller's recalculation resulted in indirect cost rates of 19.50 percent, 43.18 percent, 45.42 percent, and 48.28 percent for fiscal years 2003-2004, 2004-2005, 2005-2006, and 2006-2007 respectively.<sup>118</sup>

The claimant's main dispute is that the recalculation excludes capital costs from the calculation, and replaces capital costs with depreciation expenses.<sup>119</sup> However, there is no evidence in the record that the Controller's recalculation is arbitrary, capricious, or totally lacking in evidentiary support. As explained in the claiming instructions, the Controller excluded capital costs in accordance with the OMB Circular A-21:

The SCO developed FAM-29C to be consistent with OMB Circular A-21, cost accounting principles as they apply to mandated cost programs. The objective is to determine an equitable rate to allocate administrative support to personnel who performed the mandated cost activities. The FAM-29C methodology uses a direct cost base comprised of salary and benefit costs and operating expenses. Form FAM-29C provides a consistent indirect cost rate methodology for all CCD's mandated cost programs.

FAM-29C uses total expenditures that districts report in their *California Community Colleges Annual Financial and Budget Report* (CCFS-311), Expenditures by Activity for the General Fund—Combined. The computation excludes Capital Outlay and Other Outgo in accordance with OMB Circular A-21. The indirect cost rate computation includes any depreciation or use allowance applicable to district buildings and equipment. Districts calculate depreciation or use allowance costs separately from the CCFS-311 and should calculate them in accordance with OMB Circular A-21.<sup>120</sup>

As previously stated, the standard of review which the Commission employs to review the Controller's audit provides that the Commission may "not reweigh the evidence or substitute its

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<sup>117</sup> Exhibit A, IRC, page 71.

<sup>118</sup> *Ibid.* Compared to the claimed indirect cost rates for those years of 41.21 percent, 45.62 percent, 47.74 percent, and 53.93 percent. (Exhibit B, Controller's Late Comments on the IRC, page 13.)

<sup>119</sup> Exhibit A, IRC, page 16.

<sup>120</sup> Exhibit X, Community Colleges Mandated Cost Manual excerpt 2005-2006, page 17.

judgment for that of the agency.”<sup>121</sup> Thus, the Commission cannot compel the Controller to use other auditing procedures in place of the Form FAM-29C.

Accordingly, the Commission finds the recalculation of indirect costs for fiscal years 2003-2004, 2004-2005, 2005-2006, and 2006-2007 is not arbitrary, capricious, or entirely lacking in evidentiary support.

**D. The Controller’s Reduction for Understated Offsetting Fees Authorized to be Charged Is Correct as a Matter of Law, and the Recalculation of Authorized Fees Is Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

The Controller determined that the claimant understated its authorized health fee revenues by \$483,871 over the four fiscal years at issue.<sup>122</sup> The Controller found that the claimant reported actual receipts, rather than the health service fees authorized to be charged. The reduction was made on the basis of the fee authority available to claimant, multiplied by the number of students subject to the fee, less the amount of offsetting revenue claimed.

The plain language of Education Code section 76355 provides authority to collect health fees for all students except those who depend exclusively on prayer for healing, those attending a community college under an approved apprenticeship training program, or those who demonstrate financial need.<sup>123</sup> For the audit period, the authorized fee amounts identified by the Chancellor ranged from \$9 per student to \$11 per student. The Controller states that it “obtained student enrollment and Board of Governors Grant (BOGG) recipient data from the CCCCCO” and identified exempt students based on the information available, and multiplied those enrollment data by the authorized fee amounts for each semester during the audit period.<sup>124</sup>

Claimant disputes the reduction, arguing that the relevant Education Code provisions permit, but do not require, a community college district to levy a health services fee, and that the parameters and guidelines require a community college district to deduct from its reimbursement claims “[a]ny offsetting savings that the claimant *experiences* as a direct result of this statute...” The claimant argues that “[s]tudent fees *actually collected* must be used to offset costs, but not student fees that could have been collected and were not...”<sup>125</sup>

The Commission finds that the correct calculation and application of offsetting revenue from student health fees has been resolved by the *Clovis Unified*<sup>126</sup> decision, and that a reduction to the extent of the fee *authority*, rather than fee revenue actually collected, is correct as a matter of law.

After the claimant filed its IRC, the *Clovis* court specifically addressed the Controller’s practice of reducing claims of community college districts by the maximum fee amount that districts are

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<sup>121</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>122</sup> Exhibit A, IRC, page 75.

<sup>123</sup> Education Code section 76355.

<sup>124</sup> Exhibit A, IRC, page 75.

<sup>125</sup> Exhibit A, IRC, pages 26.

