

BEFORE THE  
 COMMISSION ON STATE MANDATES  
 STATE OF CALIFORNIA

**IN RE INCORRECT REDUCTION CLAIM  
 ON:**

Public Resources Code Sections 40148, 40196.3, 42920-42928; Public Contract Code Sections 12167 and 12167.1; Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75); State Agency Model Integrated Waste Management Plan (February 2000)

Fiscal Years 2000-2001, 2003-2004, 2004-2005, 2005-2006, 2006-2007, and 2007-2008

El Camino Community College District,  
 Claimant

Case No.: 14-0007-I-07

*Integrated Waste Management*

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

*(Adopted January 26, 2018)*

*(Served January 31, 2018)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on January 26, 2018. The claimant, El Camino Community College District, did not attend the hearing. Lisa Kurokawa appeared on behalf of the State Controller’s Office.

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 the Proposed Decision to partially approve the IRC by a vote of 6-0 as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	Yes
Richard Chivaro, Representative of the State Controller	Absent
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	Yes
Scott Morgan, Representative of the Director of the Office of Planning and Research	Yes
Sarah Olsen, Public Member	Yes
Carmen Ramirez, City Council Member	Yes
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	Yes

## **Summary of the Findings**

This IRC addresses reductions made by the State Controller's Office (Controller) to reimbursement claims of the El Camino Community College District (claimant) for fiscal years 2000-2001 and 2003-2004 through 2007-2008 (the audit period), under the *Integrated Waste Management* program, 00-TC-07. The Controller made the audit reductions because the claimant did not identify and deduct from its reimbursement claims offsetting cost savings from its diversion of solid waste and the associated reduced or avoided landfill disposal costs.

The test claim statutes require community college districts to adopt and implement, in consultation with California Integrated Waste Management Board (CIWMB, which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste<sup>1</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent by January 1, 2004.<sup>2</sup> The test claim statutes also provide that "Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency's integrated waste management plan to fund plan implementation and administration costs . . ."<sup>3</sup>

The statutes, therefore, presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. The amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB.<sup>4</sup>

The Commission finds that the Controller timely initiated the audit of the fiscal year 2000-2001 reimbursement claim and timely completed the audit for all of the reimbursement claims at issue in this matter pursuant to Government Code section 17558.5. Government Code section 17558.5(a) tolls the time to initiate the audit to three years from the date of initial payment on the claim, rather than three years from the date the claim was filed, "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 record shows that the Controller first made payment on the 2000-2001 reimbursement claim on either January 18, 2011,<sup>5</sup> or January 28, 2011,<sup>6</sup> within three years of the date the audit was initiated on January 17, 2014,<sup>7</sup> so the audit was timely initiated. The audit was complete for all

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<sup>1</sup> Public Resources Code section 42920(b).

<sup>2</sup> Public Resources Code section 40124.

<sup>3</sup> Public Resources Code section 42925(a).

<sup>4</sup> Exhibit B, Controller's Late Comments on the IRC, pages 75-76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>5</sup> Exhibit A, IRC, page 214.

<sup>6</sup> Exhibit B, Controller's Late Comments on the IRC, pages 11, 35.

<sup>7</sup> Exhibit B, Controller's Late Comments on the IRC, pages 33. Exhibit A, IRC, page 10.

reimbursement claims when the final audit report was issued March 19, 2014,<sup>8</sup> well before the two-year deadline of January 17, 2016.

On the merits, the Commission finds that the audit reductions are partially correct.

During the audit period, the claimant diverted solid waste, as required by the test claim statutes, and exceeded the mandated diversion rate in all years except in the first half of fiscal year 2000-2001. The Controller correctly presumed, consistent with the test claim statutes and the court's interpretation of those statutes, and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill disposal fee per ton of waste required to be diverted.

Based on the evidence in the record, the Commission finds that the Controller's calculation of offsetting cost savings for all years in the audit period except the first half of fiscal year 2003-2004 is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support. For those years the claimant exceeded the mandate, the Controller calculated offsetting savings by allocating the diversion to reflect the mandate. The Controller allocated the diversion by dividing the percentage of solid waste required to be diverted by the test claim statute (either 25 percent or 50 percent) by the actual percentage of solid waste diverted (as annually reported by the claimant to the California Integrated Waste Management Board (CIWMB)). The allocated tonnage of solid waste diverted was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized.<sup>9</sup> The formula allocates cost savings based on the mandated rate of diversion, and is intended to avoid penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>10</sup> The claimant has not filed any evidence to rebut the statutory presumption of cost savings or to show that the statewide average disposal fee is incorrect or arbitrary. Thus, the Controller's reduction of costs claimed for these fiscal years is correct.

For the first half of fiscal year 2000-2001, the claimant achieved a 21.5 percent diversion, which the Controller correctly determined did *not* reach the minimum 25 percent diversion mandated by the state. To calculate cost savings for this time period, the Controller did not allocate the diversion percentage, but instead multiplied 100 percent of the solid waste that claimant diverted for the year by the avoided landfill disposal fee.<sup>11</sup>

These formulas are consistent with the statutory presumption of cost savings and correctly presume, without any evidence to the contrary, that the waste diverted results in offsetting cost savings in an amount equal to the avoided landfill fee per ton of waste required to be diverted and actually diverted. In years when the claimant exceeded the mandated diversion rates, the Controller's formula limits the offset to the mandated diversion rate.

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<sup>8</sup> Exhibit A, IRC, page 26 (Final Audit Report).

<sup>9</sup> Exhibit A, IRC, pages 34; Exhibit B, Controller's Late Comments on the IRC, page 19-20.

<sup>10</sup> Exhibit B, Controller's Late Comments on the IRC, pages 19.

<sup>11</sup> Exhibit B, Controller's Late Comments on the IRC, page 71. The calculation was only for the first half of fiscal year 2000-2001, so the Controller's calculation was based on half the total tonnage diverted (206.8 tons).

However, the Controller's reduction of costs claimed for the first half of fiscal year 2003-2004 is incorrect as a matter of law. The Controller allocated the diversion rate for 2003-2004, as it did for the other fiscal years, because the claimant exceeded the mandate. However, the Controller used a 50 percent rate to calculate the allocated diversion rate although the test claim statutes required only 25 percent diversion in calendar year 2003.<sup>12</sup> The requirement to divert 50 percent of solid waste did not become operative until January 1, 2004,<sup>13</sup> so the calculation of cost savings for fiscal year 2003-2004 is incorrect as a matter of law.

Applying the Controller's cost savings formula (using the mandated 25 percent diversion rate) to the first half of fiscal year 2003-2004, results in offsetting savings of \$13,772 (25 percent divided by 62.5 percent, multiplied by 934.85 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$27,544. The Commission finds that the difference of \$13,772 has been incorrectly reduced and should be reinstated to the claimant.

Therefore, the Commission partially approves this IRC, and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission's regulations, that the Controller reinstate \$13,772 to the claimant.

## COMMISSION FINDINGS

### I. Chronology

- 10/06/2005 The claimant filed its 2000-2001 reimbursement claim.<sup>14</sup>
- 03/30/2009 The claimant filed its 2003-2004, 2004-2005, 2005-2006, 2006-2007, and 2007-2008 reimbursement claim.<sup>15</sup>
- 01/17/2014 The Controller notified the claimant of the audit.<sup>16</sup>
- 03/19/2014 The Controller issued the Final Audit Report.<sup>17</sup>
- 07/17/2014 The claimant filed this IRC.<sup>18</sup>
- 05/06/2015 The Controller filed late comments on the IRC.<sup>19</sup>

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<sup>12</sup> Exhibit B, Controller's Late Comments on the IRC, page 71.

<sup>13</sup> Public Resources Code sections 42921; Exhibit A, IRC, page 91 (Parameters and Guidelines).

<sup>14</sup> Exhibit A, IRC, pages 171.

<sup>15</sup> Exhibit A, IRC, pages 175, 185, 192, 200, and 207.

<sup>16</sup> Exhibit B, Controller's Late Comments on the IRC, page 33.

<sup>17</sup> Exhibit A, IRC, page 26 (Final Audit Report).

<sup>18</sup> Exhibit A, IRC, page 1.

<sup>19</sup> Exhibit B, Controller's Late Comments on the IRC, page 1. Note that Government Code section 17553(d) states: "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

11/08/2017 Commission staff issued the Draft Proposed Decision.<sup>20</sup>

11/14/2017 The Controller filed comments on the Draft Proposed Decision.<sup>21</sup>

## II. Background

### A. The *Integrated Waste Management Program*

The test claim statutes require community college districts<sup>22</sup> to adopt and implement, in consultation with CIWMB (which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste, reuse materials whenever possible, recycle recyclable materials, and procure products with recycled content in all agency offices and facilities.<sup>23</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent by January 1, 2004. To divert means to “reduce or eliminate the amount of solid waste from solid waste disposal...”<sup>24</sup>

CIWMB developed and adopted a model IWM plan on February 15, 2000, and the test claim statutes provide that if a district does not adopt an IWM plan, the CIWMB model plan governs the community college.<sup>25</sup> Each district is also required to report annually to CIWMB on its progress in reducing solid waste; and the reports’ minimum contents are specified in statute.<sup>26</sup> The test claim statutes also require a community college, when entering into or renewing a lease, to ensure that adequate areas are provided for and adequate personnel are available to oversee collection, storage, and loading of recyclable materials in compliance with CIWMB’s requirements.<sup>27</sup> Additionally, the test claim statutes added Public Resources Code section 42925(a), which addressed cost savings from IWM plan implementation:

Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code.

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IRCs, these late comments have not delayed consideration of this item and so have been included in the analysis and Proposed Decision.

<sup>20</sup> Exhibit C, Draft Proposed Decision.

<sup>21</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

<sup>22</sup> The test claim statutes apply to “state agencies” and define them to include “the California Community Colleges” (Pub. Res. Code, § 40196.3).

<sup>23</sup> Public Resources Code section 42920(b).

<sup>24</sup> Public Resources Code section 40124.

<sup>25</sup> Public Resources Code section 42920(b)(3).

<sup>26</sup> Public Resources Code section 42926.

<sup>27</sup> Public Resources Code section 42924(b).

The Public Contract Code sections referenced in section 42925(a) require that revenue received as a result of the community college's IWM plan be deposited in CIWMB's Integrated Waste Management Account. After July 1, 1994, CIWMB is authorized to spend the revenue upon appropriation by the Legislature to offset recycling program costs. Annual revenue under \$2,000 is to be continuously appropriated for expenditure by the community colleges, whereas annual revenue over \$2,000 is available for expenditures upon appropriation by the Legislature.<sup>28</sup>

On March 24, 2004, the Commission adopted the *Integrated Waste Management* Statement of Decision and determined that the test claim statutes impose a reimbursable state-mandated program on community college districts. The Commission also found that cost savings under Public Resources Code section 42925(a) did not preclude a reimbursable mandate under Government Code section 17556(e) because there was no evidence that offsetting savings would result in no net costs to a community college implementing an IWM plan, nor was there evidence that revenues received from plan implementation would be "in an amount sufficient to fund" the cost of the state-mandated program. The Commission found that any revenues received would be identified as offsetting revenue in the Parameters and Guidelines.

The Parameters and Guidelines were adopted on March 30, 2005, and authorize reimbursement for the increased costs to perform the following activities:

- A. One-Time Activities (*Reimbursable starting January 1, 2000*)
  - 1. Develop the necessary district policies and procedures for the implementation of the integrated waste management plan.
  - 2. Train district staff on the requirements and implementation of the integrated waste management plan (one-time per employee). Training is limited to the staff working directly on the plan.
- B. Ongoing Activities (*Reimbursable starting January 1, 2000*)
  - 1. Complete and submit to the [Integrated Waste Management] Board the following as part of the State Agency Model Integrated Waste Management Plan (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.):
    - a. state agency or large state facility information form;

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<sup>28</sup> Public Contract Code sections 12167 and 12167.1 are part of the State Assistance for Recycling Markets Act, which was originally enacted in 1989 to foster the procurement and use of recycled paper products and other recycled resources in daily state operations (See Pub. Contract Code, §§ 12153, 12160; Stats. 1989, ch. 1094). The Act, including sections 12167 and 12167.1, applies to California community colleges only to the limited extent that these sections are referenced in Public Resources Code section 42925. Community colleges are not defined as state agencies or otherwise subject to the Act's provisions for the procurement and use of recycled products in daily state operations. See Exhibit B, Controller's Late Comments on the IRC, pages 88-89 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355)).

- b. state agency list of facilities;
- c. state agency waste reduction and recycling program worksheets that describe program activities, promotional programs, and procurement activities, and other questionnaires; and
- d. state agency integrated waste management plan questions.

NOTE: Although reporting on promotional programs and procurement activities in the model plan is reimbursable, implementing promotional programs and procurement activities is not.

- 2. Respond to any Board reporting requirements during the approval process. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
  - 3. Consult with the Board to revise the model plan, if necessary. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
  - 4. Designate one solid waste reduction and recycling coordinator for each college in the district to perform new duties imposed by chapter 18.5 (Pub. Resources Code, §§ 42920 – 42928). The coordinator shall implement the integrated waste management plan. The coordinator shall act as a liaison to other state agencies (as defined by section 40196.3) and coordinators. (Pub. Resources Code, § 42920, subd. (c).)
  - 5. Divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities. Maintain the required level of reduction, as approved by the Board. (Pub. Resources Code, §§ 42921 & 42922, subd. (i).)
- C. Alternative Compliance (*Reimbursable from January 1, 2000 – December 31, 2005*)
- 1. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2002 deadline to divert 25 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42923 subds. (a) & (c).)
    - a. Notify the Board in writing, detailing the reasons for its inability to comply.
    - b. Request of the Board an alternative to the January 1, 2002 deadline.
    - c. Provide evidence to the Board that the college is making a good faith effort to implement the source reduction, recycling, and composting programs identified in its integrated waste management plan.
    - d. Provide information that describes the relevant circumstances that contributed to the request for extension, such as lack of markets for

recycled materials, local efforts to implement source reduction, recycling and composting programs, facilities built or planned, waste disposal patterns, and the type of waste disposed of by the community college.

- e. Submit a plan of correction that demonstrates that the college will meet the requirements of Section 42921 [the 25 and 50 percent diversion requirements] before the time extension expires, including the source reduction, recycling, or composting steps the community college will implement, a date prior to the expiration of the time extension when the requirements of Section 42921 will be met, the existing programs that it will modify, any new programs that will be implemented to meet those requirements, and the means by which these programs will be funded.
2. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2004 deadline to divert 50 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42922, subs. (a) & (b).)
    - a. Notify the Board in writing, detailing the reasons for its inability to comply.
    - b. Request of the Board an alternative to the 50-percent requirement.
    - c. Participate in a public hearing on its alternative requirement.
    - d. Provide the Board with information as to:
      - (i) the community college's good faith efforts to implement the source reduction, recycling, and composting measures described in its integrated waste management plan, and demonstration of its progress toward meeting the alternative requirement as described in its annual reports to the Board;
      - (ii) the community college's inability to meet the 50 percent diversion requirement despite implementing the measures in its plan;
      - (iii) how the alternative source reduction, recycling, and composting requirement represents the greatest diversion amount that the community college may reasonably and feasibly achieve; and,
      - (iv) the circumstances that support the request for an alternative requirement, such as waste disposal patterns and the types of waste disposed by the community college.<sup>29</sup>

D. Accounting System (*Reimbursable starting January 1, 2000*)

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<sup>29</sup> These alternative compliance and time extension provisions in part C were sunset on January 1, 2006, but were included in the adopted Parameters and Guidelines.

Developing, implementing, and maintaining an accounting system to enter and track the college's source reduction, recycling and composting activities, the cost of those activities, the proceeds from the sale of any recycled materials, and such other accounting systems which will allow it to make its annual reports to the state and determine waste reduction. Note: only the pro-rata portion of the costs incurred to implement the reimbursable activities can be claimed.

E. Annual Report (*Reimbursable starting January 1, 2000*)

Annually prepare and submit, by April 1, 2002, and by April 1 each subsequent year, a report to the Board summarizing its progress in reducing solid waste. The information in the report must encompass the previous calendar year and shall contain, at a minimum, the following as outlined in section 42926, subdivision (b): (Pub. Resources Code, §§ 42926, subd. (a) & 42922, subd. (i).)

1. calculations of annual disposal reduction;
2. information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors;
3. a summary of progress made in implementing the integrated waste management plan;
4. the extent to which the community college intends to use programs or facilities established by the local agency for handling, diversion, and disposal of solid waste (If the college does not intend to use those established programs or facilities, it must identify sufficient disposal capacity for solid waste that is not source reduced, recycled or composted.);
5. for a community college that has been granted a time extension by the Board, it shall include a summary of progress made in meeting the integrated waste management plan implementation schedule pursuant to section 42921, subdivision (b), and complying with the college's plan of correction, before the expiration of the time extension;
6. for a community college that has been granted an alternative source reduction, recycling, and composting requirement by the Board pursuant to section 42922, it shall include a summary of progress made towards meeting the alternative requirement as well as an explanation of current circumstances that support the continuation of the alternative requirement.

F. Annual Recycled Material Reports (*Reimbursable starting July 1, 1999*)

Annually report to the Board on quantities of recyclable materials collected for recycling. (Pub. Contract Code, § 12167.1.) (See Section VII. regarding offsetting revenues from recyclable materials.)<sup>30</sup>

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<sup>30</sup> Exhibit A, IRC, page 41-44 (Parameters and Guidelines, adopted March 30, 2005).

The Parameters and Guidelines further require that each claimed reimbursable cost be supported by contemporaneous source documentation.<sup>31</sup>

And as originally adopted, the Parameters and Guidelines required community college districts to identify and deduct from their reimbursement claims all of the offsetting revenues received from the sale of recyclable materials, limited by the provisions of Public Resources Code section 42925 and Public Contract Code section 12167.1. The original Parameters and Guidelines did not require community colleges to identify and deduct from their claims any offsetting cost savings resulting from the solid waste diversion activities required by the test claim statutes.<sup>32</sup>

### **B. Superior Court Decision on Cost Savings and Offsets Under the Program**

After the Parameters and Guidelines were adopted, the Department of Finance (Finance) and CIWMB filed a petition for writ of mandate requesting the court to direct the Commission to set aside the Test Claim Statement of Decision and Parameters and Guidelines and to issue a new Decision and Parameters and Guidelines that give full consideration to the cost savings and offsetting revenues community college districts will achieve by complying with the test claim statutes, including all cost savings realized from avoided landfill disposal fees and revenues received from the collection and sale of recyclable materials. The petitioners further argued that Public Contract Code sections 12167 and 12167.1 do not require community college districts to deposit revenues received from the collection and sale of recyclable materials into the Integrated Waste Management Account, as determined by the Commission, but instead allow community college districts to retain all revenues received. The petitioners argued that such revenues must be identified as offsetting revenues and applied to the costs of the program, without the community college district obtaining the approval of the Legislature or CIWMB.

On May 29, 2008, the Sacramento County Superior Court granted the petition for writ of mandate, finding that the Commission's treatment of cost savings and revenues in the Parameters and Guidelines was erroneous and required that the Parameters and Guidelines be amended. The court said:

There is no indication in the administrative record or in the legal authorities provided to the court that, as respondent [Commission] argues, a California Community College might not receive the full reimbursement of its actual increased costs required by section 6 if its claims for reimbursement of IWM plan costs were offset by realized cost savings and all revenues received from the plan activities.<sup>33</sup>

Instead, the court recognized that community colleges are “likely to experience costs savings in the form of reduced or avoided costs of landfill disposal” as a result of the mandated activities in Public Resources Code section 42921 because reduced or avoided costs “are a direct result and

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<sup>31</sup> Exhibit A, IRC, page 41 (Parameters and Guidelines, adopted March 30, 2005).

<sup>32</sup> Exhibit A, IRC, pages 46 (Parameters and Guidelines, adopted March 30, 2005).

<sup>33</sup> Exhibit B, Controller's Late Comments on the IRC, page 78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter, Footnote 1).

an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.”<sup>34</sup> The court noted that “diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates” and cited the statutory definition of diversion: “activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division [i.e., division 30, including § 42920 et seq.]” as well as the statutory definition of disposal: “the management of solid waste through landfill disposal or transformation at a permitted solid waste facility.”<sup>35</sup> The court explained:

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(l) of Public Resources Code section 42926.<sup>36</sup>

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of

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<sup>34</sup> Exhibit B, Controller’s Late Comments on the IRC, page 78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

<sup>35</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 78-79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>36</sup> Exhibit B, Controller’s Late Comments on the IRC, page 79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>37</sup>

The court issued a writ of mandate directing the Commission to amend the Parameters and Guidelines to require community college districts claiming reimbursable costs of an IWM plan to:

1. Identify and offset from their claims, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1, cost savings realized as a result of implementing their plans; and
2. Identify and offset from their claims all of the revenue generated as a result of implementing their plans, without regard to the limitations or conditions described in sections 12167 and 12167.1 of the Public Contract Code.<sup>38</sup>

### **C. Parameters and Guidelines Amendment Pursuant to the Writ**

In compliance with the writ, the Commission amended the Parameters and Guidelines on September 26, 2008 to add section VIII. Offsetting Cost Savings, which states:

Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1. Pursuant to these statutes, community college districts are required to deposit cost savings resulting from their Integrated Waste Management plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the California Integrated Waste Management Board for the purpose of offsetting Integrated Waste Management plan costs. Subject to the approval of the California Integrated Waste Management Board, cost savings by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting Integrated Waste Management program costs. Cost savings exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature.

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<sup>37</sup> Exhibit B, Controller's Late Comments on the IRC, pages 80-81 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>38</sup> Exhibit B, Controller's Late Comments on the IRC, page 30 (Judgment Granting Petition for Writ of Administrative Mandamus).

To the extent so approved or appropriated and applied to the college, these amounts shall be identified and offset from the costs claimed for implementing the Integrated Waste Management Plan.<sup>39</sup>

Section VII. of the Parameters and Guidelines, on Offsetting Revenues, was amended as follows (amendments in strikeout and underline):

Reimbursement for this mandate from any source, including but not limited to, services fees collected, federal funds, and other state funds allocated to any service provided under this program, shall be identified and ~~deducted~~ offset from this claim. Offsetting revenue shall include all revenues generated from implementing the Integrated Waste Management Plan. ~~the revenues cited in Public Resources Code section 42925 and Public Contract Code sections 12167 and 12167.1.~~

~~Subject to the approval of the California Integrated Waste Management Board, revenues derived from the sale of recyclable materials by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting recycling program costs. Revenues exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature. To the extent so approved or appropriated and applied to the college, these amounts are a reduction to the recycling costs mandated by the state to implement Statutes 1999, chapter 764.~~

In addition, revenue from a building-operating fee imposed pursuant to Education Code section 76375, subdivision (a) if received by a claimant and the revenue is applied to this program, shall be deducted from the costs claimed.<sup>40</sup>

All other requirements in the Parameters and Guidelines remained the same.

CIWMB requested additional amendments to the Parameters and Guidelines at this September 2008 hearing, including a request to alter the offsetting savings provision to require community college districts to provide offsetting savings information *whether or not* the offsetting savings generated in a fiscal year exceeded the \$2,000 continuous appropriation required by Public Contract Code sections 12167 and 12167.1. The Commission denied the request because the proposed language went beyond the scope of the court's judgment and writ.<sup>41</sup> As the court found:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs "in accordance with Sections 12167 and 12167.1 of the Public Contract Code," section 42925 assures that cost savings realized from state agencies' IWM plans are handled in a manner

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<sup>39</sup> Exhibit A, IRC page 59 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>40</sup> Exhibit A, IRC, pages 46, 58-59 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>41</sup> Exhibit E, Commission on State Mandates, Excerpt from the Minutes for the September 26, 2008 Meeting.

consistent with the handling of revenues received from state agencies' recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>42</sup>

CIWMB also requested adding a requirement for community college districts to analyze specified categories of potential cost savings when filing their reimbursement claims. The Commission found that the court determined that the amount or value of cost savings is already available from the annual reports the community college districts provide to CIWMB pursuant to Public Resources Code section 42926(b). This report is required to include the district's "calculations of annual disposal reduction" and "information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors." Thus, the Commission denied CIWMB's request and adopted the staff analysis finding that the request was beyond the scope of the court's writ and judgment. The Commission also noted that the request was the subject of separate pending request filed by CIWMB to amend the Parameters and Guidelines and would therefore be further analyzed for that matter.

#### **D. Subsequent Request by CIWMB to Amend the Parameters and Guidelines to Require Detailed Reports on Cost Savings and Revenues**

CIWMB filed a request to amend the Parameters and Guidelines to require community college districts to submit with their reimbursement claims a separate worksheet and report analyzing the costs incurred and avoided and any fees received relating to staffing, overhead, materials, storage, transportation, equipment, the sale of commodities, avoided disposal fees, and any other revenue received relating to the mandated program as specified by CIWMB. At its January 30, 2009 meeting, the Commission denied the request for the following reasons: there is no requirement in statute or regulation that community college districts perform the analysis specified by CIWMB; the Commission has no authority to impose additional requirements on community college districts regarding this program; the offsetting cost savings paragraph in the Parameters and Guidelines already identifies the offsetting savings consistent with the language

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<sup>42</sup> Exhibit B, Controller's Late Comments on the IRC, pages 80-81 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

of Public Resources Code section 42925(a), Public Contract Code sections 12167 and 12167.1, and the court's judgment and writ; and information on cost savings is already available in the community colleges' annual reports submitted to CIWMB, as required by Public Resources Code section 42926(b)(1).<sup>43</sup>

#### **E. The *Integrated Waste Management Program Made Optional***

This program was made optional by Statutes 2010, chapter 724 (AB 1610), section 34, effective October 19, 2010 and has remained so since that time.<sup>44</sup>

#### **F. The Controller's Audit**

The Controller audited the reimbursement claims for fiscal year 2000-2001 and 2003-2004 through 2007-2008. Fiscal years 2001-2002 and 2002-2003 were not audited because the Controller stated that the statute of limitations to initiate the review had expired for those years.<sup>45</sup>

Of the \$363,721 claimed during the audit period, the Controller found that \$156,530 is allowable and \$207,191 is unallowable because the claimant did not report offsetting savings from implementation of its IWM plan.<sup>46</sup> The Controller found that the claimant realized total offsetting savings of \$237,876 from implementation of its IWM plan but the claimant reported \$30,685 in offsetting savings, understating total offsetting savings by \$207,191.<sup>47</sup>

The Controller's audit finding is based on the court's ruling, which states, "the amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California community colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926,"<sup>48</sup> the resulting amendment to the Parameters and Guidelines, and the claimant's annual reports to CIWMB.

The Controller determined that the claimant diverted more solid waste than the amount mandated by the test claim statute each year of the audit period, except for the first half of fiscal year 2000-2001, when the Controller found that the claimant diverted solid waste, but not to the 25 percent

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<sup>43</sup> Exhibit E, Commission on State Mandates, Item 9, Final Staff Analysis of Proposed Amendments to the Parameters and Guidelines for *Integrated Waste Management*, 05-PGA-16, January 30, 2009, pages 2-3.

<sup>44</sup> See Government Code section 17581.5.

<sup>45</sup> Exhibit A, IRC, page 26 (Final Audit Report).

<sup>46</sup> Exhibit A, IRC, page 33 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, pages 7 and 27.

<sup>47</sup> Exhibit B, Controller's Late Comments on the IRC, page 16.

<sup>48</sup> Exhibit B, Controller's Late Comments on the IRC, page 79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

mandated diversion rate.<sup>49</sup> Thus, the Controller found that the claimant realized cost savings in each year of the audit period.

For the years the claimant exceeded the diversion mandate, the Controller calculated offsetting cost savings by allocating the diversion to reflect the mandate. The Controller allocated the diversion by dividing the percentage of solid waste required to be diverted (either 25 or 50 percent) by the actual percentage of solid waste diverted (as reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized in those years.<sup>50</sup>

$$\text{Offsetting Savings Realized} = \frac{\text{Maximum Allowable Diversion \%}}{\text{Actual Diversion \%}} \times \text{Tonnage Diverted} \times \text{Avoided Landfill Disposal Fee (per Ton)}$$

The Controller provided an example of how the formula works. For calendar year 2007, the claimant reported diversion of 1,184.2 tons of solid waste and disposal of 808.8 tons generated that year. Diverting 1,184.2 tons out of the 1,993 tons of waste generated results in a diversion rate of 59.42 percent (exceeding the 50 percent required).<sup>51</sup> To avoid penalizing the claimant for diverting more solid waste than the amount mandated,<sup>52</sup> the Controller allocated the diversion by dividing the diversion rate mandated by the test claim statute (50 percent) by the actual diversion rate (59.42 percent), which equals 84.15 percent. The 84.15 allocated diversion rate is then multiplied by the 1,184.2 tons diverted that year, which equals 996.5 tons of diverted solid waste, instead of the 1,184.2 tons actually diverted. The allocated 996.5 tons of diverted waste is then multiplied by the statewide average disposal fee per ton, which in calendar year 2007 was \$48, resulting in “offsetting cost savings” for calendar year 2007 of \$47,832.<sup>53</sup>

<sup>49</sup> Exhibit A, IRC, page 32, fn. 2 (Final Audit Report); Exhibit B, Controller’s Late Comments on the IRC, page 71.

<sup>50</sup> Exhibit A, IRC, pages 34 (Final Audit Report).

<sup>51</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 19, 71 (Controller’s calculation of offsetting savings).

<sup>52</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

<sup>53</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 19, 71 (Controller’s calculations of offsetting savings). Page 19 of the Controller’s Late Comments on the IRC describe the calculation differently than the formula identified in the audit report, but the result is the same. The Controller states that cost savings can be calculated by multiplying the total tonnage generated (solid waste diverted + disposed) by the mandated diversion percentage (25 or 50 percent), times the avoided landfill disposal fee:

For example, in calendar 2007, the district reported to CalRecycle that it diverted 1,184.2 tons of solid waste and disposed of 808.8 tons, which results in an overall diversion percentage of 59.4% [Tab 6, page 20]. Because the district was

For the first half of fiscal year 2000-2001, the Controller found that the claimant did not achieve the mandated 25 percent diversion rate, so the Controller did not allocate the diversion of solid waste to the mandated rate. Instead, the Controller multiplied 100 percent of the solid waste diverted by the claimant by the avoided landfill disposal fee (based on the statewide average fee) to calculate offsetting savings.<sup>54</sup>

In 2008, CIWMB stopped requiring community college districts to report the actual tonnage diverted, instead requiring a report based on "per-capita disposal." Consequently, the Controller used the claimant's reported 2007 percentage of tons diverted to calculate the offsetting savings for fiscal year 2007-2008.<sup>55</sup>

The Controller pointed out in the audit report that the claimant did not provide documentation supporting different diversion rates or disposal fees to calculate offsetting cost savings.<sup>56</sup>

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

#### **A. El Camino Community College District**

The claimant maintains that the audit reductions are incorrect and requests the reinstatement of the full amount reduced.

The claimant first argues that the three-year deadline to initiate the audit had expired for fiscal year 2000-2001 when the Controller commenced the audit. According to the claimant:

Pursuant to Chapter 724, Statutes of 2010, appropriations were made to the District by January 14, 2011, for the following fiscal year 2000-2001 for \$42,203. The exact date of payment is a matter of record not available to the District but that can be produced by the Controller.<sup>57</sup>

The claimant cites the audit report that states that the claimant was first contacted by the Controller on January 17, 2014 regarding the audit, which is more than three years after the

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required to divert 50% for that year to meet the mandated requirements and comply with the Public Resources Code, it needed to have diverted only 996.5 tons (1,993.0 total tonnage generated x 50%) in order to satisfy the 50% requirement. Therefore, we adjusted our calculation to compute offsetting savings based on 996.5 tons of diverted solid waste rather than 1,184.2 tons.

Using this formula also results in cost savings for calendar year 2007 of \$47,832 (1,993 tons generated x 50 percent = 996.5 tons x \$48 = \$47,832).

<sup>54</sup> Exhibit A, IRC, page 32, fn. 2 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 71.

<sup>55</sup> Exhibit A, IRC, page 33 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, pages 20, 71.

<sup>56</sup> Exhibit A, IRC, page 35 (Final Audit Report).

<sup>57</sup> Exhibit A, IRC, page 9.

January 14, 2011 appropriation for the 2000-2001 annual claim, so the Controller did not have jurisdiction to audit fiscal year 2000-2001.<sup>58</sup>

The claimant next alleges that it did not realize any cost savings as a result of the mandate and that it reported \$30,686 offsetting savings in error. The reported offset (\$6,137 for five years) represented a part-time groundskeeper who was laid off due to the waste diversion program, but “since this potential cost-saving was never realized by subsequent state agency action, this reduction should be reinstated to the District.”<sup>59</sup>

As to cost savings the claimant did not realize, the claimant quotes the Superior Court decision (discussed above) that cost savings will “most likely” occur as a result of reduced or avoided costs of landfill disposal, arguing:

The court presupposes a previous legal requirement for districts to incur landfill disposal fees to divert solid waste. Thus, potentially relieved of the need to incur new or additional landfill fees for increased waste diversion, a cost savings would occur. There is no finding of fact or law in the court decision or from the Commission Statement of Decision for the test claim for this assumed duty to use landfills.<sup>60</sup>

The claimant further argues that the offsetting savings provision in the Parameters and Guidelines does not assume that the cost savings occurred, but instead requires that the cost savings be *realized*. For the savings to be realized, the claimant contends that the following chain of events are required:

[T]he cost savings must exist (avoided landfill costs); be converted to cash; amounts in excess of \$2,000 per year deposited in the state fund; and, these deposits by the districts appropriated by the Legislature to districts for purposes of mitigating the cost of implementing the plan. None of those prerequisite events occurred so no cost savings were "realized" by the District. Regardless, the adjustment cannot be applied to the District since no state appropriation of the cost savings was made to the District.<sup>61</sup>

The claimant also argues that the Parameters and Guidelines are silent as to how to calculate the avoided costs, but that the court provided two alternative methods, either disposal reduction or diversion reported by districts. The Controller used the diversion percentage, which assumes, without findings of fact, that all diversion tonnage is landfill disposal tonnage reduction. The claimant contends that the Controller’s calculation of cost savings is wrong because: (1) the formula is a standard of general application that was not adopted pursuant to the Administrative Procedure Act and is therefore an unenforceable underground regulation; (2) the Controller’s formula assumes facts not in evidence, such as applying the same percentage of waste diverted in 2007 to 2007-2008 without evidence in the record, and assumes that all tonnage diverted would have been disposed in a landfill, although some waste may have been composted or may not

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<sup>58</sup> Exhibit A, IRC, page 10.

<sup>59</sup> Exhibit A, IRC, page 10.

<sup>60</sup> Exhibit A, IRC, page 12.

<sup>61</sup> Exhibit A, IRC, pages 14. Emphasis in original.

apply to the mandate (e.g. paint); and (3) the landfill disposal fee, a statewide average calculated by CIWMB, does not include the data used to generate the average fee amounts, so the average is unknown and unsupported by the audit findings.<sup>62</sup>

The claimant contends that application of the formula is incorrect, alleging that it “did not claim landfill costs, so there are none to be offset. The adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed.”<sup>63</sup> Moreover, the Controller's calculation method prevents the claimant from receiving full reimbursement for its actual increased program costs. The claimant contends, using audit results for 26 other claimants under the *Integrated Waste Management* program, the application of the Controller’s formula has arbitrary results because the percentages of allowed costs for those claimants ranges from zero to 83.4 percent.<sup>64</sup>

Finally, the claimant argues: (1) the Controller used the wrong standard of review in that the claimed costs were not found to be excessive or unreasonable, as required by Government Code section 17561(d)(2); and (2) the Controller has the burden of proof as to the propriety of its audit findings “because it bears the burden of going forward and because it is the party with the power to create, maintain, and provide evidence regarding its auditing methods and procedures, as well as the specific facts relied upon for its audit findings.”<sup>65</sup>

The claimant did not file comments on the Draft Proposed Decision.

### **B. State Controller’s Office**

The Controller maintains that the audit findings are correct. The Controller first argues that it complied with the three-year audit deadline in Government Code section 17558.5, in that it made payment to the claimant for the fiscal year 2000-2001 reimbursement claim on January 28, 2011, and notified the district of payments made pursuant to Chapter 724, Statutes 2010, totaling \$364,436. Because it initiated the audit on January 17, 2014, within the three-year deadline, the Controller had jurisdiction to audit the claims for fiscal year 2000-2001.<sup>66</sup>

The Controller states that the claimant realized total offsetting savings of \$237,876 from implementation of its IWM plan. However, since the district reported \$30,685 in offsetting savings, the Controller found that the district understated total offsetting savings by \$207,191. The Controller disagrees with the claimant’s request for a \$30,686 reinstatement because the adjustment of \$207,191 is the difference between the offset totaling \$30,685 reported by the district and the amount of offsetting savings totaling \$237,876 that the Controller found the district realized from implementing its IWM plan. Had the district not reported the offsetting savings of \$30,685, the Controller states it would have taken a finding for the entire offsetting savings determination of \$237,876. The Controller also notes that Government Code section 17568 limits the filing of a reimbursement claim to no later than “one-year after the deadline

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<sup>62</sup> Exhibit A, IRC, pages 14-17.

<sup>63</sup> Exhibit A, IRC, page 17.

<sup>64</sup> Exhibit A, IRC, pages 17-19.

<sup>65</sup> Exhibit A, IRC, page 21.

<sup>66</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 10-11.

specified in Section 17560." As such, the deadline for the district to amend the FY 2003-04 through FY 2007-08 claims expired on March 31, 2010.<sup>67</sup>

Regarding the claimant's statement that there is only a presumption to incur landfill disposal fees to dispose of solid waste, the Controller notes that the claimant does not indicate how solid waste that is not diverted would be disposed of if not at a landfill. Nor does the claimant state that it disposed of its solid waste at any location other than a landfill or used other means to dispose of its waste than to contract with a commercial waste hauler, so the Controller concludes that the claimant's comments relating to alternatives for the disposal of solid waste are irrelevant.<sup>68</sup>

The Controller also cites some of the claimant's annual reports and its contracts with a waste hauler that indicates that the claimant disposed of waste in a landfill.<sup>69</sup> According to the Controller, the evidence obtained by it "supports that the district normally disposes of its waste at a landfill through the use of a commercial waste hauler (Cal-Met Services)."<sup>70</sup> The Controller states:

Unless the district had an arrangement with its waste hauler (Cal-Met Services) that it did not disclose to us, the district did not dispose of its solid waste at a landfill for no cost. For example, El Camino College is located in Torrance, CA. An internet search for landfill fees revealed that the South Gate Transfer Station in South Gate, California (15 miles from El Camino College), currently charges \$53.91 per ton to dispose of solid waste [Tab 8, page 2]. Therefore, the higher rate of diversion results in less trash that is disposed at a landfill, which creates cost savings to the district.<sup>71</sup>

The Controller also argues that the claimant realized offsetting cost savings by implementing its IWM plan because claimant reported diversion of 6,798.95 tons of solid waste during the audit period, given the cost per ton to dispose of solid waste at the landfill.<sup>72</sup>

As to the claimant not remitting cost savings from the implementation of its IWM plan into the Integrated Waste Management Account in compliance with the Public Contract Code, the Controller asserts that the claimant is not precluded from the requirement to do so, as indicated in the Parameters and Guidelines and the court ruling. The Controller says the evidence supports that the claimant realized cost savings that should have been remitted to the State and that must be used to fund IWM plan costs.<sup>73</sup>

In response to the claimant's argument that the Controller's formula is a standard of general application that is an underground regulation, the Controller asserts that it used a "court

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<sup>67</sup> Exhibit B, Controller's Late Comments on the IRC, pages 16.

<sup>68</sup> Exhibit B, Controller's Late Comments on the IRC, pages 16.

<sup>69</sup> Exhibit B, Controller's Late Comments on the IRC, pages 16-17.

<sup>70</sup> Exhibit B, Controller's Late Comments on the IRC, pages 17.

<sup>71</sup> Exhibit B, Controller's Late Comments on the IRC, page 17.

<sup>72</sup> Exhibit B, Controller's Late Comments on the IRC, pages 17-18.

<sup>73</sup> Exhibit B, Controller's Late Comments on the IRC, pages 17-18.

approved methodology” to determine the “required offset.” The Controller also states that the claimant did not amend any of its reimbursement claims after the Parameters and Guidelines were amended in September 2008. According to the Controller: “We believe that this “court-identified” approach provides a reasonable methodology to identify the applicable offsets.”<sup>74</sup>

The Controller also states that it “allocated” the offsetting savings to avoid penalizing the claimant for diverting more than the minimum rate of diversion required in calendar years 2001 and 2003 through 2007.<sup>75</sup> According to the Controller:

As there is no State mandate to exceed solid waste diversion for amounts in excess of 25% for calendar years 2002 and 2003 or greater than 50% for calendar year 2004 and beyond, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceeded the levels set by statute.<sup>76</sup>

The Controller notes that after the passage of Statutes 2008, chapter 343, CIWMB no longer required districts to report their tonnage or percentage diverted, but they are still required to divert 50 percent of their solid waste.<sup>77</sup>

Defending its use of the claimant’s 2007 reported diversion rate to calculate offsetting savings for 2007-2008, the Controller calls the 2007 report a “fair representation” of 2008 because the Controller found that the “district’s annual per-capita disposal rate for both the employee and student populations to be well below the target rate, so the district far surpassed its requirement to divert more than 50% of its solid waste.”<sup>78</sup> The Controller also cites the claimant’s 2008 annual report, in which the claimant stated, “[n]o new programs were implemented, or discontinued.”<sup>79</sup>

The Controller also responded to the claimant’s argument against the assumption that all tonnage diverted would have been disposed in a landfill, even though some waste may have been composted or may not apply to the mandate (e.g. paint). The Controller states, “Our analysis shows that the composted material represents approximately 19% of the total tonnage diverted for calendar years 2000, and 2001 through 2007.”<sup>80</sup> The Controller also states:

As a result of this mandated program, the district is claiming over \$45,000 in salaries and benefits for its gardeners and groundskeeper to "divert solid waste from landfill disposal or transformation facilities - composting" [Tab 15]. Therefore, it seems reasonable that the correlated landfill fees that the district did not incur for the composted materials translate into savings realized by the district. Further, such savings should be recognized and appropriately offset

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<sup>74</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

<sup>75</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

<sup>76</sup> Exhibit B, Controller’s Late Comments on the IRC, page 20.

<sup>77</sup> Exhibit B, Controller’s Late Comments on the IRC, page 20.

<sup>78</sup> Exhibit B, Controller’s Late Comments on the IRC, page 20.

<sup>79</sup> Exhibit B, Controller’s Late Comments on the IRC, page 20.

<sup>80</sup> Exhibit B, Controller’s Late Comments on the IRC, page 20.

against composting costs that the district incurred and claimed as part of implementing its IWM plan.<sup>81</sup>

The Controller also states that the claimant's reference to paint disposal is irrelevant because hazardous waste is not included in the diversion amounts that the claimant reported, and therefore, are not included in the Controller's offsetting savings calculation.<sup>82</sup>

Regarding the data for the statewide disposal fee, the Controller states the information was provided by CIWMB, is included in the record, and is based on private surveys of a large percentage of landfills across California. The Controller also cites its internet search for landfill fees that revealed that the South Gate Transfer Station in South Gate, California, currently charges \$53.91 per ton to dispose of solid waste, so the \$36 to \$56 "statewide average disposal fee" used to calculate the offsetting savings realized by the district is reasonable. In addition, the claimant "did not provide any information, such as its contract with or invoices received from its commercial waste hauler (Cal-Met Services) to support either the landfill fees actually incurred by the district or to confirm that the statewide average landfill fee was greater than the actual landfill fees incurred by the district."<sup>83</sup>

In response to the claimant's argument that it did not claim landfill costs, so there are none to offset, the Controller answers that the mandated program does not reimburse claimants for landfill costs incurred to dispose of solid waste, so none would be claimable. Rather, the program reimburses claimants' costs to divert solid waste from disposal, which according to the Controller, results in both a reduction of solid waste going to a landfill and the associated costs of having the waste hauled there, which creates offsetting savings that the claimant is required to identify in its mandated cost claims.<sup>84</sup>

In response to the claimant's argument that "the adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed," the Controller quotes Public Resources Code section 42925 which provides that "cost savings realized as a result of the IWM plan are to "fund plan *implementation and administration costs*."<sup>85</sup> The Controller argues that offsetting savings applies to the whole program and is not limited to solid waste diversion activities. The Controller also cites the reimbursable activities in the Parameters and Guidelines that refer to "implementation of the IWM plan," concluding that it is reasonable that offsetting savings from implementing the plan be offset against direct costs to implement the plan. The Controller also asserts that the claimant's reference to other IWM audits is irrelevant to the current issue.<sup>86</sup>

The Controller also disagrees with claimant's argument that the Controller used the wrong standard of review. The Controller cites the statute that authorizes it to audit the claimant's

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<sup>81</sup> Exhibit B, Controller's Late Comments on the IRC, page 21.

<sup>82</sup> Exhibit B, Controller's Late Comments on the IRC, page 21.