<sup>126</sup> *Clovis Unified School Dist. v. Chiang, supra*, 188 Cal.App.4th 794.

statutorily authorized to charge students, whether or not districts choose to impose those fees. As expressed 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.<sup>127</sup> (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 calculation produces an increase of one dollar (\$1) above the existing fee, the fee may be increased by one dollar (\$1).<sup>128</sup>

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.<sup>129</sup> The Chancellor of the California Community Colleges issues a notice to the governing boards of all community colleges when a fee increase is triggered. The claimant argues that the Controller cannot rely on the Chancellor’s notice to adjust the claim for ‘collectible’ student health services fees because the fees levied on students are raised by the governing board of the community college district.<sup>130</sup> But the *authority* to impose the health service fees increases automatically with the Implicit Price Deflator, as noticed by the Chancellor. Accordingly, 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. The court held that:

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<sup>127</sup> *Clovis Unified School Dist. v. Chiang, supra*, 188 Cal.App.4th 794, 811.

<sup>128</sup> Education Code section 76355(d)(2) (Stats. 1993, ch. 8 (AB 46); Stats. 1993, ch. 1132 (AB 39); Stats. 1994, ch. 422 (AB 2589); Stats. 1995, ch. 758 (AB 446); Stats. 2005, ch. 320 (AB 982)) [Formerly Education Code section 72246(e) (Stats. 1987, ch. 118)].

<sup>129</sup> 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.

<sup>130</sup> Exhibit A, IRC, pages 23-27.

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.<sup>131</sup>

The court also noted 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.’”<sup>132</sup> Additionally, in responding to the claimant’s argument that, “since the Health Fee Rule is a claiming instruction, its validity must be determined *solely* through the Commission’s P&G’s,”<sup>133</sup> 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*.<sup>134</sup> (Italics added.)

Since the *Clovis* case is a final decision of the court addressing the merits of the issue presented here, the Commission, under principles of stare decisis, is required to apply the rule set forth by the court.<sup>135</sup> In addition, the *Clovis* decision is binding on the claimant under principles of collateral estoppel.<sup>136</sup> Collateral estoppel applies when (1) the issue necessarily decided in the previous proceeding is identical to the one that is currently being decided; (2) the previous proceeding terminated with a final judgment on the merits; (3) the party against whom collateral estoppel is asserted is a party to or in privity with a party in the previous proceeding; and (4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue.<sup>137</sup> Although the claimant to this IRC was not a party to the *Clovis* action, the claimant is in privity with the petitioners in *Clovis*. “A party is adequately represented for purposes of the privity rule if his or her interests are so similar to a party’s interest that the latter was the former’s virtual representative in the earlier action.”<sup>138</sup>

The Commission further finds that the Controller’s calculation of the claimant’s authorized offsetting fee revenue is not arbitrary, capricious, or entirely lacking in evidentiary support, since the Controller used the enrollment data available and reported by the claimant. The Controller obtained student enrollment and Board of Governors Grant (BOGG) recipient data from the California Community Colleges Chancellor’s Office and calculated the authorized health service

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<sup>131</sup> *Clovis Unified School Dist. v. Chiang, supra*, 188 Cal.App.4th 794, 812.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.* Italics in original.

<sup>134</sup> *Clovis Unified School Dist. v. Chiang, supra*, 188 Cal.App.4th 794, 812.

<sup>135</sup> *Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 596.

<sup>136</sup> The petitioners in the *Clovis* case included Clovis Unified School District, El Camino Community College District, Fremont Unified School District, Newport-Mesa Unified School District, Norwalk-La Mirada Unified School District, Riverside Unified School District, San Mateo Community College District, Santa Monica Community College District, State Center Community College District, and Sweetwater Union High School District.

<sup>137</sup> *Roos v. Red* (2006) 130 Cal.App.4th 870, 879-880.

<sup>138</sup> *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 91.



fees using the authorized rates that the Chancellor's Office noticed during the fiscal years at issue.<sup>139</sup>

Therefore, the Commission finds that the Controller's reduction of \$483,871 based on the claimant's unreported offsetting fee authority is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

#### **V. Conclusion**

The Commission finds that the Controller's reduction of costs is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

Based on the foregoing, the Commission denies this IRC.

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<sup>139</sup> Exhibit A, IRC, page 75.

**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento 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 February 13, 2017, I served the:

**Draft Proposed Decision, Schedule for Comments, and Notice of Hearing**

*Health Fee Elimination*, 10-4206-I-31

Former Education Code Section 72246 (Renumbered as 76355)<sup>1</sup>

Statutes 1984, Chapter 1 (1983-1984 2nd Ex. Sess.) (AB2X 1);

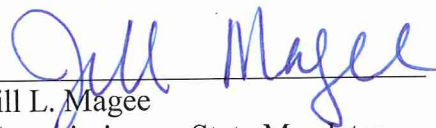
and Statutes 1987, Chapter 1118 (AB 2336)

Fiscal Years: 2003-2004, 2004-2005, 2005-2006, and 2006-2007

San Bernardino Community College District, Claimant

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 February 13, 2017 at Sacramento, California.



Jill L. Magee

Commission on State Mandates

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Sacramento, CA 95814

(916) 323-3562

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<sup>1</sup> Statutes 1993, chapter 8.

# COMMISSION ON STATE MANDATES

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**Last Updated:** 2/8/17

**Claim Number:** 10-4206-I-31

**Matter:** Health Fee Elimination

**Claimant:** San Bernardino Community College District

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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, § 1181.3.)

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