<sup>83</sup> Exhibit B, Controller's Late Comments on the IRC, page 21-22.

<sup>84</sup> Exhibit B, Controller's Late Comments on the IRC, page 22.

<sup>85</sup> Public Resources Code section 42925. Emphasis added.

<sup>86</sup> Exhibit B, Controller's Late Comments on the IRC, pages 22-23.

records to verify actual mandate-related costs *and* reduce any claim that is excessive or unreasonable. In this case, the claims were excessive because the claimant’s “mandated cost claims exceeded the proper amount based on the reimbursable costs allowable per statutory language and the program’s parameters and guidelines.”<sup>87</sup> As to the burden of proof, the Controller states that it used data from the claimant’s annual reports to CIWMB from implementing its IWM program.<sup>88</sup>

In comments on the Draft Proposed Decision, the Controller agreed with the conclusion that the audit reductions for all years in the audit period were correct except for the first half of fiscal year 2003-2004. The Controller also agreed to reinstate \$13,772 to the claimant for the first half of fiscal year 2003-2004 that the Draft Proposed Decision concluded was incorrectly reduced as a matter of law.<sup>89</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 if the Controller determines that the claim 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 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>90</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>91</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

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<sup>87</sup> Exhibit B, Controller’s Late Comments on the IRC, page 26.

<sup>88</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 26.

<sup>89</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

<sup>90</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>91</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.

the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.<sup>92</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.’ ”<sup>93</sup>

The Commission must review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>94</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>95</sup>

**A. The Controller Timely Initiated the Audit for Fiscal Years 2000-2001 and Timely Completed the Audit of All Claims.**

Government Code section 17558.5 requires an audit to be initiated no later than three years after the date the reimbursement claim is filed or last amended. However, section 17558.5 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>96</sup> “In any case,” section 17558.5 requires the audit to be completed no later than two years after it is commenced.<sup>97</sup>

1. The audit of the 2000-2001 reimbursement claim was timely initiated.

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<sup>92</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space Dist.* (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>93</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>94</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>95</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>96</sup> Government Code section 17558.5 (as amended, Stats. 2002, ch. 1128 (AB 2834)).

<sup>97</sup> Government Code section 17558.5 (as amended, Stats. 2004, ch. 890 (AB 2856)).

The claimant filed its 2000-2001 reimbursement claim on October 6, 2005,<sup>98</sup> but the State did not pay it until January 2011. The claimant alleges that appropriations were made to the claimant by January 14, 2011 for these years, and that the Controller initiated the audit more than three years later on January 17, 2014, according to the final audit report. Therefore, the claimant asserts that the Controller did not timely initiate the audit.<sup>99</sup>

Government Code section 17558.5(a) tolls the time to initiate the audit to three years from the date of initial payment on the claim, rather than three years from the date the claim was filed, “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,” as follows:

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, whichever is later. However, 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*. In any case, an audit shall be completed not later than two years after the date that the audit is commenced.<sup>100</sup>

Although the Controller agrees that payment was first made on the 2000-2001 claim in January 2011, the parties dispute the date of payment. The claimant alleges:

Pursuant to Chapter 724, Statutes of 2010, appropriations were made to the District by January 14, 2011, for the following fiscal year 2000-2001 for \$42,203. The exact date of payment is a matter of record not available to the District but that can be produced by the Controller.<sup>101</sup>

There is no evidence in the record, however, to support the claimant’s assertion that payment was made on January 14, 2011. Rather, the record supports a finding that payment was first made on the 2000-2001 reimbursement claims on either January 18, 2011, or January 28, 2011.

The claimant filed, as part of its IRC, a copy of a notice from the Controller to the claimant dated March 26, 2014 (following the audit), showing the audit adjustment to the 2000-2001 reimbursement claim, and noting a payment on this reimbursement claim on *January 18, 2011* by “Schedule No. AP00122A” of \$42,203. The letter states in pertinent part:

FIELD AUDIT FINDINGS	-	8,145.00	
TOTAL ADJUSTMENTS		-	0.00
PRIOR PAYMENTS:			
SCHEDULE NO. AP00122A			
<b>PAID 01-18-2011</b>	-	0.00	

<sup>98</sup> Exhibit A, IRC, page 171.

<sup>99</sup> Exhibit A, IRC, pages 9-10.

<sup>100</sup> Emphasis added. This is the current version of section 17558.5, and the version in effect when these reimbursement claim was filed in October 2005 (Exhibit A, IRC, p. 171).

<sup>101</sup> Exhibit A, IRC, page 9.

The Controller asserts that payment was first made on the reimbursement claims on *January 28, 2011*, pursuant to Statutes of 2010, chapter 724 (AB 1610, eff. Oct. 19, 2010).<sup>103</sup> That statute appropriated funds to offset the outstanding balance of the State's minimum funding obligation under Proposition 98 to school districts and community college districts, and required that funds first be paid in satisfaction of any outstanding claims for reimbursement of state-mandated costs. The Controller filed a copy of a remittance advice showing payments to the claimant under AB 1610 for several state-mandated programs, including \$42,203 for the *Integrated Waste Management* program for fiscal year 2000-2001 in "CLAIM SCHEDULE NUMBER: 1000149A, PAYMENT ISSUE DATE: 01/28/2011."<sup>104</sup>

The Controller has not explained the discrepancy between the notice indicating payment of \$42,203 for the 2000-2001 reimbursement claim on January 18, 2011 by "Schedule No. AP00122A," and the remittance advice indicating payment for the 2000-2001 reimbursement claims on January 28, 2011 by "Schedule Number: 1000149A." Nevertheless, the Controller issued both documents that support a finding that payment was first made on the 2000-2001 reimbursement claim on either January 18, 2011, or January 28, 2011.

As indicated above, Government Codes section 17558.5(a) tolls the time to initiate the audit of a claim "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," to three years from the date of initial payment on the claim. Therefore, using the earlier of the two dates in documents showing payment on the 2000-2001 reimbursement claim on January 18, 2011, the Controller had until January 18, 2014 to initiate the audit of the 2000-2001 reimbursement claim.

The Legislature has not specifically defined the event that initiates the audit and, unlike other auditing agencies,<sup>105</sup> the Controller has not adopted formal regulations (which can be viewed as the controlling interpretation of a statute), to clarify when the audit of a mandate reimbursement claim begins. Therefore, the Commission cannot, as a matter of law, state the event that initiates an audit in all cases, but must determine when the audit was initiated based on evidence in the record. Initiating an audit requires a unilateral act of the Controller. In this respect, Government Code section 17558.5(a) can be characterized as a statute of repose because it provides a period during which an audit has been commenced, and after which claimants may enjoy repose, dispose of evidence to support their claims, and assert a defense that the audit is not timely and

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<sup>102</sup> Exhibit A, IRC, page 214. Emphasis added.

<sup>103</sup> Exhibit A, IRC, pages 26 (Final Audit Report – "For fiscal year (FY) 2000-01 claim, the State paid the district \$42,203 from funds appropriated under Chapter 724, Statutes of 2010."). Exhibit B, Controller's Late Comments on the IRC, page 11 ("The SCO sent a remittance advice to the district dated January 28, 2011 [Tab 5], notifying the district of payments made on that date pursuant to Chapter 724, Statutes 2010 (Assembly Bill No. 1610) totaling \$364,436.").

<sup>104</sup> Exhibit B, Controller's Late Comments on the IRC, pages 35-37.

<sup>105</sup> See, e.g., regulations adopted by the California Board of Equalization (title 18, section 1698.5, stating that an "audit engagement letter" is a letter "used by Board staff to confirm the start of an audit or establish contact with the taxpayer").

therefore void.<sup>106</sup> Since the Controller's authority to audit must be exercised within a specified time, it must be within the Controller's exclusive control to meet or fail to meet the deadline. The Controller has the burden of proof on this issue and must show with evidence in the record that the claimant was notified that an audit was being initiated by the statutory deadline to ensure that the claimant does not dispose of any evidence or documentation to support its claim for reimbursement.

The Controller asserts that the audit began on January 17, 2014, before the January 18, 2014 deadline. In support, the Controller filed a declaration by Jim Spano (Chief, Mandated Cost Audits Bureau, Division of Audits), stating under penalty of perjury that "a review of the claims . . . commenced on January 17, 2014, . . ."<sup>107</sup> The Controller also filed a copy of an email dated January 17, 2014, from an audit manager at the Controller's Office to the claimant, as evidence of the Controller's initial contact with the claimant about the audit. The email states in relevant part:

I am contacting you because the State Controller's Office will be adjusting the district's Integrated Waste Management claims for FY 2000-01 and FY 2003-04 through FY 2007-08 because the district did not offset any savings (e.g. avoided landfill disposal fees) received as a result of implementing the districts' IWM Plan.

I will notify you, via email, of the exact adjustment amount later next week. Also, included in this email, will be documentation to support the adjustment.<sup>108</sup>

The claimant concurs that the audit was initiated by the Controller's initial contact on January 17, 2014.<sup>109</sup>

Accordingly, the Commission finds that the Controller timely initiated the audit, pursuant to Government Code section 17558.5(a), on January 17, 2014.

2. The audit was timely completed.

Government Code section 17558.5 provides that 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>110</sup> As indicated above, the audit was initiated on January 17, 2014, the date of the Controller's initial contact with the claimant about the audit and thus, had to be completed no later than January 17, 2016. 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 the claimant with written notice of the claim components adjusted, the amounts adjusted, and the reasons for the adjustment.<sup>111</sup> This notice enables the claimant to file

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<sup>106</sup> *Giest v. Sequoia Ventures, Inc.* (2000) 83 Cal.App.4th 300, 305.

<sup>107</sup> Exhibit B, Controller's Late Comments on the IRC, page 5.

<sup>108</sup> Exhibit B, Controller's Late Comments on the IRC, page 33. Emphasis in original.

<sup>109</sup> Exhibit A, IRC, page 10.

<sup>110</sup> Government Code section 17558.5 (Stats. 2004, ch. 890).

<sup>111</sup> Government Code section 17558(c).

an IRC. Here, the final audit report was issued March 19, 2014, well before the January 17, 2016 deadline.<sup>112</sup>

Therefore, the Commission finds that the Controller's audit of all years in the audit period was timely completed in accordance with Government Code section 17558.5.

**B. The Controller's Reduction of Costs Claimed Is Generally Correct as a Matter of Law; However, the Reduction for the First Half of Fiscal Year 2003-2004, Based on a 50 Percent Mandated Diversion Rate, Is Incorrect as a Matter of Law.**

1. The test claim statutes presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized.

The test claim statute added Public Resources Code section 42925(a), which provides: "Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency's integrated waste management plan to fund plan implementation and administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code."

The court's Ruling on Submitted Matter states that community colleges are "likely to experience costs savings in the form of reduced or avoided costs of landfill disposal" as a result of the mandated activities in Public Resources Code section 42921 because reduced or avoided costs "are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided." The court noted that "diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates." The statutory definition of diversion provides that "activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division." And the statutory definition of disposal is "the management of solid waste through landfill disposal or transformation at a permitted solid waste facility."<sup>113</sup> The court explained:

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(l) of Public Resources Code section 42926.<sup>114</sup>

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<sup>112</sup> Exhibit A, IRC, page 26 (Final Audit Report).

<sup>113</sup> Exhibit B, Controller's Late Comments on the IRC, pages 78-79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>114</sup> Exhibit B, Controller's Late Comments on the IRC, page 79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates,*

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>115</sup>

Thus, the court found that offsetting savings are, by statutory definition, likely to occur as a result of implementing the mandated activities. Reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.”<sup>116</sup> As the court held, “landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs. . . .”<sup>117</sup>

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*et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

<sup>115</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 80-81 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>116</sup> Exhibit B, Controller’s Late Comments on the IRC, page 78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>117</sup> Exhibit B, Controller’s Late Comments on the IRC, page 79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

The statutes, therefore, presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. As indicated in the court's ruling, the amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB. The amount of cost savings realized must be identified by the claimant and used to offset the costs incurred to comply with IWM plan implementation and administration activities approved for reimbursement in the Parameters and Guidelines. Accordingly, the court's ruling requires claimants to report in their reimbursement claims the costs incurred to comply with the reimbursable activities (which includes the activities and costs to divert at least 25 or 50 percent of all solid waste from landfill disposal) and the cost savings from the avoided landfill disposal fees, for a reimbursement claim of the net increased costs.

The Parameters and Guidelines are consistent with the court's ruling and require in Section IV. that "[t]he claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate."<sup>118</sup> Section VIII. requires that "[r]educed or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1."<sup>119</sup> The court's decision and the amended Parameters and Guidelines are binding.<sup>120</sup>

2. During the audit period, the claimant diverted solid waste as required by the test claim statutes, but has filed no evidence to rebut the presumption that cost savings were realized. Thus, the Controller's finding that the claimant realized cost savings is correct as a matter of law.

In this case, the claimant asserts that no cost savings were realized, but does not explain why.<sup>121</sup>

The mandate requires community colleges to divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, through source reduction, recycling, and composting activities, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004.<sup>122</sup> The record shows that the claimant diverted more solid waste than required by the test claim statutes except in the first half of fiscal year 2000-2001.<sup>123</sup> The claimant's annual report to CIWMB for calendar year 2000 indicates a

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<sup>118</sup> Exhibit A, IRC, page 54 (Parameters and Guidelines).

<sup>119</sup> Exhibit A, IRC, page 59 (Parameters and Guidelines).

<sup>120</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

<sup>121</sup> Exhibit A, IRC, page 10.

<sup>122</sup> Public Resources Code sections 42921. Exhibit A, IRC, pages 51 and 55 (Parameters and Guidelines, section IV.(B)(5)).

<sup>123</sup> Exhibit A, IRC, page 32, fn. 2 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 71.

diversion percentage of 21.50 percent.<sup>124</sup> The claimant's annual reports to CIWMB for calendar years 2001 through 2003 indicate diversion percentages from 25.7 percent to 62.5 percent of the total waste generated, which exceed the mandated diversion requirement of 25 percent.<sup>125</sup> The claimant's annual reports to CIWMB for calendar years 2004 through 2008 also report diversion percentages that exceed the mandated diversion requirement of 50 percent, and range from 51.95 percent to 67.16 percent of the total waste generated.<sup>126</sup>

In 2008, CIWMB stopped requiring community college districts to report the amount and percentage of tonnage diverted, and instead required them to report the "per-capita disposal" of waste.<sup>127</sup> As amended, each community college now has a disposal target that is the equivalent to a 50 percent diversion, and is expressed on a per capita basis. So if the district's per-capita disposal rate is less than the target, it means that the district is meeting the requirement to divert 50 percent of its solid waste.<sup>128</sup>

The claimant, in its report for 2008, reported annual per capita disposal rates for both the employee and student populations to be at or below the target rates, thereby satisfying the requirement to divert 50 percent of its solid waste.<sup>129</sup> Claimant's 2008 report also shows it had waste reduction programs in place, listing the following programs: Business Source Reduction, Beverage Containers, Cardboard, Newspaper, Office Paper (white), Office Paper (mixed), Scrap Metal, Xeriscaping, grasscycling, On-site composting/mulching, Tires, Wood waste, Concrete/asphalt/rubble (C&D).<sup>130</sup> Claimant also reported on changes in 2008 to its waste diversion programs that: "Increased monitoring of paper/cardboard recycling have also contributed to landfill diversion" and reported "more communication to the college to help with our recycling efforts."<sup>131</sup> As to new programs in 2008, claimant reported "No new programs were implemented, or discontinued."<sup>132</sup>

The record also shows that the claimant's solid waste that was not diverted was disposed of at a landfill by a waste hauler. The claimant's annual reports filed with CIWMB during the audit

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<sup>124</sup> Exhibit B, Controller's Late Comments on the IRC, page 39 (2000 report).

<sup>125</sup> Exhibit B, Controller's Late Comments on the IRC, pages 42-48 and 71.

<sup>126</sup> Exhibit B, Controller's Late Comments on the IRC, pages 49-63 and 71.

<sup>127</sup> The new requirement was a result of Statutes 2008, chapter 343 (SB 1016).

<sup>128</sup> Exhibit B, Controller's Late Comments on the IRC, pages 92-100 ["Understanding SB 1016 Solid Waste Per Capita Disposal Measurement Act", <http://www.calrecycle.ca.gov/lgcentral/goalmeasure/Tools/SimplePresen.pdf>.]

<sup>129</sup> Exhibit B, Controller's Late Comments on the IRC, pages 62 (2008 report, showing an employee population target of 2.6, and 2.0 was achieved; and a student population target of 0.3, and 0.2 was achieved).

<sup>130</sup> Exhibit B, Controller's Late Comments on the IRC, pages 63 (2008 report).

<sup>131</sup> Exhibit B, Controller's Late Comments on the IRC, pages 63 (2008 report).

<sup>132</sup> Exhibit B, Controller's Late Comments on the IRC, pages 63 (2008 report).

period identify the total tonnage of waste disposed<sup>133</sup> and the use of a waste hauler.<sup>134</sup> The record also includes a district agenda item from 2003 recommending a waste hauling contract.<sup>135</sup> The record also shows the claimant used landfill disposal for the solid waste it did not divert. For example, in its 2001 annual report, the claimant states: “Staff . . . has identified additional diversion opportunities and is diverting previously landfill-bound materials daily.”<sup>136</sup> In its annual reports for 2003, 2004, 2005, 2006, 2007, and 2008, claimant reports: “C&D diversion efforts have contributed considerably to our disposal of materials to landfills. . . . Efforts towards donations to local schools and increased monitoring of paper/cardboard recycling have also contributed to landfill diversion.”<sup>137</sup>

The avoided landfill disposal fee was based on the statewide average disposal fee provided by CIWMB for each fiscal year in the audit period, since the claimant did not provide any information to the Controller regarding the landfill fees it was charged.<sup>138</sup>

Based on this documentation, the Controller correctly presumed, consistent with the presumption in the test claim statutes and the court’s interpretation of those statutes and with no evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted.

The statutory presumption of cost savings controls unless the claimant files evidence to rebut the presumption and shows that cost savings were not realized.<sup>139</sup> The claimant has the burden of proof on this issue. Under the mandates statutes and regulations, the claimant is required to

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<sup>133</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 39 (2000 report), 42 (2001 report) 46 (2003 report), 49 (2004 report), 52 (2005 report), 55 (2006 report), 58 (2007 report), 61 (2008 report).

<sup>134</sup> For example, the 2000 annual report states: “Green Waste Recycling: Hauler will provide containers and separate pick-ups. Cost per tonnage of diverted green waste materials will be less than trash hauling fees.” See Exhibit B, Controller’s Late Comments on the IRC, page 41.

<sup>135</sup> Exhibit B, Controller’s Late Comments on the IRC, page 65-66.

<sup>136</sup> Exhibit B, Controller’s Late Comments on the IRC, page 43 (2001 report).

<sup>137</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 47 (2003 annual report), 50 (2003 annual report), 53 (2005 annual report), 56 (2006 annual report, which states: “C&D diversion efforts have contributed considerably to our diversion from landfills), 59 (2007 annual report), 62 (2008 annual report).

<sup>138</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 22, 111-133.

<sup>139</sup> Government Code section 17559, which requires that the Commission’s decisions be supported by substantial evidence in the record. See also, *Coffy v. Shiimoto* (2015) 60 Cal.4th 1198, 1209, a case interpreting the rebuttable presumption in Vehicle Code section 23152 that if a person had 0.08 percent or more, by weight, of alcohol in the blood at the time of testing, then it is presumed by law that he or she had 0.08 percent or more, by weight, of alcohol in the blood at the time of driving, unless he or she files evidence to rebut the presumption. The court states that unless and until evidence is introduced that would support a finding that the presumption does not exist, the statutory presumption that the person was driving over the legal limit remains the finding of fact.

show that it has incurred increased costs mandated by the state when submitting a reimbursement claim to the Controller's Office, and the burden to show that any reduction made by the Controller is incorrect.<sup>140</sup> The Parameters and Guidelines, as amended pursuant to the court's writ, also require claimants to show the costs incurred to divert solid waste and to perform the administrative activities, and *to report and identify* the costs saved or avoided by diverting solid waste: "Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans *shall be* identified and offset from this claim as cost savings."<sup>141</sup> Thus, the claimant has the burden to rebut the statutory presumption and to show, with substantial evidence in the record, that the costs of complying with the mandate exceed any cost savings realized by diverting solid waste.

Accordingly, the Commission finds that the claimant has not filed any evidence to rebut the statutory presumption of cost savings. Therefore, the Controller's finding that cost savings have been realized is correct as a matter of law.

3. For all years of the audit period except the first half of fiscal year 2003-2004, the Controller's calculation of cost savings is correct as a matter of law, and not arbitrary, capricious or entirely lacking in evidentiary support.

The Controller correctly determined that during the audit period, the claimant diverted solid waste, as mandated by the test claim statute, and exceeded the minimum required diversion rate

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<sup>140</sup> Evidence Code section 500, which states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." See also, *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 24, where the court recognized that "the general principle of Evidence Code 500 is that a party who seeks a court's action in his favor bears the burden of persuasion thereon." This burden of proof is recognized throughout the architecture of the mandates statutes and regulations. Government Code section 17551(a) requires the Commission to hear and decide a claim filed by a local agency or school district that it is entitled to reimbursement under article XIII B, section 6. Section 17551(d) requires the Commission to hear and decide a claim by a local agency or school district that the Controller has incorrectly reduced payments to the local agency or school district. In these claims, the claimant must show that it has incurred increased costs mandated by the state. (Gov. Code, §§ 17514 [defining "costs mandated by the state"], 17560(a) ["A local agency or school district may . . . file an annual reimbursement claim that details the costs actually incurred for that fiscal year."]; 17561 [providing that the issuance of the Controller's claiming instructions constitutes a notice of the right of local agencies and school districts to file reimbursement claims based upon the parameters and guidelines, and authorizing the Controller to audit the records of any local agency or school district to "verify the actual amount of the mandated costs."]; 17558.7(a) ["If the Controller reduces a claim approved by the commission, the claimant may file with the commission an incorrect reduction claim pursuant to regulations adopted by the commission."]). By statute, only the local agency or school district may bring these claims, and the local entity must present and prove its claim that it is entitled to reimbursement. (See also, Cal. Code Regs., tit. 2, §§ 1185.1, et seq., which requires that the IRC contain a narrative that describes the alleged incorrect reductions, and be signed under penalty of perjury.)

<sup>141</sup> Exhibit A, IRC, page 59 (Amended Parameters and Guidelines). Emphasis added.

every year except in the first half of fiscal year 2000-2001.<sup>142</sup> For years the claimant exceeded the mandate, the Controller calculated offsetting savings by allocating the diversion to reflect the mandate. The Controller allocated the diversion by dividing the percentage of solid waste required to be diverted by the test claim statute (either 25 percent or 50 percent) by the actual percentage of solid waste diverted (as annually reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized.<sup>143</sup>

$$\begin{array}{rcccl}
 & \text{Allocated Diversion \%} & & & \\
 & \text{┌───────────┐} & & & \\
 & \text{Maximum} & & & \text{Avoided} \\
 & \text{Allowable} & & & \text{Landfill} \\
 \text{Offsetting} & = & \frac{\text{Diversion \%}}{\text{Actual}} & \times & \text{Disposal Fee} \\
 \text{Savings} & & \text{Diversion \%} & \times & \text{(per Ton)} \\
 \text{Realized} & & & \times & \\
 & & \text{Tonnage} & & \\
 & & \text{Diverted} & & 
 \end{array}$$

The formula allocates or reduces cost savings based on the mandated rate, and is intended to avoid penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>144</sup>

For the first half of fiscal year 2000-2001, the claimant achieved a 21.5 percent diversion, which the Controller correctly determined did *not* reach the minimum 25 percent state-mandated diversion. To calculate cost savings for this time period, the Controller did not allocate the diversion percentage, but instead multiplied 100 percent of the solid waste diverted by the claimant for the year (103.2 tons) by the avoided landfill disposal fee (based on the statewide average fee of \$36.39), for a total offset of \$3,755.<sup>145</sup>

These formulas are consistent with the statutory presumption of cost savings, as interpreted by the court for this program, and the requirements in the Parameters and Guidelines. The court found that the test claim statutes require that reduced or avoided landfill fees represent savings that must be offset against the cost of diversion. The court stated: “The amount or value of the [offsetting cost] savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report” to CIWMB.<sup>146</sup> The Parameters and Guidelines state: “Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be

<sup>142</sup> Exhibit B, Controller’s Late Comments on the IRC, page 71.

<sup>143</sup> Exhibit A, IRC, pages 34; Exhibit B, Controller’s Late Comments on the IRC, page 19-20.

<sup>144</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 19.

<sup>145</sup> Exhibit B, Controller’s Late Comments on the IRC, page 71. The calculation was only for the first half of fiscal year 2000-2001, so the Controller’s calculation was based on half the total tonnage diverted (206.8 tons). See Exhibit B, Controller’s Late Comments on the IRC, page 39 (2000 report).

<sup>146</sup> Exhibit B, Controller’s Late Comments on the IRC, page 79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

identified and offset from this claim as cost savings . . . .”<sup>147</sup> Thus, the Controller’s formula correctly presumes, based on the record and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted. And when the claimant exceeded the mandated diversion rates, the Controller’s formula limited the offset to reflect the mandated rate.

The claimant raises several arguments, unsupported by the law or evidence in the record, that the Controller’s calculation of cost savings is incorrect.

The claimant first alleges that cost savings cannot be realized because the chain of events required by Public Contract Code sections 12167 and 12167.1 did not occur: that savings have to be converted to cash, and amounts in excess of \$2,000 per year must be deposited in the state fund and appropriated back by the Legislature to mitigate the costs.<sup>148</sup> It is undisputed that the claimant did not remit to the state any savings realized from the implementation of the IWM plan.<sup>149</sup> However, as indicated above, cost savings are presumed by the statutes and the claimant has not filed evidence to rebut that-presumption. Thus, the claimant should have deposited the cost savings into the state’s account as required by the test claim statutes, and the claimant’s failure to comply with the law does not make the Controller’s calculations of cost savings incorrect as a matter of law, or arbitrary or capricious. Since cost savings are presumed by the statutes, the claimant has the burden to show increased costs mandated by the state. As the court stated: “[r]eimbursement is not available under section 6 and section 17514 to the extent that a local government or school district is able to provide the mandated program or increased level of service without actually incurring increased costs.”<sup>150</sup>

The claimant next asserts that the Controller’s formula is an underground regulation.<sup>151</sup> The Commission disagrees. Government Code section 11340.5 provides that no state agency shall enforce or attempt to enforce a rule or criterion which is a regulation, as defined in section 11342.600, unless it has been adopted pursuant to the Administrative Procedures Act. As discussed above, however, the formula is consistent with the statutory presumption of cost savings, as interpreted by the court for this program. Interpretations that arise in the course of case-specific adjudications are not regulations.<sup>152</sup>

The claimant also argues that using landfill fees in the calculation of offsetting savings is not relevant because “[t]he District did not claim landfill costs, so there are none to be offset.”<sup>153</sup> The claimant’s interpretation of the cost savings requirement is not correct. The cost of

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<sup>147</sup> Exhibit A, IRC page 59 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>148</sup> Exhibit A, IRC, page 14.

<sup>149</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 12, 17.

<sup>150</sup> Exhibit B, Controller’s Late Comments on the IRC, page 78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>151</sup> Exhibit A, IRC, page 15.

<sup>152</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>153</sup> Exhibit A, IRC, page 17.

disposing waste at a landfill is not eligible for reimbursement. Reimbursement is authorized to *divert* solid waste from the landfill through source reduction, recycling, and composting activities.<sup>154</sup> As explained by the court:

In complying with the mandated solid waste diversion requirements of Public Resources Code section 42921, California Community Colleges are likely to experience cost savings in the form of reduced or avoided costs of landfill disposal. The reduced or avoided costs are a direct result and an integral part of the mandated IWM plan ....

Such reduction or avoidance of landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings which must be offset against the costs of the diversion activities to determine the reimbursable costs of IWM plan implementation -- i.e., the actual increased costs of diversion -- under section 6 and section 17514.<sup>155</sup>

The court also noted that diversion is defined as “activities which reduce or eliminate the amount of solid waste from solid waste disposal.”<sup>156</sup>

In addition, the claimant argues that the formula assumes facts without evidence in the record. For example, the claimant questions the Controller’s assumption that the diversion rate achieved in 2007 applies equally to 2008, the assumption that all diverted waste would have been disposed in a landfill, and that the statewide average cost to dispose of waste at a landfill actually applied to the claimant.<sup>157</sup>

The Controller’s assumptions, however, are supported by evidence in the record and the claimant has filed no evidence to rebut them. The Controller applied the diversion rate achieved in 2007 to 2008 because CIWMB stopped requiring community college districts to report the actual amount and percent of tonnage diverted in 2008. As the Controller notes, the claimant’s diversion program was well-established by 2007, and the claimant’s report of 2008 shows continued diversion. The claimant’s report for 2008 reveals that the claimant’s annual per capita disposal rate for both the employee and student populations were below or near the target rate.<sup>158</sup>

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<sup>154</sup> Exhibit A, IRC, page 55 (Parameters and Guidelines).

<sup>155</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 78-79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>156</sup> Public Resources Code section 40124. Exhibit B, Controller’s Late Comments on the IRC, page 78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>157</sup> Exhibit A, IRC, pages 15-17.

<sup>158</sup> Exhibit B, Controller’s Late Comments on the IRC, page 62 (2008 report) showing an employee population target of 2.6, and 2.0 was achieved; and a student population target of 0.3, and 0.2 was achieved.

Overall, the evidence indicates that the claimant satisfied the requirement to divert 50 percent of its solid waste during 2008.<sup>159</sup>

The Controller obtained the statewide average cost for landfill disposal fees from CIWMB. The fees were based on private surveys of a large percentage of landfills across California.<sup>160</sup> The Controller's audit report indicates that the claimant did not provide documentation to support a different disposal fee.<sup>161</sup> In addition, the Controller states:

The district did not provide any information, such as its contract with or invoices received from its commercial waste hauler (Cal-Met Services) to support either the landfill fees actually incurred by the district or to confirm that the statewide average landfill fee was greater than the actual landfill fees incurred by the district.<sup>162</sup>

On these audit issues, the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. The Commission must only ensure that the Controller's decision is not arbitrary, capricious, or entirely lacking in evidentiary support, and adequately considered all relevant factors.<sup>163</sup> There is no evidence that the Controller's assumptions are wrong or arbitrary or capricious with regard to the statewide average landfill fee.

The claimant also points to the Controller's audits of other community college districts, arguing that the Controller's audit results in those cases vary and are arbitrary.<sup>164</sup> The Controller's audits of other community college district reimbursement claims are not relevant to the Controller's audit here. Each audit depends on the documentation and evidence provided by the claimant to show increased costs mandated by the state.

Accordingly, the Controller's calculation of cost savings for all years of the audit period except the first half of fiscal year 2003-2004 is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

4. The Controller's calculation of cost savings for the first half of fiscal year 2003-2004 is incorrect as a matter of law.

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<sup>159</sup> Exhibit B, Controller's Late Comments on the IRC, pages 63 (2008 report), listing the waste reduction programs in place, stating that "Increased monitoring of paper/cardboard recycling have also contributed to landfill diversion" and reporting there was "more communication to the college to help with our recycling efforts." Claimant also reported that in 2008: "No new programs were implemented, or discontinued."

<sup>160</sup> Exhibit B, Controller's Late Comments on the IRC, page 21-22.

<sup>161</sup> Exhibit A, IRC, page 35.

<sup>162</sup> Exhibit B, Controller's Late Comments on the IRC, page 24.

<sup>163</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>164</sup> Exhibit A, IRC, pages 18-19.

The claimant achieved an actual diversion rate of 62.5 percent in the first half of fiscal year 2003-2004.<sup>165</sup> The Controller allocated the diversion rate, as it did for the other fiscal years, because the claimant exceeded the mandate. However, the Controller used a 50 percent mandated rate to calculate the allocated diversion rate although the test claim statutes required only 25 percent diversion in calendar year 2003.<sup>166</sup> The requirement to divert 50 percent of solid waste did not become operative until January 1, 2004,<sup>167</sup> so the calculation of cost savings for fiscal year 2003-2004 using a 25 percent diversion rate is incorrect.

As indicated in the Parameters and Guidelines, the mandate is to divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities.<sup>168</sup> Thus, from July 1, 2003, through December 31, 2003, community college districts were mandated to achieve diversion rates of only 25 percent. The Controller admits that, “as there is no state mandate to exceed solid waste diversion for amounts in excess of 25% for calendar years 2000 through 2003 or 50% for calendar year 2004 and later, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceed the levels set by statute.”<sup>169</sup>

The Controller’s calculation of cost savings, using a 50 percent diversion rate from July 1, 2003 through December 31, 2003, instead of the mandated 25 percent diversion rate, is incorrect as a matter of law.<sup>170</sup> As discussed above, the Controller’s formula for offsetting cost savings for years in which the claimant exceeded the diversion mandate, which allocates the diversion based on the mandated rate, is consistent with the test claim statutes and the court’s decision on this program.

Applying the Controller’s cost savings formula (that allocates cost savings for years the claimant exceeded the mandate) to the first half of fiscal year 2003-2004, results in offsetting savings of \$13,772 (25 percent divided by 62.5 percent, multiplied by 934.85 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$27,544. Therefore, the difference of \$13,772 (\$27,544 - \$13,772) has been incorrectly reduced.

In comments on the Draft Proposed Decision, the Controller agreed with the conclusion to reinstate \$13,772 to the claimant for the first half of fiscal year 2003-2004.<sup>171</sup>

Accordingly, the Commission finds that the difference of \$13,772 (\$27,544 - \$13,772) reduced from costs claimed for the first half of fiscal year 2003-2004 is incorrect as a matter of law.

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<sup>165</sup> Exhibit B, Controller’s Late Comments on the IRC, page 46 (2003 Annual Report).

<sup>166</sup> Exhibit B, Controller’s Late Comments on the IRC, page 71.

<sup>167</sup> Public Resources Code sections 42921; Exhibit A, IRC, page 91 (Parameters and Guidelines).

<sup>168</sup> Exhibit A, IRC, page 91 (Parameters and Guidelines). This is based on Public Resources Code sections 42921.

<sup>169</sup> Exhibit B, Controller’s Late Comments on the IRC, page 20.

<sup>170</sup> Exhibit B, Controller’s Late Comments on the IRC, page 71.

<sup>171</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

## **V. Conclusion**

Based on the foregoing, the Commission concludes that the Controller timely initiated the audit of the fiscal year 2000-2001 reimbursement claim, and timely completed the audit of all claims.

The Commission also finds that the Controller's reduction of costs claimed for all years in the audit period except the first half of fiscal year 2003-2004 is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

The Commission further concludes that the Controller's reduction of costs claimed for the first half of fiscal year 2003-2004 is partially incorrect as a matter of law. The law and the record support offsetting cost savings for this time period of \$13,772 rather than \$27,544. Therefore, the difference of \$13,772 has been incorrectly reduced and should be reinstated to claimant.

Accordingly, the Commission partially approves this IRC and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission's regulations, that the Controller reinstate \$13,772 to the claimant.



RE: **Decision**

*Integrated Waste Management*, 14-0007-I-07

Public Resources Code Sections 40418, 40196.3, 42920-42928;

Public Contract Code Sections 12167 and 12167.1

Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75)

State Agency Model Integrated Waste Management Plan (February 2000)

Fiscal Years: 2000-2001, 2003-2004, 2004-2005, 2005-2006, 2006-2007, and 2007-2008

El Camino Community College District, Claimant

On January 26, 2018, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

  
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Heather Halsey, Executive Director

Dated: January 31, 2018

BEFORE THE  
 COMMISSION ON STATE MANDATES  
 STATE OF CALIFORNIA

**IN RE INCORRECT REDUCTION CLAIM  
 ON:**

Public Resources Code Sections 40148, 40196.3, 42920-42928; Public Contract Code Sections 12167 and 12167.1; Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75); State Agency Model Integrated Waste Management Plan (February 2000).

Fiscal Years 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, and 2010-2011

North Orange County Community College District, Claimant

Case No.: 14-0007-I-08

*Integrated Waste Management*

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

*(Adopted March 23, 2018)*

*(Served March 27, 2018)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on March 23, 2018. The claimant, North Orange County Community College District, did not attend the hearing. Lisa Kurokawa appeared on behalf of the State Controller’s Office (Controller).

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 the Proposed Decision to deny the IRC by a vote of 5-0 as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	Yes
Ken Alex, Director of the Office of Planning and Research	Absent
Richard Chivaro, Representative of the State Controller	Absent
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	Yes
Sarah Olsen, Public Member	Yes
Carmen Ramirez, City Council Member	Yes
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	Yes

## **Summary of the Findings**

This IRC addresses reductions made by the Controller to reimbursement claims of the claimant for fiscal years 2005-2006 through 2010-2011 (the audit period), under the *Integrated Waste Management* program, 00-TC-07. The Controller made the audit reductions because the claimant did not identify and deduct from its reimbursement claims offsetting cost savings from its diversion of solid waste and the associated reduced or avoided landfill disposal costs.

The test claim statutes require community college districts to adopt and implement, in consultation with California Integrated Waste Management Board (CIWMB, which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste.<sup>1</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent of generated solid waste by January 1, 2004.<sup>2</sup> The test claim statutes also provide that “Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs . . .”<sup>3</sup>

The statutes, therefore, presume that by diverting solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. The amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB.<sup>4</sup>

The Commission finds that the Controller correctly presumed, consistent with the test claim statutes and the court’s interpretation of those statutes, and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill disposal fee per ton of waste diverted. The record shows that the claimant diverted solid waste each year during the audit period and thus, achieved cost savings from the avoided landfill fee per ton of waste diverted.<sup>5</sup>

The Commission also finds, based on the evidence in the record, that the Controller’s calculation of offsetting cost savings for all fiscal years in the audit period is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support. In 2006, when the claimant exceeded the mandate to divert 50 percent of its solid waste, the Controller calculated offsetting savings by allocating the diversion to reflect the mandate. The Controller allocated the diversion by dividing the mandated rate of solid waste diverted under the test claim statute (50 percent) by the actual rate of solid waste diverted (as annually reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the

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<sup>1</sup> Public Resources Code section 42920(b).

<sup>2</sup> Public Resources Code section 40124.

<sup>3</sup> Public Resources Code section 42925(a).

<sup>4</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 75-76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>5</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 32-63 (Annual Reports), 84-85.

statewide average fee) to calculate the offsetting savings realized.<sup>6</sup> The formula allocates or reduces the offsetting cost savings based on the mandated rate, and is intended to avoid penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>7</sup>

To calculate cost savings in all other years when the claimant did not exceed the 50 percent diversion rate,<sup>8</sup> the Controller multiplied 100 percent of the solid waste that the claimant diverted by the avoided landfill disposal fee (based on the statewide average fee).<sup>9</sup>

These formulas are consistent with the statutory presumption of cost savings and correctly presume, without any evidence to the contrary, that waste diverted results in offsetting cost savings in an amount equal to the avoided landfill fee per ton of waste required to be diverted and actually diverted. In 2006 when the claimant exceeded the mandated diversion rate, the Controller's formula limited the offset to the mandated diversion rate.

The Commission therefore concludes that the Controller's reduction of costs claimed for all years in the audit period is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support. Accordingly, the Commission denies this IRC.

## COMMISSION FINDINGS

### I. Chronology

- 01/04/2007 The claimant filed its 2005-2006 reimbursement claim.<sup>10</sup>
- 02/11/2008 The claimant filed its 2006-2007 reimbursement claim.<sup>11</sup>
- 02/02/2009 The claimant filed its 2007-2008 reimbursement claim.<sup>12</sup>
- 01/25/2011 The claimant filed its 2008-2009 amended reimbursement claim.<sup>13</sup>
- 02/15/2012 The claimant filed its 2009-2010 amended reimbursement claim.<sup>14</sup>
- 02/15/2012 The claimant filed its 2010-2011 reimbursement claim.<sup>15</sup>

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<sup>6</sup> Exhibit A, IRC, pages 34; Exhibit B, Controller's Late Comments on the IRC, page 18.

<sup>7</sup> Exhibit B, Controller's Late Comments on the IRC, page 18.

<sup>8</sup> Fullerton College achieved 49.96 percent in 2005 and 32.75 percent in 2007 – 2011, and Cypress College achieved 49.98 percent in 2005, and 40.41 percent in 2007-2011 (Exhibit B, Controller's Late Comments on the IRC, pages 36-37, 40-51, 54-63, 84-85.)

<sup>9</sup> Exhibit B, Controller's Late Comments on the IRC, pages 84-85.

<sup>10</sup> Exhibit A, IRC, page 203.

<sup>11</sup> Exhibit A, IRC, page 209.

<sup>12</sup> Exhibit A, IRC, page 213.

<sup>13</sup> Exhibit A, IRC, page 223.

<sup>14</sup> Exhibit A, IRC, page 231.

<sup>15</sup> Exhibit A, IRC, page 239. This reimbursement claim is for July 1, 2010 to October 7, 2010 only.

- 07/02/2013 The Controller notified the claimant of the audit.<sup>16</sup>
- 08/15/2013 The Controller issued the Final Audit Report.<sup>17</sup>
- 07/31/2014 The claimant filed this IRC.<sup>18</sup>
- 12/07/2015 The Controller filed late comments on the IRC.<sup>19</sup>
- 12/20/2017 Commission staff issued the Draft Proposed Decision.<sup>20</sup>
- 01/04/2018 The Controller filed comments on the Draft Proposed Decision.<sup>21</sup>

## II. Background

### A. The *Integrated Waste Management Program*

The test claim statutes require community college districts<sup>22</sup> to adopt and implement, in consultation with CIWMB (which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste, reuse materials whenever possible, recycle recyclable materials, and procure products with recycled content in all agency offices and facilities.<sup>23</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent by January 1, 2004. To divert means to “reduce or eliminate the amount of solid waste from solid waste disposal...”<sup>24</sup>

CIWMB developed and adopted a model IWM plan on February 15, 2000, and the test claim statutes provide that if a district does not adopt an IWM plan, the CIWMB model plan governs the community college.<sup>25</sup> Each district is also required to report annually to CIWMB on its

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<sup>16</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 5, 87-89.

<sup>17</sup> Exhibit A, IRC, page 24 (Final Audit Report).

<sup>18</sup> Exhibit A, IRC, pages 1-2.

<sup>19</sup> Exhibit B, Controller’s Late Comments on the IRC, page 1. Note that Government Code section 17553(d) states: “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>20</sup> Exhibit C, Draft Proposed Decision.

<sup>21</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

<sup>22</sup> The test claim statutes apply to “state agencies” and define them to include “the California Community Colleges” (Pub. Res. Code, § 40196.3).

<sup>23</sup> Public Resources Code section 42920(b).

<sup>24</sup> Public Resources Code section 40124.

<sup>25</sup> Public Resources Code section 42920(b)(3).

progress in reducing solid waste; and the reports' minimum contents are specified in statute.<sup>26</sup> The test claim statutes also require a community college, when entering into or renewing a lease, to ensure that adequate areas are provided for and adequate personnel are available to oversee collection, storage, and loading of recyclable materials in compliance with CIWMB's requirements.<sup>27</sup> Additionally, the test claim statutes added Public Resources Code section 42925(a), which addressed cost savings from IWM plan implementation:

Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency's integrated waste management plan to fund plan implementation and administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code.

The Public Contract Code sections referenced in section 42925(a) require that revenue received as a result of the community college's IWM plan be deposited in CIWMB's Integrated Waste Management Account. After July 1, 1994, CIWMB is authorized to spend the revenue upon appropriation by the Legislature to offset recycling program costs. Annual revenue under \$2,000 is to be continuously appropriated for expenditure by the community colleges, whereas annual revenue over \$2,000 is available for expenditures upon appropriation by the Legislature.<sup>28</sup>

On March 24, 2004, the Commission adopted the *Integrated Waste Management* Statement of Decision and determined that the test claim statutes impose a reimbursable state-mandated program on community college districts. The Commission found that cost savings under Public Resources Code section 42925(a) did not preclude a reimbursable mandate under Government Code section 17556(e) because there was no evidence that offsetting savings would result in no net costs to a community college implementing an IWM plan, nor was there evidence that revenues received from plan implementation would be "in an amount sufficient to fund" the cost of the state-mandated program. The Commission found that any revenues received would be identified as offsetting revenue in the Parameters and Guidelines.

The Parameters and Guidelines were adopted on March 30, 2005, and authorize reimbursement for the increased costs to perform the following activities:

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<sup>26</sup> Public Resources Code section 42926.

<sup>27</sup> Public Resources Code section 42924(b).

<sup>28</sup> Public Contract Code sections 12167 and 12167.1 are part of the State Assistance for Recycling Markets Act, which was originally enacted in 1989 to foster the procurement and use of recycled paper products and other recycled resources in daily state operations (See Pub. Contract Code, §§ 12153, 12160; Stats. 1989, ch. 1094). The Act, including sections 12167 and 12167.1, applies to California community colleges only to the limited extent that these sections are referenced in Public Resources Code section 42925. Community colleges are not defined as state agencies or otherwise subject to the Act's provisions for the procurement and use of recycled products in daily state operations. See Exhibit B, Controller's Late Comments on the IRC, pages 71-72 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355)).

- A. One-Time Activities (*Reimbursable starting January 1, 2000*)
1. Develop the necessary district policies and procedures for the implementation of the integrated waste management plan.
  2. Train district staff on the requirements and implementation of the integrated waste management plan (one-time per employee). Training is limited to the staff working directly on the plan.
- B. Ongoing Activities (*Reimbursable starting January 1, 2000*)
1. Complete and submit to the [Integrated Waste Management] Board the following as part of the State Agency Model Integrated Waste Management Plan (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.):
    - a. state agency or large state facility information form;
    - b. state agency list of facilities;
    - c. state agency waste reduction and recycling program worksheets that describe program activities, promotional programs, and procurement activities, and other questionnaires; and
    - d. state agency integrated waste management plan questions.

NOTE: Although reporting on promotional programs and procurement activities in the model plan is reimbursable, implementing promotional programs and procurement activities is not.
  2. Respond to any Board reporting requirements during the approval process. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
  3. Consult with the Board to revise the model plan, if necessary. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
  4. Designate one solid waste reduction and recycling coordinator for each college in the district to perform new duties imposed by chapter 18.5 (Pub. Resources Code, §§ 42920 – 42928). The coordinator shall implement the integrated waste management plan. The coordinator shall act as a liaison to other state agencies (as defined by section 40196.3) and coordinators. (Pub. Resources Code, § 42920, subd. (c).)
  5. Divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities. Maintain the required level of reduction, as approved by the Board. (Pub. Resources Code, §§ 42921 & 42922, subd. (i).)
- C. Alternative Compliance (*Reimbursable from January 1, 2000 – December 31, 2005*)

1. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2002 deadline to divert 25 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42923 subds. (a) & (c).)
  - a. Notify the Board in writing, detailing the reasons for its inability to comply.
  - b. Request of the Board an alternative to the January 1, 2002 deadline.
  - c. Provide evidence to the Board that the college is making a good faith effort to implement the source reduction, recycling, and composting programs identified in its integrated waste management plan.
  - d. Provide information that describes the relevant circumstances that contributed to the request for extension, such as lack of markets for recycled materials, local efforts to implement source reduction, recycling and composting programs, facilities built or planned, waste disposal patterns, and the type of waste disposed of by the community college.
  - e. Submit a plan of correction that demonstrates that the college will meet the requirements of Section 42921 [the 25 and 50 percent diversion requirements] before the time extension expires, including the source reduction, recycling, or composting steps the community college will implement, a date prior to the expiration of the time extension when the requirements of Section 42921 will be met, the existing programs that it will modify, any new programs that will be implemented to meet those requirements, and the means by which these programs will be funded.
2. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2004 deadline to divert 50 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42922, subds. (a) & (b).)
  - a. Notify the Board in writing, detailing the reasons for its inability to comply.
  - b. Request of the Board an alternative to the 50-percent requirement.
  - c. Participate in a public hearing on its alternative requirement.
  - d. Provide the Board with information as to:
    - (i) the community college's good faith efforts to implement the source reduction, recycling, and composting measures described in its integrated waste management plan, and demonstration of its progress toward meeting the alternative requirement as described in its annual reports to the Board;

- (ii) the community college's inability to meet the 50 percent diversion requirement despite implementing the measures in its plan;
- (iii) how the alternative source reduction, recycling, and composting requirement represents the greatest diversion amount that the community college may reasonably and feasibly achieve; and,
- (iv) the circumstances that support the request for an alternative requirement, such as waste disposal patterns and the types of waste disposed by the community college.<sup>29</sup>

D. Accounting System (*Reimbursable starting January 1, 2000*)

Developing, implementing, and maintaining an accounting system to enter and track the college's source reduction, recycling and composting activities, the cost of those activities, the proceeds from the sale of any recycled materials, and such other accounting systems which will allow it to make its annual reports to the state and determine waste reduction. Note: only the pro-rata portion of the costs incurred to implement the reimbursable activities can be claimed.

E. Annual Report (*Reimbursable starting January 1, 2000*)

Annually prepare and submit, by April 1, 2002, and by April 1 each subsequent year, a report to the Board summarizing its progress in reducing solid waste. The information in the report must encompass the previous calendar year and shall contain, at a minimum, the following as outlined in section 42926, subdivision (b): (Pub. Resources Code, §§ 42926, subd. (a) & 42922, subd. (i).)

1. calculations of annual disposal reduction;
2. information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors;
3. a summary of progress made in implementing the integrated waste management plan;
4. the extent to which the community college intends to use programs or facilities established by the local agency for handling, diversion, and disposal of solid waste (If the college does not intend to use those established programs or facilities, it must identify sufficient disposal capacity for solid waste that is not source reduced, recycled or composted.);
5. for a community college that has been granted a time extension by the Board, it shall include a summary of progress made in meeting the integrated waste management plan implementation schedule pursuant to

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<sup>29</sup> These alternative compliance and time extension provisions in part C were sunset on January 1, 2006, but were included in the adopted Parameters and Guidelines.

section 42921, subdivision (b), and complying with the college's plan of correction, before the expiration of the time extension;

6. for a community college that has been granted an alternative source reduction, recycling, and composting requirement by the Board pursuant to section 42922, it shall include a summary of progress made towards meeting the alternative requirement as well as an explanation of current circumstances that support the continuation of the alternative requirement.

F. Annual Recycled Material Reports (*Reimbursable starting July 1, 1999*)

Annually report to the Board on quantities of recyclable materials collected for recycling. (Pub. Contract Code, § 12167.1.) (See Section VII. regarding offsetting revenues from recyclable materials.)<sup>30</sup>

The Parameters and Guidelines further require that each claimed reimbursable cost be supported by contemporaneous source documentation.<sup>31</sup>

And as originally adopted, the Parameters and Guidelines required community college districts to identify and deduct from their reimbursement claims all of the offsetting revenues received from the sale of recyclable materials, limited by the provisions of Public Resources Code section 42925 and Public Contract Code section 12167.1. The original Parameters and Guidelines did not require community colleges to identify and deduct from their claims any offsetting cost savings resulting from the solid waste diversion activities required by the test claim statutes.<sup>32</sup>

**B. Superior Court Decision on Cost Savings and Offsets Under the Program**

After the Parameters and Guidelines were adopted, the Department of Finance (Finance) and CIWMB filed a petition for a writ of mandate requesting the court to direct the Commission to set aside the Test Claim Statement of Decision and Parameters and Guidelines and to issue a new Decision and Parameters and Guidelines that give full consideration to the cost savings and offsetting revenues community college districts will achieve by complying with the test claim statutes, including all cost savings realized from avoided landfill disposal fees and revenues received from the collection and sale of recyclable materials. The petitioners further argued that Public Contract Code sections 12167 and 12167.1 do not require community college districts to deposit revenues received from the collection and sale of recyclable materials into the Integrated Waste Management Account, as determined by the Commission, but instead allow community college districts to retain all revenues received. The petitioners argued that such revenues must be identified as offsetting revenues and applied to the costs of the program, without the community college district obtaining the approval of the Legislature or CIWMB.<sup>33</sup>

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<sup>30</sup> Exhibit A, IRC, page 40-43 (Parameters and Guidelines, adopted March 30, 2005).

<sup>31</sup> Exhibit A, IRC, page 40 (Parameters and Guidelines, adopted March 30, 2005).

<sup>32</sup> Exhibit A, IRC, pages 45 (Parameters and Guidelines, adopted March 30, 2005).

<sup>33</sup> *State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355).

On May 29, 2008, the Sacramento County Superior Court granted the petition for writ of mandate, finding that the Commission's treatment of cost savings and revenues in the Parameters and Guidelines was erroneous and required that the Parameters and Guidelines be amended. The court said:

There is no indication in the administrative record or in the legal authorities provided to the court that, as respondent [Commission] argues, a California Community College might not receive the full reimbursement of its actual increased costs required by section 6 if its claims for reimbursement of IWM plan costs were offset by realized cost savings and all revenues received from the plan activities.<sup>34</sup>

Instead, the court recognized that community colleges are "*likely* to experience costs savings in the form of reduced or avoided costs of landfill disposal" as a result of the mandated activities in Public Resources Code section 42921 because reduced or avoided costs "are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided."<sup>35</sup> The court noted that "diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates" and cited the statutory definition of diversion: "activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division [i.e., division 30, including § 42920 et seq.]" as well as the statutory definition of disposal: "the management of solid waste through landfill disposal or transformation at a permitted solid waste facility."<sup>36</sup> The court explained:

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated

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<sup>34</sup> Exhibit B, Controller's Late Comments on the IRC, page 75 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter, Footnote 1).

<sup>35</sup> Exhibit B, Controller's Late Comments on the IRC, page 75 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>36</sup> Exhibit B, Controller's Late Comments on the IRC, pages 75-76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926.<sup>37</sup>

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>38</sup>

The court issued a writ of mandate directing the Commission to amend the Parameters and Guidelines to require community college districts claiming reimbursable costs of an IWM plan to:

1. Identify and offset from their claims, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1, cost savings realized as a result of implementing their plans; and
2. Identify and offset from their claims all of the revenue generated as a result of implementing their plans, without regard to the limitations or conditions described in sections 12167 and 12167.1 of the Public Contract Code.<sup>39</sup>

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<sup>37</sup> Exhibit B, Controller’s Late Comments on the IRC, page 76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>38</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 77-78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>39</sup> Exhibit B, Controller’s Late Comments on the IRC, page 29 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

### C. Parameters and Guidelines Amendment Pursuant to the Writ

In compliance with the writ, the Commission amended the Parameters and Guidelines on September 26, 2008 to add section VIII. Offsetting Cost Savings, which states:

Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1. Pursuant to these statutes, community college districts are required to deposit cost savings resulting from their Integrated Waste Management plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the California Integrated Waste Management Board for the purpose of offsetting Integrated Waste Management plan costs. Subject to the approval of the California Integrated Waste Management Board, cost savings by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting Integrated Waste Management program costs. Cost savings exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature. To the extent so approved or appropriated and applied to the college, these amounts shall be identified and offset from the costs claimed for implementing the Integrated Waste Management Plan.<sup>40</sup>

Section VII. of the Parameters and Guidelines, on Offsetting Revenues, was amended as follows (amendments in strikeout and underline):

Reimbursement for this mandate from any source, including but not limited to, services fees collected, federal funds, and other state funds allocated to any service provided under this program, shall be identified and ~~deducted~~ offset from this claim. Offsetting revenue shall include all revenues generated from implementing the Integrated Waste Management Plan. ~~the revenues cited in Public Resources Code section 42925 and Public Contract Code sections 12167 and 12167.1.~~

~~Subject to the approval of the California Integrated Waste Management Board, revenues derived from the sale of recyclable materials by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting recycling program costs. Revenues exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature. To the extent so approved or~~

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*et al.* (Sacramento County Superior Court, Case No. 07CS00355, Judgment Granting Petition for Writ of Administrative Mandamus).

<sup>40</sup> Exhibit A, IRC page 58 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

~~appropriated and applied to the college, these amounts are a reduction to the recycling costs mandated by the state to implement Statutes 1999, chapter 764.~~

In addition, revenue from a building-operating fee imposed pursuant to Education Code section 76375, subdivision (a) if received by a claimant and the revenue is applied to this program, shall be deducted from the costs claimed.<sup>41</sup>

All other requirements in the Parameters and Guidelines remained the same.

CIWMB requested additional amendments to the Parameters and Guidelines at this September 2008 hearing, including a request to alter the offsetting savings provision to require community college districts to provide offsetting savings information *whether or not* the offsetting savings generated in a fiscal year exceeded the \$2,000 continuous appropriation required by Public Contract Code sections 12167 and 12167.1. The Commission denied the request because the proposed language went beyond the scope of the court's judgment and writ.<sup>42</sup> As the court found:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs "in accordance with Sections 12167 and 12167.1 of the Public Contract Code," section 42925 assures that cost savings realized from state agencies' IWM plans are handled in a manner consistent with the handling of revenues received from state agencies' recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>43</sup>

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<sup>41</sup> Exhibit A, IRC, pages 45, 57-58 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>42</sup> Exhibit X, Commission on State Mandates, Excerpt from the Minutes for the September 26, 2008 Meeting.

<sup>43</sup> Exhibit B, Controller's Late Comments on the IRC, pages 77-78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

CIWMB also requested adding a requirement for community college districts to analyze specified categories of potential cost savings when filing their reimbursement claims. The Commission found that the court determined that the amount or value of cost savings is already available from the annual reports the community college districts provide to CIWMB pursuant to Public Resources Code section 42926(b). This report is required to include the district's "calculations of annual disposal reduction" and "information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors." Thus, the Commission denied CIWMB's request and adopted the staff analysis finding that the request was beyond the scope of the court's writ and judgment. The Commission also noted that the request was the subject of separate pending request filed by CIWMB to amend the Parameters and Guidelines and would therefore be further analyzed for that matter.

**D. Subsequent Request by CIWMB to Amend the Parameters and Guidelines to Require Detailed Reports on Cost Savings and Revenues**

CIWMB filed a request to amend the Parameters and Guidelines to require community college districts to submit with their reimbursement claims a separate worksheet and report analyzing the costs incurred and avoided and any fees received relating to staffing, overhead, materials, storage, transportation, equipment, the sale of commodities, avoided disposal fees, and any other revenue received relating to the mandated program as specified by CIWMB. At its January 30, 2009 meeting, the Commission denied the request for the following reasons: there is no requirement in statute or regulation that community college districts perform the analysis specified by CIWMB; the Commission has no authority to impose additional requirements on community college districts regarding this program; the offsetting cost savings paragraph in the Parameters and Guidelines already identifies the offsetting savings consistent with the language of Public Resources Code section 42925(a), Public Contract Code sections 12167 and 12167.1, and the court's judgment and writ; and information on cost savings is already available in the community colleges' annual reports submitted to CIWMB, as required by Public Resources Code section 42926(b)(1).<sup>44</sup>

**E. The *Integrated Waste Management* Program Made Optional**

This program was made optional by Statutes 2010, chapter 724 (AB 1610), section 34, effective October 19, 2010 and has remained so since that time.<sup>45</sup>

**F. The Controller's Audit**

The Controller audited the reimbursement claims for fiscal years 2005-2006 through 2010-2011. Of the \$567,598 claimed during the audit period, the Controller found that \$190,901 is allowable and \$376,697 is unallowable because the claimant did not report offsetting savings from implementation of its IWM plan.<sup>46</sup>

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<sup>44</sup> Exhibit X, Commission on State Mandates, Item 9, Final Staff Analysis of Proposed Amendments to the Parameters and Guidelines for *Integrated Waste Management*, 05-PGA-16, January 30, 2009, pages 2-3.

<sup>45</sup> See Government Code section 17581.5.

<sup>46</sup> Exhibit A, IRC, page 24 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, pages 7 and 26. The Controller actually found that claimant realized savings of \$531,973,

The Controller’s audit finding is based on the court’s ruling, which states that “the amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California community colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926,”<sup>47</sup> the resulting amendment to the Parameters and Guidelines, and the claimant’s annual reports to CIWMB.

During the audit period, the claimant operated two campuses: Fullerton College and Cypress College, each of which submitted annual reports to CIWMB.<sup>48</sup> The Controller determined that at both colleges, the claimant diverted solid waste each year of the audit period, and thus realized cost savings in each year. The Controller further found that the claimant diverted less solid waste than the amount mandated by the test claim statute in all years, except for calendar year 2006 when the Controller found that the claimant diverted more solid waste (76.36 percent at Fullerton College and 51.88 percent at Cypress College) than the mandated 50 percent diversion rate.<sup>49</sup>

For calendar year 2006, when the claimant exceeded the 50 percent diversion mandate, the Controller calculated offsetting cost savings by allocating the diversion to reflect the mandate. The Controller allocated the diversion by dividing the mandated diversion rate (50 percent) by the actual diversion rate (76.36 percent at Fullerton College and 51.88 percent at Cypress College). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized in those years.<sup>50</sup>

$$\begin{array}{rcccl}
 & & \text{Allocated Diversion \%} & & \\
 & & \text{┌───────────┐} & & \\
 & & \text{Maximum} & & \text{Avoided} \\
 & & \text{Allowable} & & \text{Landfill} \\
 \text{Offsetting} & = & \frac{\text{Diversion \%}}{\text{Actual}} & \times & \text{Disposal Fee} \\
 \text{Savings} & & \text{Diversion \%} & \times & \text{(per Ton)} \\
 \text{Realized} & & & \times & \\
 & & \text{Tonnage} & & \\
 & & \text{Diverted} & & 
 \end{array}$$

The Controller provided an example of how the formula works. For calendar year 2006, Fullerton College reported diversion of 4,337.2 tons of solid waste and disposal of 1,342.8 tons

but because the offsetting savings exceeded the amount claimed for 2005-2006 and 2006-2007, the Controller found that \$190,901 is allowable and \$376,697 is unallowable.

<sup>47</sup> Exhibit B, Controller’s Late Comments on the IRC, page 76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>48</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 36-51 (Fullerton College Annual Reports) and 54-63 (Cypress College Annual Reports).

<sup>49</sup> Exhibit A, IRC, page 31, footnotes 2 and 3 (Final Audit Report); Exhibit B, Controller’s Late Comments on the IRC, pages 38 (Fullerton College 2006 Annual Report), 52 (Cypress College 2006 Annual Report) and 84-85.

<sup>50</sup> Exhibit A, IRC, pages 33 (Final Audit Report). Exhibit B, Controller’s Late Comments on the IRC, page 18.

generated. Diverting 4,337.2 tons out of the 5,680 tons of waste generated results in a diversion rate of 76.4 percent (exceeding the 50 percent required).<sup>51</sup> To avoid penalizing the claimant for diverting more solid waste than the amount mandated,<sup>52</sup> instead of using 100 percent of the claimant's diversion to calculate offsetting savings, the Controller allocated the diversion by dividing the mandated diversion rate (50 percent) by the actual diversion rate (76.4 percent), which equals 65.48 percent. The 65.48 allocated rate is then multiplied by the 4,337.2 tons diverted in 2006, which equals 2,840 tons of diverted solid waste, instead of the 4,337.2 tons actually diverted. The allocated 2,840 tons of diverted waste is then multiplied by the statewide average disposal fee per ton, which in 2006 was \$46, resulting in "offsetting cost savings" for calendar year 2006 of \$130,640.<sup>53</sup>

In years when the claimant did not achieve the mandated diversion rate, the Controller multiplied 100 percent of the solid waste diverted by the claimant by the avoided landfill disposal fee (based on the statewide average fee) to calculate offsetting savings.<sup>54</sup>

In 2008, CIWMB stopped requiring community college districts to report the actual tonnage diverted, instead requiring a report based on "per-capita disposal." Consequently, the Controller used the claimant's report of 2007 percentage of tons diverted to calculate the offsetting savings for fiscal years 2007-2008 to 2010-2011.<sup>55</sup>

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<sup>51</sup> Exhibit B, Controller's Late Comments on the IRC, pages 18, 84 (Controller's calculation of offsetting savings).

<sup>52</sup> Exhibit B, Controller's Late Comments on the IRC, pages 18.

<sup>53</sup> Exhibit B, Controller's Late Comments on the IRC, pages 18, 84 (Controller's calculations of offsetting savings). Page 18 of the Controller's Late Comments on the IRC describe the calculation differently than the formula in the audit report, but the result is the same. The Controller states that cost savings can be calculated by multiplying the total tonnage generated (solid waste diverted + disposed) by the mandated diversion percentage (50 percent), times the avoided landfill disposal fee:

For example, in calendar 2006, for Fullerton College, the district reported to CalRecycle that it diverted 4,337.2 tons of solid waste and disposed of 1,372.8 tons, which results in an overall diversion percentage of 76.4% [Tab 5, page 3]. Because the district was required to divert 50% for that year to meet the mandated requirements and comply with the Public Resources Code, it needed to have diverted only 2,840.0 tons (5,680.0 total tonnage generated x 50%) in order to satisfy the 50% requirement. Therefore, we adjusted our calculation to compute offsetting savings based on 2,840.0 tons of diverted solid waste rather than a total of 4,337.2 tons diverted.

Using this formula also results in cost savings for calendar year 2006 of \$130,640 (5,680 tons generated x 50 percent = 2,840 tons x \$46 = \$130,640).

<sup>54</sup> Exhibit A, IRC, page 31, footnotes 2 and 3 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, pages 84-85.

<sup>55</sup> Exhibit A, IRC, page 34 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, pages 19, 84-85.

The Controller pointed out in the audit report that the claimant did not provide documentation supporting different diversion rates or disposal fees to calculate offsetting cost savings.<sup>56</sup>

### III. Positions of the Parties

#### A. North Orange County Community College District

The claimant maintains that the audit reductions are incorrect and requests the reinstatement of the full amount reduced. The claimant alleges that it did not realize any cost savings as a result of the mandate and quotes the Superior Court decision (discussed above) that cost savings will “most likely” occur as a result of reduced or avoided costs of landfill disposal, arguing that:

The court presupposes a previous legal requirement for districts to incur landfill disposal fees to divert solid waste. Thus, potentially relieved of the need to incur new or additional landfill fees for increased waste diversion, a cost savings would occur. There is no finding of fact or law in the court decision or from the Commission Statement of Decision for the test claim for this assumed duty to use landfills.<sup>57</sup>

The claimant further argues that the offsetting savings provision in the Parameters and Guidelines does not assume that the cost savings occurred, but instead requires that the cost savings be *realized*. For the savings to be realized, the claimant contends that the following chain of events are required:

[T]he cost savings must exist (avoided landfill costs); be converted to cash; amounts in excess of \$2,000 per year deposited in the state fund; and, these deposits by the districts appropriated by the Legislature to districts for purposes of mitigating the cost of implementing the plan. None of those prerequisite events occurred so no cost savings were "realized" by the District. Regardless, the adjustment cannot be applied to the District since no state appropriation of the cost savings was made to the District.<sup>58</sup>

The claimant also argues that the Parameters and Guidelines are silent as to how to calculate the avoided costs, but that the court provided two alternative methods, either disposal reduction or diversion reported by districts. The Controller used the diversion percentage, which assumes, without findings of fact, that all diversion tonnage is landfill disposal tonnage reduction. The claimant contends that the Controller’s calculation of cost savings is wrong because: (1) the formula is a standard of general application that was not adopted pursuant to the Administrative Procedure Act and is therefore an unenforceable underground regulation; (2) the Controller’s formula assumes facts not in evidence, such as applying the same percentage of waste diverted in 2007 to subsequent years in the audit period without evidence in the record, and assumes that all tonnage diverted would have been disposed in a landfill, although some waste may have been composted or may not apply to the mandate (e.g. paint); and (3) the landfill disposal fee, a

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<sup>56</sup> Exhibit A, IRC, page 34 (Final Audit Report).

<sup>57</sup> Exhibit A, IRC, page 11.

<sup>58</sup> Exhibit A, IRC, pages 12-13. Emphasis in original.

statewide average calculated by CIWMB, does not include the data used to generate the average fee amounts, so the average is unknown and unsupported by the audit findings.<sup>59</sup>

The claimant contends that application of the formula is incorrect, alleging that it “did not claim landfill costs, so there are none to be offset. The adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed.”<sup>60</sup> Moreover, the Controller's calculation method prevents the claimant from receiving full reimbursement for its actual increased program costs. The claimant contends, using audit results for 26 other claimants under the *Integrated Waste Management* program, that application of the Controller's formula has arbitrary results because the percentages of allowed costs for those claimants ranges from zero to 83.4 percent.<sup>61</sup>

Finally, the claimant argues: (1) the Controller used the wrong standard of review in that the claimed costs were not found to be excessive or unreasonable, as required by Government Code section 17561(d)(2); and (2) the Controller has the burden of proof as to the propriety of its audit findings “because it bears the burden of going forward and because it is the party with the power to create, maintain, and provide evidence regarding its auditing methods and procedures, as well as the specific facts relied upon for its audit findings.”<sup>62</sup>

The claimant did not file comments on the Draft Proposed Decision.

#### **B. State Controller's Office**

The Controller maintains that the audit findings are correct. Regarding the claimant's statement that there is only a presumption to incur landfill disposal fees to dispose of solid waste, the Controller notes that the claimant does not indicate how solid waste that is not diverted would be disposed of if not at a landfill. The Controller asserts that the claimant's comments relating to alternatives for the disposal of solid waste are irrelevant since the claimant does not state that it disposed of its solid waste at any location other than a landfill or used any other means to dispose of its waste than to contract with a commercial waste hauler.<sup>63</sup>

The Controller also cites the claimant's annual reports, its disposal of 14,400.7 tons of solid waste during the audit period, and mention of its contract with a waste hauler in its annual reports that indicates that the claimant disposed of waste in a landfill.<sup>64</sup> The Controller states:

Unless the district had an arrangement with its waste hauler that it did not disclose to us or CalRecycle, the district did not dispose of its solid waste at a landfill for no cost. We confirmed that the district incurred a fee to dispose of its solid waste during the fiscal years in the review period. An internet search on the district's website revealed that on June 28, 2005, during a regular meeting of the board of

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<sup>59</sup> Exhibit A, IRC, pages 13-16.

<sup>60</sup> Exhibit A, IRC, page 16.

<sup>61</sup> Exhibit A, IRC, pages 17-18.

<sup>62</sup> Exhibit A, IRC, pages 20-21.

<sup>63</sup> Exhibit B, Controller's Late Comments on the IRC, page 15.

<sup>64</sup> Exhibit B, Controller's Late Comments on the IRC, pages 15-16.

trustees, the district awarded a bid for “Trash Container Services for the District, to M-G Disposal, LLC, in the amount of \$696,192.” The minutes go on to state, “This is subject to contract allowance for adjustments in *charges levied for the use of the County refuse facility*. . .”<sup>65</sup>

The Controller acknowledged that the claimant has not remitted cost savings from the implementation of its IWM plan into the Integrated Waste Management Account in compliance with the Public Contract Code. But the Controller asserts that the claimant is not precluded from the requirement to do so, as indicated in the Parameters and Guidelines and the court ruling. The Controller says the evidence supports that the claimant realized cost savings that should have been remitted to the State and that must be used to fund IWM plan costs.<sup>66</sup>

In response to the claimant’s argument that the Controller’s formula is a standard of general application that is an underground regulation, the Controller asserts that it used a “court approved methodology” to determine the “required offset.” The Controller also states that the claimant did not amend any of its reimbursement claims after the Parameters and Guidelines were amended in September 2008. According to the Controller: “We believe that this “court-identified” approach provides a reasonable methodology to identify the required offset.”<sup>67</sup>

The Controller also states that it “allocated” the offsetting savings to avoid penalizing the claimant for diverting more than the minimum rate of diversion required in calendar year 2006.<sup>68</sup> According to the Controller: “As there is no State mandate to exceed solid waste diversion greater than 50% for calendar year 2004 and later, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceeded the levels set by statute.”<sup>69</sup>

The Controller notes that after the passage of Statutes 2008, chapter 343, CIWMB no longer required districts to report their diversion information, but they are still required to divert 50 percent of their solid waste.<sup>70</sup>

Defending its use of the claimant’s 2007 reported diversion rate to calculate offsetting savings for fiscal years 2007-2008 to 2010-2011, the Controller calls the 2007 report a “fair representation” of 2008-2011 because “In reviewing the 2008, 2009, and 2010 annual reports, we found the district’s annual per capita disposal rate for both the employee and student populations to be below the target rate. Therefore, the district met its requirement to divert 50% of its solid waste.”<sup>71</sup> The Controller also cites the 2008 annual reports for Fullerton and Cypress Colleges that describe improvements to their office paper recycling programs.<sup>72</sup>

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<sup>65</sup> Exhibit B, Controller’s Late Comments on the IRC, page 16. Emphasis in original.

<sup>66</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 16-17.

<sup>67</sup> Exhibit B, Controller’s Late Comments on the IRC, page 17.

<sup>68</sup> Exhibit B, Controller’s Late Comments on the IRC, page 18.

<sup>69</sup> Exhibit B, Controller’s Late Comments on the IRC, page 18.

<sup>70</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

<sup>71</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

<sup>72</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

The Controller also responded to the claimant's argument against the assumption that all tonnage diverted would have been disposed in a landfill, even though some waste may have been composted or may not apply to the mandate (e.g. paint). The Controller points to statements in Fullerton College's 2000 annual report that its composting and mulching will reduce waste going to the landfill.<sup>73</sup>

The Controller also states that the claimant's reference to paint disposal is irrelevant because hazardous waste is not included in the diversion amounts that the claimant reported, and therefore, are not included in the Controller's offsetting savings calculation.<sup>74</sup>

Regarding the data for the statewide disposal fee, the Controller states the information was provided by CalRecycle, and is based on private surveys of a large percentage of landfills across California. The Controller also states that "a cost analysis based on the district's contract with M-G Disposal, LLC indicates that the district paid approximately \$45.94 per ton in 2005 to \$55.20 per ton in 2010 for waste disposal, which is consistent with the statewide average landfill fee provided by CalRecycle."<sup>75</sup>

In response to the claimant's argument that it did not claim landfill costs, so there are none to offset, the Controller answers that the mandated program does not reimburse claimants for landfill costs incurred to dispose of solid waste. Rather, the program reimburses claimants' costs to divert solid waste from disposal, which according to the Controller, results in both a reduction of solid waste going to a landfill and the associated costs of having the waste hauled there, which creates offsetting savings that the claimant is required to identify in its mandated cost claims.<sup>76</sup>

In response to the claimant's argument that "the adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed," the Controller quotes Public Resources Code section 42925 which provides that "cost savings realized as a result of the IWM plan are to "fund plan *implementation and administration costs*."<sup>77</sup> The Controller argues that offsetting savings applies to the whole program and is not limited to solid waste diversion activities. The Controller also cites the reimbursable activities in the Parameters and Guidelines that refer to "implementation of the IWM plan," concluding that it is reasonable that offsetting savings from implementing the plan be offset against direct costs to implement the plan. The Controller also asserts that the claimant's reference to other IWM audits is irrelevant to the current issue.<sup>78</sup>

The Controller disagrees with claimant's argument that the Controller used the wrong standard of review. The Controller cites the statute that authorizes it to audit the claimant's records to verify actual mandate-related costs *and* reduce any claim that is excessive or unreasonable. In this case, the claims were excessive because the claimant's "mandated cost claims exceeded the

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<sup>73</sup> Exhibit B, Controller's Late Comments on the IRC, page 20.

<sup>74</sup> Exhibit B, Controller's Late Comments on the IRC, page 20.

<sup>75</sup> Exhibit B, Controller's Late Comments on the IRC, page 21.

<sup>76</sup> Exhibit B, Controller's Late Comments on the IRC, page 21.

<sup>77</sup> Public Resources Code section 42925. Emphasis added.

<sup>78</sup> Exhibit B, Controller's Late Comments on the IRC, pages 21-22.

proper amount based on the reimbursable costs allowable per statutory language and the program's parameters and guidelines.”<sup>79</sup> As to the burden of proof, the Controller states that it used data from the claimant's annual reports to CIWMB from implementing its IWM program.<sup>80</sup>

The Controller filed comments agreeing with the Draft Proposed Decision.<sup>81</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 if the Controller determines that the claim 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 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>82</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>83</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>84</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.

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<sup>79</sup> Exhibit B, Controller's Late Comments on the IRC, page 25.

<sup>80</sup> Exhibit B, Controller's Late Comments on the IRC, page 25.

<sup>81</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision.

<sup>82</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>83</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>84</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space Dist.* (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.



[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926.<sup>89</sup>

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>90</sup>

Thus, the court found that offsetting savings are, by statutory definition, likely to occur as a result of implementing the mandated activities. Reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.:

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*Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>89</sup> Exhibit B, Controller’s Late Comments on the IRC, page 76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

<sup>90</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 77-78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.”<sup>91</sup> As the court held, “landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs. . . .”<sup>92</sup>

The statutes, therefore, presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. As indicated in the court’s ruling, the amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB. The amount of cost savings realized must be identified by the claimant and used to offset the costs incurred to comply with IWM plan implementation and administration activities approved for reimbursement in the Parameters and Guidelines. Accordingly, the court’s ruling requires claimants to report in their reimbursement claims the costs incurred to comply with the reimbursable activities (which includes the activities and costs to divert at least 50 percent of all solid waste from landfill disposal) and the cost savings from the avoided landfill disposal fees, for a reimbursement claim of the net increased costs.

The Parameters and Guidelines are consistent with the court’s ruling and require in Section IV. that “[t]he claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.”<sup>93</sup> Section VIII. requires that “[r]educed or avoided costs realized from implementation of the community college districts’ Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1.”<sup>94</sup> The court’s decision and the amended Parameters and Guidelines are binding.<sup>95</sup>

2. During the audit period, the claimant diverted solid waste as required by the test claim statutes, but has filed no evidence to rebut the presumption that cost savings were realized. Thus, the Controller’s finding that the claimant realized cost savings is correct as a matter of law.

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<sup>91</sup> Exhibit B, Controller’s Late Comments on the IRC, page 75 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>92</sup> Exhibit B, Controller’s Late Comments on the IRC, page 76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

<sup>93</sup> Exhibit A, IRC, page 53 (Parameters and Guidelines).

<sup>94</sup> Exhibit A, IRC, page 58 (Parameters and Guidelines).

<sup>95</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

In this case, the claimant asserts that no cost savings were realized, but does not explain why.<sup>96</sup>

The mandate requires community colleges to divert at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004.<sup>97</sup> The record shows that the claimant diverted solid waste each year during the audit period and thus, achieved cost savings from the avoided landfill fee per ton of waste diverted. The claimant's annual reports to CIWMB for calendar years 2005 and 2007 indicate diversion percentages of 49.96 percent to 32.75 percent of the solid waste generated at Fullerton College,<sup>98</sup> and of 40.41 percent to 49.98 percent of the solid waste generated at Cypress College.<sup>99</sup> These diversions fall short of the mandated diversion requirement of 50 percent. The claimant's annual reports to CIWMB for calendar year 2006 reports diversion percentages of 76.4 percent at Fullerton College, and 51.9 percent at Cypress College, both of which exceed the mandated diversion requirement of 50 percent.<sup>100</sup>

In 2008, CIWMB stopped requiring community college districts to report the amount and percentage of tonnage diverted, and instead required them to report the "per-capita disposal" of waste.<sup>101</sup> As amended, each community college now has a disposal target that is the equivalent to a 50 percent diversion, and is expressed on a per capita basis. Consequently, the Controller used the percentage of tons diverted identified in claimant's 2007 annual report to calculate the offsetting savings for fiscal years 2007-2008 to 2010-2011.<sup>102</sup> The claimant has not filed any evidence to show that the Controller's use of the 2007 diversion rates for subsequent years is incorrect. Moreover, the claimant's annual reports after 2007 show that the claimant was continuing or expanding the program to divert solid waste.<sup>103</sup>

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<sup>96</sup> Exhibit A, IRC, page 9.

<sup>97</sup> Public Resources Code sections 42921. Exhibit A, IRC, pages 50 and 54 (Parameters and Guidelines, section IV.(B)(5)).

<sup>98</sup> Exhibit B, Controller's Late Comments on the IRC, pages 36-37, 40-41, and 84.

<sup>99</sup> Exhibit B, Controller's Late Comments on the IRC, pages 50-51, 54-55, and 85.

<sup>100</sup> Exhibit B, Controller's Late Comments on the IRC, pages 38-39, 52-53, and 84-85.

<sup>101</sup> The new requirement was a result of Statutes 2008, chapter 343 (SB 1016).

<sup>102</sup> Exhibit A, IRC, page 34 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, pages 19, 84-85.

<sup>103</sup> In its reports for 2008, 2009 and 2010 reported annual per capita disposal rates for both the employee and student populations at or below the target rates at both Colleges. Exhibit B, Controller's Late Comments on the IRC, pages 42 (Fullerton College 2008 report, showing an employee population target of 21.8, and 10.2 was achieved; and a student population target of 0.9, and 0.36 was achieved), 44 (Fullerton College 2009 report, showing an employee population target of 21.8, and 10.0 was achieved; and a student population target of 0.9, and 0.32 was achieved), 47 (Fullerton College 2010 report, showing an employee population target of 21.8, and 15.2 was achieved; and a student population target of 0.9, and 0.51 was achieved), 56 (Cypress College 2008 report, showing an employee population target of 4.9, and 4.3 was achieved; and a student population target of 0.20, and 0.14 was achieved), 58 (Cypress College 2009 report, showing an employee population target of 4.9, and 4.0 was achieved; and a student

Fullerton College's 2008 report shows it had waste reduction programs in place, listing the following: "Business Source Reduction, Material Exchange, Salvage Yards, Beverage Containers, Cardboard, Glass, Newspaper, Office Paper (white), Office Paper (mixed), Plastics, Scrap Metal, Other Materials, Xeriscaping, grasscycling, Alternative Daily Cover." Fullerton College also listed the following programs that were planned or expanding: "On-site composting/mulching, Other composting."<sup>104</sup> Fullerton College also reported in 2008 that it had made improvements in its office paper recycling program by increasing the number of bins and increasing collection efforts.<sup>105</sup> Fullerton College's 2009 report states that it added recycling bins for plastics and cans,<sup>106</sup> and its 2010 report stated it was "working ... to promote and improve our recycling program,"<sup>107</sup> and showed "other composting" as an existing program<sup>108</sup> (which in previous years had been shown in the Planned/Expanding column).

Similarly, Cypress College's 2008 report listed the following waste reduction programs in place: "Business Source Reduction, Material Exchange, Salvage Yards, Beverage Containers, Cardboard, Glass, Newspaper, Plastics, Scrap Metal, Xeriscaping, grasscycling, Self-haul greenwaste, Commercial pickup of compostables, wood waste, concrete/asphalt/rubble C&D, MRF, Alternative daily cover, Other factory recovery." And the following programs were listed as Planned/Expanding: "Office Paper (mixed), On-site composting/mulching."<sup>109</sup> Cypress College also reported in 2008 that it had made improvements in its office paper recycling program by increasing the number of bins and increasing collection efforts, and also reported improvements in on-site composting.<sup>110</sup> Cypress College's 2009 report stated that it recycled six truckloads of classroom furniture, and used contract language in its construction bids to ensure that construction debris is recycled.<sup>111</sup> And Cypress College reported "On-site composting/mulching" and "Tires" as existing program in 2010, whereas in previous years these program were listed as Planned/Expanding.<sup>112</sup>

The record also shows that the claimant's solid waste that was not diverted was disposed of at a landfill by a waste hauler. The Controller submitted minutes of the June 28, 2005 meeting of the claimant's board of trustees that shows it approved a Trash Container Services contract to M-G Disposal, LLC, for July 1, 2005 to June 30, 2010. The contract was subject to allowance for

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population target of 0.20, and 0.15 was achieved), 61 (Cypress College 2010 report, showing an employee population target of 4.9, and 2.1 was achieved; and a student population target of 0.20, and 0.10 was achieved).

<sup>104</sup> Exhibit B, Controller's Late Comments on the IRC, page 43 (Fullerton College 2008 report).

<sup>105</sup> Exhibit B, Controller's Late Comments on the IRC, page 43 (Fullerton College 2008 report).

<sup>106</sup> Exhibit B, Controller's Late Comments on the IRC, page 45 (Fullerton College 2009 report).

<sup>107</sup> Exhibit B, Controller's Late Comments on the IRC, page 48 (Fullerton College 2010 report).

<sup>108</sup> Exhibit B, Controller's Late Comments on the IRC, page 49 (Fullerton College 2010 report).

<sup>109</sup> Exhibit B, Controller's Late Comments on the IRC, page 57 (Cypress College 2008 report).

<sup>110</sup> Exhibit B, Controller's Late Comments on the IRC, page 57 (Cypress College 2008 report).

<sup>111</sup> Exhibit B, Controller's Late Comments on the IRC, page 59 (Cypress College 2009 report).

<sup>112</sup> Exhibit B, Controller's Late Comments on the IRC, page 63 (Cypress College 2010 report).

adjustments levied for use of the county refuse facility.<sup>113</sup> The claimant's annual reports filed with CIWMB during the audit period also identify the tonnage of waste disposed<sup>114</sup> and that it used a waste hauler.<sup>115</sup>

The avoided landfill disposal fee used by the Controller was based on the statewide average disposal fee provided by CIWMB for each fiscal year in the audit period, since the claimant did not provide any information to the Controller regarding the landfill fees it may have been charged.<sup>116</sup>

Based on this documentation, the Controller correctly presumed, consistent with the presumption in the test claim statutes and the court's interpretation of those statutes and with no evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted and actually diverted.

The statutory presumption of cost savings controls unless the claimant files evidence to rebut the presumption and shows that cost savings were not realized.<sup>117</sup> The claimant has the burden of

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<sup>113</sup> Exhibit B, Controller's Late Comments on the IRC, page 66 (Board of Trustee's Meeting Minutes).

<sup>114</sup> Exhibit B, Controller's Late Comments on the IRC, pages 36 (Fullerton College 2005 report), 38 (Fullerton College 2006 report), 40 (Fullerton College 2007 report), 42 (Fullerton College 2008 report), 44 (Fullerton College 2009 report), 47 (Fullerton College 2010 report), 50 (Cypress College 2005 report), 52 (Cypress College 2006 report), 54 (Cypress College 2007 report), 56 (Cypress College 2008 report), 58 (Cypress College 2009 report), 61 (Cypress College 2010 report).

<sup>115</sup> The Fullerton College 2005 report cites "better reporting and tracking ... in conjunction with ... our waste hauler (MG Disposal)," and "tonnages for the materials disposed were reported by the waste hauler (MG Disposal)." (Exhibit B, Controller's Late Comments on the IRC, page 36 (Fullerton College 2005 report)). The Fullerton College 2006 and 2007 reports cite "increased efficiency in respect to tracking waste streams in conjunction with our ... waste hauler (MG Disposal)" and "tonnages for the materials disposed were reported by the waste hauler (MG Disposal)." (Exhibit B, Controller's Late Comments on the IRC, pages 39 (Fullerton College 2006 report)), 41 (Fullerton College 2007 report). Fullerton College's 2008, 2009 and 2010 reports and Cypress College's 2008, 2009 and 2010 reports expressly state that the numbers for the report were provided by MG Disposal (or in 2010, Ware Disposal), the claimant's service provider. (Exhibit B, Controller's Late Comments on the IRC, pages 43 (Fullerton College 2008 report)), 45 (Fullerton College 2009 report), 48 (Fullerton College 2010 report). The Fullerton College 2010 report also mentions "Ware," a second vendor. (Exhibit B, Controller's Late Comments on the IRC, pages 57 (Cypress College 2008 report), 59 (Cypress College 2009 report)).

<sup>116</sup> Exhibit B, Controller's Late Comments on the IRC, pages 20-21, 108-136. Exhibit A, IRC, page 34 (Final Audit Report).

<sup>117</sup> Government Code section 17559, which requires that the Commission's decisions be supported by substantial evidence in the record. See also, *Coffy v. Shiimoto* (2015) 60 Cal.4th 1198, 1209, a case interpreting the rebuttable presumption in Vehicle Code section 23152 that if a person had 0.08 percent or more, by weight, of alcohol in the blood at the time of testing, then

proof on this issue. Under the mandates statutes and regulations, the claimant is required to show that it has incurred increased costs mandated by the state when submitting a reimbursement claim to the Controller's Office, and the burden to show that any reduction made by the Controller is incorrect.<sup>118</sup> The Parameters and Guidelines, as amended pursuant to the court's writ, also require claimants to show the costs incurred to divert solid waste and to perform the administrative activities, and *to report and identify* the costs saved or avoided by diverting solid waste: "Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans *shall be* identified and offset from this claim as cost savings."<sup>119</sup> Thus, the claimant has the burden to rebut the statutory presumption and to show, with substantial evidence in the record, that the costs of complying with the mandate exceed any cost savings realized by diverting solid waste.

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it is presumed by law that he or she had 0.08 percent or more, by weight, of alcohol in the blood at the time of driving, unless he or she files evidence to rebut the presumption. The court states that unless and until evidence is introduced that would support a finding that the presumption does not exist, the statutory presumption that the person was driving over the legal limit remains the finding of fact.

<sup>118</sup> Evidence Code section 500, which states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." See also, *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 24, where the court recognized that "the general principle of Evidence Code 500 is that a party who seeks a court's action in his favor bears the burden of persuasion thereon." This burden of proof is recognized throughout the architecture of the mandates statutes and regulations. Government Code section 17551(a) requires the Commission to hear and decide a claim filed by a local agency or school district that it is entitled to reimbursement under article XIII B, section 6. Section 17551(d) requires the Commission to hear and decide a claim by a local agency or school district that the Controller has incorrectly reduced payments to the local agency or school district. In these claims, the claimant must show that it has incurred increased costs mandated by the state. (Gov. Code, §§ 17514 [defining "costs mandated by the state"], 17560(a) ["A local agency or school district may . . . file an annual reimbursement claim that details the costs actually incurred for that fiscal year."]; 17561 [providing that the issuance of the Controller's claiming instructions constitutes a notice of the right of local agencies and school districts to file reimbursement claims based upon the parameters and guidelines, and authorizing the Controller to audit the records of any local agency or school district to "verify the actual amount of the mandated costs."]; 17558.7(a) ["If the Controller reduces a claim approved by the commission, the claimant may file with the commission an incorrect reduction claim pursuant to regulations adopted by the commission."]. By statute, only the local agency or school district may bring these claims, and the local entity must present and prove its claim that it is entitled to reimbursement. (See also, Cal. Code Regs., tit. 2, §§ 1185.1, et seq., which requires that the IRC contain a narrative that describes the alleged incorrect reductions, and be signed under penalty of perjury.)

<sup>119</sup> Exhibit A, IRC, page 58 (Amended Parameters and Guidelines). Emphasis added.

The Commission finds that the claimant has not filed any evidence to rebut the statutory presumption of cost savings. Therefore, the Controller’s finding that cost savings have been realized is correct as a matter of law.

3. For all years of the audit period, the Controller’s calculation of cost savings is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

The Controller correctly determined that during the audit period, the claimant diverted solid waste, as mandated by the test claim statute, and exceeded the mandated diversion rate in calendar year 2006 at both Fullerton College and Cypress College.<sup>120</sup> Because the claimant exceeded the mandate in 2006, the Controller calculated offsetting savings by allocating the diversion to reflect the mandate. The Controller allocated the diversion by dividing the mandated rate under the test claim statute (50 percent) by the actual rate diverted (as annually reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized.<sup>121</sup>

$$\begin{array}{rcccl}
 & \text{Allocated Diversion \%} & & & \\
 & \text{-----} & & & \\
 & \text{Maximum} & & & \text{Avoided} \\
 & \text{Allowable} & & & \text{Landfill} \\
 \text{Offsetting} & = & \frac{\text{Diversion \%}}{\text{Actual}} & \times & \text{Disposal Fee} \\
 \text{Savings} & & \text{Diversion \%} & \times & \text{(per Ton)} \\
 \text{Realized} & & & \times & \\
 & & \text{Tonnage} & & \\
 & & \text{Diverted} & & 
 \end{array}$$

The formula allocates or reduces cost savings based on the mandated rate, and is intended to avoid penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>122</sup>

For years the claimant did not exceed the 50 percent mandated diversion rate (all years except 2006), the Controller multiplied 100 percent of the solid waste annually diverted by the claimant by the avoided landfill disposal fee (based on the statewide average fee), to calculate the total offset.<sup>123</sup>

These formulas are consistent with the statutory presumption of cost savings, as interpreted by the court for this program, and the requirements in the Parameters and Guidelines. The court found that the test claim statutes require that reduced or avoided landfill fees represent savings that must be offset against the cost of diversion. The court stated: “The amount or value of the [offsetting cost] savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report” to

<sup>120</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 38 (Fullerton College 2006 report), 52 (Cypress College 2006 report), 84-85.

<sup>121</sup> Exhibit A, IRC, pages 33 (Final Audit Report); Exhibit B, Controller’s Late Comments on the IRC, page 18-19.

<sup>122</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 18.

<sup>123</sup> Exhibit A, IRC, page 31, footnotes 2 and 3 (Final Audit Report).

CIWMB.<sup>124</sup> The Parameters and Guidelines state: “Reduced or avoided costs realized from implementation of the community college districts’ Integrated Waste Management plans shall be identified and offset from this claim as cost savings . . . .”<sup>125</sup> Thus, the Controller’s formula correctly presumes, based on the record and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted and actually diverted. And in 2006 when the claimant exceeded the mandated diversion rates, the Controller’s formula limited the offset to the allocated rate.

The claimant raises several arguments, unsupported by the law or evidence in the record, that the Controller’s calculation of cost savings is incorrect.

The claimant first alleges that cost savings cannot be realized because the chain of events required by Public Contract Code sections 12167 and 12167.1 did not occur: that savings have to be converted to cash, and amounts in excess of \$2,000 per year must be deposited in the state fund and appropriated back by the Legislature to mitigate the costs.<sup>126</sup> It is undisputed that the claimant did not remit to the state any savings realized from the implementation of the IWM plan.<sup>127</sup> However, as indicated above, cost savings are presumed by the statutes and the claimant has not filed evidence to rebut that presumption. Thus, the claimant should have deposited the cost savings into the state’s account as required by the test claim statutes, and the claimant’s failure to comply with the law does not make the Controller’s calculations of cost savings incorrect as a matter of law, or arbitrary or capricious. Since cost savings are presumed by the statutes, the claimant has the burden to show increased costs mandated by the state. As the court stated: “[r]eimbursement is not available under section 6 and section 17514 to the extent that a local government or school district is able to provide the mandated program or increased level of service without actually incurring increased costs.”<sup>128</sup>

The claimant next asserts that the Controller’s formula is an underground regulation.<sup>129</sup> The Commission disagrees. Government Code section 11340.5 provides that no state agency shall enforce or attempt to enforce a rule or criterion which is a regulation, as defined in section 11342.600, unless it has been adopted pursuant to the Administrative Procedures Act. As discussed above, however, the formula is consistent with the statutory presumption of cost

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<sup>124</sup> Exhibit B, Controller’s Late Comments on the IRC, page 76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>125</sup> Exhibit A, IRC page 58 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>126</sup> Exhibit A, IRC, pages 12-13.

<sup>127</sup> Exhibit B, Controller’s Late Comments on the IRC, page 16.

<sup>128</sup> Exhibit B, Controller’s Late Comments on the IRC, page 75 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>129</sup> Exhibit A, IRC, pages 13-14.

savings, as interpreted by the court for this program. Interpretations that arise in the course of case-specific adjudications are not regulations.<sup>130</sup>

The claimant also argues that using landfill fees in the calculation of offsetting savings is not relevant because “[t]he District did not claim landfill costs, so there are none to be offset.”<sup>131</sup> The claimant’s interpretation of the cost savings requirement is not correct. The cost of disposing waste at a landfill is not eligible for reimbursement. Reimbursement is authorized to *divert* solid waste from the landfill through source reduction, recycling, and composting activities.<sup>132</sup> As explained by the court:

In complying with the mandated solid waste diversion requirements of Public Resources Code section 42921, California Community Colleges are likely to experience cost savings in the form of reduced or avoided costs of landfill disposal. The reduced or avoided costs are a direct result and an integral part of the mandated IWM plan ....

Such reduction or avoidance of landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings which must be offset against the costs of the diversion activities to determine the reimbursable costs of IWM plan implementation -- i.e., the actual increased costs of diversion -- under section 6 and section 17514.<sup>133</sup>

The court also noted that diversion is defined as “activities which reduce or eliminate the amount of solid waste from solid waste disposal.”<sup>134</sup>

In addition, the claimant argues that the formula assumes facts without evidence in the record. For example, the claimant questions the Controller’s assumption that the diversion rate achieved in 2007 applies equally to subsequent years, the assumption that all diverted waste would have been disposed in a landfill, and that the statewide average cost to dispose of waste at a landfill actually applied to the claimant.<sup>135</sup>

The Controller’s assumptions, however, are supported by evidence in the record and the claimant has filed no evidence to rebut them. The Controller applied the diversion rate achieved in 2007 to subsequent years because CIWMB stopped requiring community college districts to report the

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<sup>130</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>131</sup> Exhibit A, IRC, page 14.

<sup>132</sup> Exhibit A, IRC, page 54 (Parameters and Guidelines).

<sup>133</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 75-76 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>134</sup> Public Resources Code section 40124. Exhibit B, Controller’s Late Comments on the IRC, page 75 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>135</sup> Exhibit A, IRC, pages 14-16.

actual amount and percent of tonnage diverted in 2008. As the Controller notes, the claimant's diversion program was well-established by 2007, and the claimant's reports for 2008-2011 shows continued diversion, and that the claimant's annual per capita disposal rate for both the employee and student populations were below or near the target rate at both Fullerton and Cypress colleges.<sup>136</sup> And the narrative in the 2008-2011 reports, as discussed above, reveals that the claimant was continuing to divert solid waste.

The Controller obtained the statewide average cost for landfill disposal fees from CIWMB. The fees were based on private surveys of a large percentage of landfills across California.<sup>137</sup> The Controller's audit report indicates that the claimant did not provide documentation to support a different disposal fee.<sup>138</sup> As stated above, the Controller submitted minutes of the June 28, 2005 meeting of the claimant's board of trustees during which it approved a Trash Container Services contract to M-G Disposal, LLC, for July 1, 2005 to June 30, 2010. According to the Controller's analysis of this contract:

A cost analysis based on the district's contract with M-G Disposal, LLC, indicates that the district paid approximately \$45.94 per ton in 2005 to \$55.20 per ton in 2010 for waste disposal, which is consistent with the statewide average landfill fee provided by CalRecycle.<sup>139</sup>

On these audit issues, the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. The Commission must only ensure that the Controller's decision is not arbitrary, capricious, or entirely lacking in evidentiary support, and adequately considered all relevant factors.<sup>140</sup> There is no evidence that the Controller's assumptions are wrong or arbitrary or capricious with regard to the statewide average landfill fee.

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<sup>136</sup> Exhibit B, Controller's Late Comments on the IRC, pages 42 (Fullerton College 2008 report, showing an employee population target of 21.8, and 10.2 was achieved; and a student population target of 0.9, and 0.36 was achieved), 44 (Fullerton College 2009 report, showing an employee population target of 21.8, and 10.0 was achieved; and a student population target of 0.9, and 0.32 was achieved), 47 (Fullerton College 2010 report, showing an employee population target of 21.8, and 15.2 was achieved; and a student population target of 0.9, and 0.51 was achieved), 56 (Cypress College 2008 report, showing an employee population target of 4.9, and 4.3 was achieved; and a student population target of 0.20, and 0.14 was achieved), 58 (Cypress College 2009 report, showing an employee population target of 4.9, and 4.0 was achieved; and a student population target of 0.20, and 0.15 was achieved), 61 (Cypress College 2010 report, showing an employee population target of 4.9, and 2.1 was achieved; and a student population target of 0.20, and 0.10 was achieved).

<sup>137</sup> Exhibit B, Controller's Late Comments on the IRC, pages 20-21, 108-136.

<sup>138</sup> Exhibit A, page 34 (Final Audit Report).

<sup>139</sup> Exhibit B, Controller's Late Comments on the IRC, pages 21, 68.

<sup>140</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

The claimant also points to the Controller's audits of other community college districts, arguing that the Controller's audit results in those cases vary and are arbitrary.<sup>141</sup> The Controller's audits of other community college district reimbursement claims are not relevant to the Controller's audit here. Each audit depends on the documentation and evidence provided by the claimant to show increased costs mandated by the state.

Therefore, the Controller's calculation of cost savings for all years of the audit period is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

#### **V. Conclusion**

Based on the foregoing, the Commission concludes that the Controller's reduction of costs claimed for all years in the audit period is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support. Accordingly, the Commission denies this IRC.

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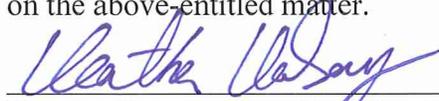
<sup>141</sup> Exhibit A, IRC, pages 17-18.



RE: **Decision**

*Integrated Waste Management*, 14-0007-I-08  
Public Resources Code Sections 40148, 40196.3, 42920-42928;  
Public Contract Code Sections 12167 and 12167.1  
Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75)  
State Agency Model Integrated Waste Management Plan (February 2000)  
Fiscal Years: 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, and 2010-2011  
North Orange County Community College District, Claimant

On March 23, 2018, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

  
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Heather Halsey, Executive Director

Dated: March 27, 2018

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE INCORRECT REDUCTION CLAIM  
ON:

Public Resources Code Sections 40148, 40196.3, 42920-42928; Public Contract Code Sections 12167 and 12167.1; Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75); State Agency Model Integrated Waste Management Plan (February 2000)

Fiscal Years 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, and 2010-2011

Long Beach Community College District,  
Claimant

Case No.: 14-0007-I-09

*Integrated Waste Management*

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

*(Adopted March 23, 2018)*

*(Served March 27, 2018)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on March 23, 2018. The claimant, Long Beach Community College District, did not attend the hearing. Lisa Kurokawa appeared on behalf of the State Controller’s Office (Controller).

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 the Proposed Decision to partially approve the IRC by a vote of 5-0 as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	Yes
Ken Alex, Director of the Office of Planning and Research	Absent
Richard Chivaro, Representative of the State Controller	Absent
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	Yes
Sarah Olsen, Public Member	Yes
Carmen Ramirez, City Council Member	Yes
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	Yes

## **Summary of the Findings**

This IRC addresses reductions made by the Controller to reimbursement claims of the claimant for fiscal years 2000-2001 through 2010-2011 (the audit period), under the *Integrated Waste Management* program, 00-TC-07. The Controller made the audit reductions because the claimant did not identify and deduct from its reimbursement claims offsetting cost savings from its diversion of solid waste and the associated reduced or avoided landfill disposal costs.

The test claim statutes require community college districts to adopt and implement, in consultation with California Integrated Waste Management Board (CIWMB, which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste.<sup>1</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent of generated solid waste by January 1, 2004.<sup>2</sup> The test claim statutes also provide that “Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs . . .”<sup>3</sup>

The statutes, therefore, presume that by diverting solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. The amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB.<sup>4</sup>

The claimant diverted solid waste, as required by the test claim statutes, and exceeded the mandated diversion rate (25 or 50 percent) in all years of the audit period. Thus, the Controller correctly presumed, consistent with the test claim statutes and the court’s interpretation of those statutes, and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill disposal fee per ton of waste required to be diverted.

The Commission finds, based on the evidence in the record, that the Controller’s calculation of offsetting cost savings for all years in the audit period, except calendar years 2002 and 2003, is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support. Because the claimant exceeded the mandate and diverted more solid waste than required by law, the Controller derived a cost savings formula that “allocated” the diversion by dividing the mandated solid waste diversion rate, either 25 or 50 percent, by the actual diversion rate, as reported by the claimant to CIWMB. The resulting quotient was then multiplied by the tons of solid waste diverted, as annually reported by the claimant to CIWMB, multiplied by the avoided landfill disposal fee (based on the statewide average fee).<sup>5</sup> The formula allocates cost savings

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<sup>1</sup> Public Resources Code section 42920(b).

<sup>2</sup> Public Resources Code section 40124.

<sup>3</sup> Public Resources Code section 42925(a).

<sup>4</sup> Exhibit B, Controller’s Late Comments on the IRC, page 79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>5</sup> Exhibit A, IRC, pages 36-37 (Final Audit Report); Exhibit B, Controller’s Late Comments on the IRC, page 20.

based on the mandated rates of diversion, and was intended to avoid penalizing the claimant for diverting more solid waste than the percentage mandated by law.<sup>6</sup> The claimant has not filed any evidence to rebut the statutory presumption of cost savings or to show that the statewide average disposal fee is incorrect or arbitrary. Thus, the Controller's reduction of costs claimed for these years is correct.

However, the Controller's reduction of costs claimed for calendar years 2002 and 2003 (the second half of fiscal year 2001-2002, all of fiscal year 2002-2003, and the first half of fiscal year 2003-2004) is incorrect as a matter of law and arbitrary, capricious, and entirely lacking in evidentiary support. During calendar year 2002, the claimant achieved a 31.91 percent diversion rate, and in calendar year 2003, a 31.57 percent diversion rate.<sup>7</sup> The Controller found that the claimant did not achieve the mandated "50 percent" diversion rate in 2002 and 2003,<sup>8</sup> although the mandate to divert at least 50 percent of solid waste was not operative until January 1, 2004.<sup>9</sup> In calendar years 2002 and 2003, community college districts were required to divert only 25 percent, which the claimant exceeded. Therefore, the Controller's finding that the claimant did not divert the mandated rate in calendar years 2002 and 2003 is incorrect as a matter of law. Moreover, the Controller's calculation of offsetting savings for this period, which used 100 percent of the reported diversion and did not reduce cost savings by allocating the diversion to reflect the mandate as it did for other years when the claimant exceeded the mandate, is arbitrary, capricious, and entirely lacking in evidentiary support. Applying the Controller's calculation of cost savings (using the mandated 25 percent diversion rate) to calendar years 2002 and 2003, results in offsetting savings of:

- \$9,334 for 2002 (25 percent divided by 31.91 percent, multiplied by 329.4 tons diverted multiplied by the statewide average landfill disposal fee of \$36.17), rather than \$11,914; and
- \$9,616 for 2003 (25 percent divided by 31.57 percent, multiplied by 329.7 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83), rather than \$12,143.

Therefore, the Commission finds that the difference of \$5,107 (\$24,057 - \$18,950) has been incorrectly reduced. Accordingly, the Commission partially approves this IRC, and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission's regulations, that the Controller reinstate \$5,107 to the claimant.

## COMMISSION FINDINGS

### I. Chronology

09/12/2006 The claimant filed its 2000-2001, 2001-2002, 2002-2003, 2003-2004 and 2004-2005 reimbursement claims.<sup>10</sup>

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<sup>6</sup> Exhibit B, Controller's Late Comments on the IRC, page 20.

<sup>7</sup> Exhibit B, Controller's Late Comments on the IRC, pages 39, 42, 86.

<sup>8</sup> Exhibit A, IRC, pages 32 and 34, footnote 2 (Final Audit Report).

<sup>9</sup> Public Resources Code sections 42921; Exhibit A, IRC, pages 54 and 58 (Parameters and Guidelines, section IV.(B)(5)).

<sup>10</sup>Exhibit A, IRC, pages 226, 230, 234, 239, and 243.

01/02/2007 The claimant filed its 2005-2006 reimbursement claim.<sup>11</sup>  
01/27/2008 The claimant filed its 2006-2007 reimbursement claim.<sup>12</sup>  
12/29/2008 The claimant filed its 2007-2008 reimbursement claim.<sup>13</sup>  
12/14/2009 The claimant filed its 2008-2009 reimbursement claim.<sup>14</sup>  
11/29/2010 The claimant filed its 2009-2010 reimbursement claim.<sup>15</sup>  
01/30/2012 The claimant filed its 2010-2011 reimbursement claim.<sup>16</sup>  
05/05/2014 The Controller notified the claimant of the pending audit adjustment.<sup>17</sup>  
05/22/2014 The Controller issued the Final Audit Report.<sup>18</sup>  
08/11/2014 The claimant filed this IRC.<sup>19</sup>  
08/31/2015 The Controller filed late comments on the IRC.<sup>20</sup>  
01/12/2018 Commission staff issued the Draft Proposed Decision.<sup>21</sup>  
01/18/2018 The Controller filed comments on the Draft Proposed Decision.<sup>22</sup>

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<sup>11</sup> Exhibit A, IRC, page 250; Exhibit B, Controller’s Late Comments on the IRC, page 19.

<sup>12</sup> Exhibit A, IRC, page 255.

<sup>13</sup> Exhibit A, IRC, page 263.

<sup>14</sup> Exhibit A, IRC, page 269.

<sup>15</sup> Exhibit A, IRC, page 276.

<sup>16</sup> Exhibit A, IRC, page 283. This claim only covered three months of diversion. See Exhibit A, page 34 (Final Audit Report) and Exhibit B, Controller’s Late Comments on the IRC, page 86.

<sup>17</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 19, 88-89.

<sup>18</sup> Exhibit A, IRC, page 25 (Final Audit Report).

<sup>19</sup> Exhibit A, IRC, page 1.

<sup>20</sup> Exhibit B, Controller’s Late Comments on the IRC, page 1. Note that Government Code section 17553(d) states: “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>21</sup> Exhibit C, Draft Proposed Decision.

<sup>22</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

## II. Background

### A. The *Integrated Waste Management Program*

The test claim statutes require community college districts<sup>23</sup> to adopt and implement, in consultation with CIWMB (which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste, reuse materials whenever possible, recycle recyclable materials, and procure products with recycled content in all agency offices and facilities.<sup>24</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent by January 1, 2004. To divert means to “reduce or eliminate the amount of solid waste from solid waste disposal...”<sup>25</sup>

CIWMB developed and adopted a model IWM plan on February 15, 2000, and the test claim statutes provide that if a district does not adopt an IWM plan, the CIWMB model plan governs the community college.<sup>26</sup> Each district is also required to report annually to CIWMB on its progress in reducing solid waste; and the reports’ minimum contents are specified in statute.<sup>27</sup> The test claim statutes also require a community college, when entering into or renewing a lease, to ensure that adequate areas are provided for and adequate personnel are available to oversee collection, storage, and loading of recyclable materials in compliance with CIWMB’s requirements.<sup>28</sup> Additionally, the test claim statutes added Public Resources Code section 42925(a), which addressed cost savings from IWM plan implementation:

Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code.

The Public Contract Code sections referenced in section 42925(a) require that revenue received as a result of the community college’s IWM plan be deposited in CIWMB’s Integrated Waste Management Account. After July 1, 1994, CIWMB is authorized to spend the revenue upon appropriation by the Legislature to offset recycling program costs. Annual revenue under \$2,000 is to be continuously appropriated for expenditure by the community colleges, whereas annual revenue over \$2,000 is available for expenditures upon appropriation by the Legislature.<sup>29</sup>

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<sup>23</sup> The test claim statutes apply to “state agencies” and define them to include “the California Community Colleges” (Pub. Res. Code, § 40196.3).

<sup>24</sup> Public Resources Code section 42920(b).

<sup>25</sup> Public Resources Code section 40124.

<sup>26</sup> Public Resources Code section 42920(b)(3).

<sup>27</sup> Public Resources Code section 42926.

<sup>28</sup> Public Resources Code section 42924(b).

<sup>29</sup> Public Contract Code sections 12167 and 12167.1 are part of the State Assistance for Recycling Markets Act, which was originally enacted in 1989 to foster the procurement and use of recycled paper products and other recycled resources in daily state operations (See Pub.

On March 24, 2004, the Commission adopted the *Integrated Waste Management* Statement of Decision and determined that the test claim statutes impose a reimbursable state-mandated program on community college districts. The Commission also found that cost savings under Public Resources Code section 42925(a) did not preclude a reimbursable mandate under Government Code section 17556(e) because there was no evidence that offsetting savings would result in no net costs to a community college implementing an IWM plan, nor was there evidence that revenues received from plan implementation would be "in an amount sufficient to fund" the cost of the state-mandated program. The Commission found that any revenues received would be identified as offsetting revenue in the Parameters and Guidelines.

The Parameters and Guidelines were adopted on March 30, 2005, and authorize reimbursement for the increased costs to perform the following activities:

A. One-Time Activities (*Reimbursable starting January 1, 2000*)

1. Develop the necessary district policies and procedures for the implementation of the integrated waste management plan.
2. Train district staff on the requirements and implementation of the integrated waste management plan (one-time per employee). Training is limited to the staff working directly on the plan.

B. Ongoing Activities (*Reimbursable starting January 1, 2000*)

1. Complete and submit to the [Integrated Waste Management] Board the following as part of the State Agency Model Integrated Waste Management Plan (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.):
  - a. state agency or large state facility information form;
  - b. state agency list of facilities;
  - c. state agency waste reduction and recycling program worksheets that describe program activities, promotional programs, and procurement activities, and other questionnaires; and
  - d. state agency integrated waste management plan questions.

NOTE: Although reporting on promotional programs and procurement activities in the model plan is reimbursable, implementing promotional programs and procurement activities is not.

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Contract Code, §§ 12153, 12160; Stats. 1989, ch. 1094). The Act, including sections 12167 and 12167.1, applies to California community colleges only to the limited extent that these sections are referenced in Public Resources Code section 42925. Community colleges are not defined as state agencies or otherwise subject to the Act's provisions for the procurement and use of recycled products in daily state operations. See Exhibit B, Controller's Late Comments on the IRC, pages 88-89 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355)).

2. Respond to any Board reporting requirements during the approval process. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
  3. Consult with the Board to revise the model plan, if necessary. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
  4. Designate one solid waste reduction and recycling coordinator for each college in the district to perform new duties imposed by chapter 18.5 (Pub. Resources Code, §§ 42920 – 42928). The coordinator shall implement the integrated waste management plan. The coordinator shall act as a liaison to other state agencies (as defined by section 40196.3) and coordinators. (Pub. Resources Code, § 42920, subd. (c).)
  5. Divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities. Maintain the required level of reduction, as approved by the Board. (Pub. Resources Code, §§ 42921 & 42922, subd. (i).)
- C. Alternative Compliance (*Reimbursable from January 1, 2000 – December 31, 2005*)
1. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2002 deadline to divert 25 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42923 subds. (a) & (c).)
    - a. Notify the Board in writing, detailing the reasons for its inability to comply.
    - b. Request of the Board an alternative to the January 1, 2002 deadline.
    - c. Provide evidence to the Board that the college is making a good faith effort to implement the source reduction, recycling, and composting programs identified in its integrated waste management plan.
    - d. Provide information that describes the relevant circumstances that contributed to the request for extension, such as lack of markets for recycled materials, local efforts to implement source reduction, recycling and composting programs, facilities built or planned, waste disposal patterns, and the type of waste disposed of by the community college.
    - e. Submit a plan of correction that demonstrates that the college will meet the requirements of Section 42921 [the 25 and 50 percent diversion requirements] before the time extension expires, including the source reduction, recycling, or composting steps the community college will implement, a date prior to the expiration of the time extension when the requirements of Section 42921 will be met, the

existing programs that it will modify, any new programs that will be implemented to meet those requirements, and the means by which these programs will be funded.

2. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2004 deadline to divert 50 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42922, subds. (a) & (b).)
  - a. Notify the Board in writing, detailing the reasons for its inability to comply.
  - b. Request of the Board an alternative to the 50-percent requirement.
  - c. Participate in a public hearing on its alternative requirement.
  - d. Provide the Board with information as to:
    - (i) the community college's good faith efforts to implement the source reduction, recycling, and composting measures described in its integrated waste management plan, and demonstration of its progress toward meeting the alternative requirement as described in its annual reports to the Board;
    - (ii) the community college's inability to meet the 50 percent diversion requirement despite implementing the measures in its plan;
    - (iii) how the alternative source reduction, recycling, and composting requirement represents the greatest diversion amount that the community college may reasonably and feasibly achieve; and,
    - (iv) the circumstances that support the request for an alternative requirement, such as waste disposal patterns and the types of waste disposed by the community college.<sup>30</sup>

D. Accounting System (*Reimbursable starting January 1, 2000*)

Developing, implementing, and maintaining an accounting system to enter and track the college's source reduction, recycling and composting activities, the cost of those activities, the proceeds from the sale of any recycled materials, and such other accounting systems which will allow it to make its annual reports to the state and determine waste reduction. Note: only the pro-rata portion of the costs incurred to implement the reimbursable activities can be claimed.

E. Annual Report (*Reimbursable starting January 1, 2000*)

Annually prepare and submit, by April 1, 2002, and by April 1 each subsequent year, a report to the Board summarizing its progress in reducing

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<sup>30</sup> These alternative compliance and time extension provisions in part C were sunset on January 1, 2006, but were included in the adopted Parameters and Guidelines.

solid waste. The information in the report must encompass the previous calendar year and shall contain, at a minimum, the following as outlined in section 42926, subdivision (b): (Pub. Resources Code, §§ 42926, subd. (a) & 42922, subd. (i).)

1. calculations of annual disposal reduction;
2. information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors;
3. a summary of progress made in implementing the integrated waste management plan;
4. the extent to which the community college intends to use programs or facilities established by the local agency for handling, diversion, and disposal of solid waste (If the college does not intend to use those established programs or facilities, it must identify sufficient disposal capacity for solid waste that is not source reduced, recycled or composted.);
5. for a community college that has been granted a time extension by the Board, it shall include a summary of progress made in meeting the integrated waste management plan implementation schedule pursuant to section 42921, subdivision (b), and complying with the college's plan of correction, before the expiration of the time extension;
6. for a community college that has been granted an alternative source reduction, recycling, and composting requirement by the Board pursuant to section 42922, it shall include a summary of progress made towards meeting the alternative requirement as well as an explanation of current circumstances that support the continuation of the alternative requirement.

F. Annual Recycled Material Reports (*Reimbursable starting July 1, 1999*)

Annually report to the Board on quantities of recyclable materials collected for recycling. (Pub. Contract Code, § 12167.1.) (See Section VII. regarding offsetting revenues from recyclable materials.)<sup>31</sup>

The Parameters and Guidelines further require that each claimed reimbursable cost be supported by contemporaneous source documentation.<sup>32</sup>

And as originally adopted, the Parameters and Guidelines required community college districts to identify and deduct from their reimbursement claims all of the offsetting revenues received from the sale of recyclable materials, limited by the provisions of Public Resources Code section 42925 and Public Contract Code section 12167.1. The original Parameters and Guidelines did

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<sup>31</sup> Exhibit A, IRC, pages 44-47 (Parameters and Guidelines, adopted March 30, 2005).

<sup>32</sup> Exhibit A, IRC, page 44 (Parameters and Guidelines, adopted March 30, 2005).

not require community colleges to identify and deduct from their claims any offsetting cost savings resulting from the solid waste diversion activities required by the test claim statutes.<sup>33</sup>

### **B. Superior Court Decision on Cost Savings and Offsets Under the Program**

After the Parameters and Guidelines were adopted, the Department of Finance (Finance) and CIWMB filed a petition for writ of mandate requesting the court to direct the Commission to set aside the Test Claim Statement of Decision and Parameters and Guidelines and to issue a new Decision and Parameters and Guidelines that give full consideration to the cost savings and offsetting revenues community college districts will achieve by complying with the test claim statutes, including all cost savings realized from avoided landfill disposal fees and revenues received from the collection and sale of recyclable materials. The petitioners further argued that Public Contract Code sections 12167 and 12167.1 do not require community college districts to deposit revenues received from the collection and sale of recyclable materials into the Integrated Waste Management Account, as determined by the Commission, but instead allow community college districts to retain all revenues received. The petitioners argued that such revenues must be identified as offsetting revenues and applied to the costs of the program, without the community college district obtaining the approval of the Legislature or CIWMB.

On May 29, 2008, the Sacramento County Superior Court granted the petition for writ of mandate, finding that the Commission's treatment of cost savings and revenues in the Parameters and Guidelines was erroneous and required that the Parameters and Guidelines be amended. The court said:

There is no indication in the administrative record or in the legal authorities provided to the court that, as respondent [Commission] argues, a California Community College might not receive the full reimbursement of its actual increased costs required by section 6 if its claims for reimbursement of IWM plan costs were offset by realized cost savings and all revenues received from the plan activities.<sup>34</sup>

Instead, the court recognized that community colleges are “*likely* to experience costs savings in the form of reduced or avoided costs of landfill disposal” as a result of the mandated activities in Public Resources Code section 42921 because reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.”<sup>35</sup> The court noted that “diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates” and cited the statutory definition of

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<sup>33</sup> Exhibit A, IRC, pages 49 (Parameters and Guidelines, adopted March 30, 2005).

<sup>34</sup> Exhibit B, Controller's Late Comments on the IRC, page 78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter, Footnote 1).

<sup>35</sup> Exhibit B, Controller's Late Comments on the IRC, page 78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

diversion: “activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division [i.e., division 30, including § 42920 et seq.]” as well as the statutory definition of disposal: “the management of solid waste through landfill disposal or transformation at a permitted solid waste facility.”<sup>36</sup> The court explained:

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926.<sup>37</sup>

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans

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<sup>36</sup> Public Resources Code sections 40124 & 40192. Exhibit B, Controller’s Late Comments on the IRC, pages 78-79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>37</sup> Exhibit B, Controller’s Late Comments on the IRC, page 79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>38</sup>

The court issued a writ of mandate directing the Commission to amend the Parameters and Guidelines to require community college districts claiming reimbursable costs of an IWM plan to:

1. Identify and offset from their claims, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1, cost savings realized as a result of implementing their plans; and
2. Identify and offset from their claims all of the revenue generated as a result of implementing their plans, without regard to the limitations or conditions described in sections 12167 and 12167.1 of the Public Contract Code.<sup>39</sup>

### **C. Parameters and Guidelines Amendment Pursuant to the Writ**

In compliance with the writ, the Commission amended the Parameters and Guidelines on September 26, 2008 to add section VIII. Offsetting Cost Savings, which states:

Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1. Pursuant to these statutes, community college districts are required to deposit cost savings resulting from their Integrated Waste Management plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the California Integrated Waste Management Board for the purpose of offsetting Integrated Waste Management plan costs. Subject to the approval of the California Integrated Waste Management Board, cost savings by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting Integrated Waste Management program costs. Cost savings exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature. To the extent so approved or appropriated and applied to the college, these amounts shall be identified and offset from the costs claimed for implementing the Integrated Waste Management Plan.<sup>40</sup>

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<sup>38</sup> Exhibit B, Controller's Late Comments on the IRC, pages 80-81 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>39</sup> Exhibit B, Controller's Late Comments on the IRC, page 31 (Judgment Granting Petition for Writ of Administrative Mandamus).

<sup>40</sup> Exhibit A, IRC page 62 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

Section VII. of the Parameters and Guidelines, on Offsetting Revenues, was amended as follows (amendments in ~~strikeout~~ and underline):

Reimbursement for this mandate from any source, including but not limited to, services fees collected, federal funds, and other state funds allocated to any service provided under this program, shall be identified and ~~deducted~~ offset from this claim. Offsetting revenue shall include all revenues generated from implementing the Integrated Waste Management Plan. ~~the revenues cited in Public Resources Code section 42925 and Public Contract Code sections 12167 and 12167.1.~~

~~Subject to the approval of the California Integrated Waste Management Board, revenues derived from the sale of recyclable materials by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting recycling program costs. Revenues exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature. To the extent so approved or appropriated and applied to the college, these amounts are a reduction to the recycling costs mandated by the state to implement Statutes 1999, chapter 764.~~

In addition, revenue from a building-operating fee imposed pursuant to Education Code section 76375, subdivision (a) if received by a claimant and the revenue is applied to this program, shall be deducted from the costs claimed.<sup>41</sup>

All other requirements in the Parameters and Guidelines remained the same.

CIWMB requested additional amendments to the Parameters and Guidelines at this September 2008 hearing, including a request to alter the offsetting savings provision to require community college districts to provide offsetting savings information *whether or not* the offsetting savings generated in a fiscal year exceeded the \$2,000 continuous appropriation required by Public Contract Code sections 12167 and 12167.1. The Commission denied the request because the proposed language went beyond the scope of the court's judgment and writ.<sup>42</sup> As the court found:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs "in accordance with Sections 12167 and 12167.1 of the Public Contract Code," section 42925 assures that cost savings realized from state agencies' IWM plans are handled in a manner consistent with the handling of revenues received from state agencies' recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public

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<sup>41</sup> Exhibit A, IRC, pages 49, 61-62 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>42</sup> Exhibit X, Commission on State Mandates, Excerpt from the Minutes for the September 26, 2008 Meeting.

Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>43</sup>

CIWMB also requested adding a requirement for community college districts to analyze specified categories of potential cost savings when filing their reimbursement claims. The Commission found that the court determined that the amount or value of cost savings is already available from the annual reports the community college districts provide to CIWMB pursuant to Public Resources Code section 42926(b). This report is required to include the district's "calculations of annual disposal reduction" and "information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors." Thus, the Commission denied CIWMB's request and adopted the staff analysis finding that the request was beyond the scope of the court's writ and judgment. The Commission also noted that the request was the subject of separate pending request filed by CIWMB to amend the Parameters and Guidelines and would therefore be further analyzed for that matter.

#### **D. Subsequent Request by CIWMB to Amend the Parameters and Guidelines to Require Detailed Reports on Cost Savings and Revenues**

CIWMB filed a request to amend the Parameters and Guidelines to require community college districts to submit with their reimbursement claims a separate worksheet and report analyzing the costs incurred and avoided and any fees received relating to staffing, overhead, materials, storage, transportation, equipment, the sale of commodities, avoided disposal fees, and any other revenue received relating to the mandated program as specified by CIWMB. At its January 30, 2009 meeting, the Commission denied the request for the following reasons: there is no requirement in statute or regulation that community college districts perform the analysis specified by CIWMB; the Commission has no authority to impose additional requirements on community college districts regarding this program; the offsetting cost savings paragraph in the Parameters and Guidelines already identifies the offsetting savings consistent with the language of Public Resources Code section 42925(a), Public Contract Code sections 12167 and 12167.1, and the court's judgment and writ; and information on cost savings is already available in the

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<sup>43</sup> Exhibit B, Controller's Late Comments on the IRC, pages 80-81 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

community colleges' annual reports submitted to CIWMB, as required by Public Resources Code section 42926(b)(1).<sup>44</sup>

#### **E. The *Integrated Waste Management Program Made Optional***

This program was made optional by Statutes 2010, chapter 724 (AB 1610), section 34, effective October 19, 2010 and has remained so since that time.<sup>45</sup>

#### **F. The Controller's Audit**

The Controller audited the reimbursement claims for fiscal years 2000-2001 through 2010-2011. Of the \$279,043 claimed during the audit period, the Controller found that \$98,710 is allowable (\$109,678 minus a \$10,968 penalty for filing late claims) and \$180,333 is unallowable because the claimant did not report offsetting savings from implementation of its IWM plan.<sup>46</sup> The Controller found that the claimant realized total offsetting savings of \$245,268 from implementation of its IWM plan. But because the audit adjustment exceeded the costs claimed for fiscal years 2004-2005 to 2010-2011, the Controller found that \$180,333 is unallowable.<sup>47</sup>

The Controller's audit finding is based on the court's ruling, which states, "the amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California community colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(l) of Public Resources Code section 42926,"<sup>48</sup> the resulting amendment to the Parameters and Guidelines, and the claimant's annual reports to CIWMB.

The Controller determined that the claimant diverted more solid waste than the percentage mandated by the test claim statute each year of the audit period, except for calendar years 2002 and 2003, when the Controller found that the claimant diverted solid waste below the mandated diversion rate.<sup>49</sup> Thus, the Controller found that the claimant realized cost savings in each year of the audit period.

For the years the Controller found that the claimant exceeded the diversion mandate, the Controller calculated offsetting cost savings by allocating the diversion to reflect the mandate. The Controller allocated the diversion by dividing the mandated diversion rate (either 25 or 50

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<sup>44</sup> Exhibit X, Commission on State Mandates, Item 9, Final Staff Analysis of Proposed Amendments to the Parameters and Guidelines for *Integrated Waste Management*, 05-PGA-16, January 30, 2009, pages 2-3.

<sup>45</sup> See Government Code section 17581.5.

<sup>46</sup> Exhibit A, IRC, page 25 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, pages 7 and 27.

<sup>47</sup> Exhibit A, IRC, pages 17, 25-38 (Final Audit Report).

<sup>48</sup> Exhibit B, Controller's Late Comments on the IRC, page 79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>49</sup> Exhibit A, IRC, page 34, fn. 2 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 86.

percent) by the actual diversion rate (as reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized in those years.<sup>50</sup>

$$\text{Offsetting Savings Realized} = \frac{\text{Maximum Allowable Diversion \%}}{\text{Actual Diversion \%}} \times \text{Tonnage Diverted} \times \text{Avoided Landfill Disposal Fee (per Ton)}$$

The Controller provided an example of how the formula works. For calendar year 2007, the claimant reported diversion of 356.4 tons of solid waste and disposal of 686.5 tons generated that year.<sup>51</sup> Diverting 356.4 tons out of the 686.5 tons of waste generated results in a diversion rate of 51.92 percent (exceeding the 50 percent required).<sup>52</sup> To avoid penalizing the claimant for diverting more solid waste than the percentage mandated,<sup>53</sup> the Controller allocated the diversion by dividing the diversion rate mandated by the test claim statute (50 percent) by the actual diversion rate (51.92 percent), which equals 96.3 percent. The 96.3 allocated diversion rate is then multiplied by the 356.4 tons diverted that year, which equals 343.22 tons of diverted solid waste, instead of the 356.4 tons actually diverted. The allocated 343.22 tons of diverted waste is then multiplied by the statewide average disposal fee per ton, which in calendar year 2007 was \$48, resulting in “offsetting cost savings” for calendar year 2007 of \$16,474.<sup>54</sup>

<sup>50</sup> Exhibit A, IRC, pages 36 (Final Audit Report).

<sup>51</sup> Exhibit B, Controller’s Late Comments on the IRC, page 54 (2007 Report).

<sup>52</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 19, 86 (Controller’s calculation of offsetting savings).

<sup>53</sup> Exhibit B, Controller’s Late Comments on the IRC, page 20.

<sup>54</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 20, 86 (Controller’s calculations of offsetting savings). Page 20 of the Controller’s Late Comments on the IRC describe the calculation differently than the formula identified in the audit report, but the result is the same. The Controller states that cost savings can be calculated by multiplying the total tonnage generated (solid waste diverted + disposed) by the mandated diversion percentage (25 or 50 percent), times the avoided landfill disposal fee:

For example, in calendar year 2007, the district reported to CalRecycle that it diverted 356.4 tons of solid waste and disposed of 330.1 tons, which results in an overall diversion percentage of 51.9% [Tab 4, page 21]. Because the district was required to divert 50% for that year to meet the mandated requirements and comply with the Public Resources Code, it needed to divert only 343.25 tons (686.5 total tonnage generated x 50%) in order to satisfy the 50% requirement. Therefore, we adjusted our calculation to compute offsetting savings based on 343.25 tons of diverted solid waste rather than a total of 356.4 tons diverted.

For calendar years 2002 and 2003, the Controller found that the claimant did not exceed the mandated diversion rate (which the Controller stated was 50 percent), so the Controller did not allocate the diversion of solid waste to the mandated rate. Instead, the Controller multiplied 100 percent of the claimant's diversion by the avoided landfill disposal fee (based on the statewide average fee) to calculate offsetting savings.<sup>55</sup>

In 2000, the claimant did not report its annual tonnage,<sup>56</sup> so the Controller applied the claimant's 2001 diversion data to determine the applicable offset for the first half of fiscal year 2000-2001.<sup>57</sup>

In 2008, CIWMB stopped requiring community college districts to report the actual tonnage diverted, instead requiring a report based on "per-capita disposal." Consequently, the Controller used the claimant's reported 2007 percentage of tons diverted to calculate the offsetting savings for fiscal years 2007-2011.<sup>58</sup>

The Controller pointed out in the audit report that the claimant did not provide documentation supporting different diversion rates or disposal fees to calculate offsetting cost savings.<sup>59</sup>

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

#### **A. Long Beach Community College District**

The claimant maintains that the audit reductions are incorrect and requests the reinstatement of the full amount reduced.

The claimant first alleges that it did not realize any cost savings as a result of the mandate and quotes the Superior Court decision (discussed above) that cost savings will "most likely" occur as a result of reduced or avoided costs of landfill disposal, arguing:

The court presupposes a previous legal requirement for districts to incur landfill disposal fees to divert solid waste. Thus, potentially relieved of the need to incur new or additional landfill fees for increased waste diversion, a cost savings would occur. There is no finding of fact or law in the court decision or from the Commission Statement of Decision for the test claim for this assumed duty to use landfills.<sup>60</sup>

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Using this formula results in cost savings for calendar year 2007 of \$16,476 (686.5 tons generated x 50 percent = 343.25 tons x \$48 = \$16,476). Slight differences are due to rounding.

<sup>55</sup> Exhibit A, IRC, page 34, fn. 2 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 86.

<sup>56</sup> Exhibit B, Controller's Late Comments on the IRC, page 34 (2000 Report).

<sup>57</sup> Exhibit B, Controller's Late Comments on the IRC, page 20.

<sup>58</sup> Exhibit A, IRC, page 37 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, pages 21, 86.

<sup>59</sup> Exhibit A, IRC, page 37 (Final Audit Report).

<sup>60</sup> Exhibit A, IRC, page 11.

The claimant further argues that the offsetting savings provision in the Parameters and Guidelines does not assume that the cost savings occurred, but instead requires that the cost savings be *realized*. For the savings to be realized, the claimant contends that the following chain of events are required:

[T]he cost savings must exist (avoided landfill costs); be converted to cash; amounts in excess of \$2,000 per year deposited in the state fund; and, these deposits by the districts appropriated by the Legislature to districts for purposes of mitigating the cost of implementing the plan. None of those prerequisite events occurred so no cost savings were "realized" by the District. Regardless, the adjustment cannot be applied to the District since no state appropriation of the cost savings was made to the District.<sup>61</sup>

The claimant also argues that the Parameters and Guidelines are silent as to how to calculate the avoided costs, but that the court provided two alternative methods, either disposal reduction or diversion reported by districts. The Controller used the diversion percentage, which assumes, without findings of fact, that all diversion tonnage is landfill disposal tonnage reduction. The claimant contends that the Controller's calculation of cost savings is wrong because: (1) the formula is a standard of general application that was not adopted pursuant to the Administrative Procedure Act and is therefore an unenforceable underground regulation; (2) the Controller's formula assumes facts not in evidence, such as applying the same percentage of waste diverted in 2001 to 2000, and applying 2007 diversion rates to subsequent years without evidence in the record, and assumes that all tonnage diverted would have been disposed in a landfill, although some waste may not apply to the mandate (e.g. paint); and (3) the landfill disposal fee, a statewide average calculated by CIWMB, does not include the data used to generate the average fee amounts, so the average is unknown and unsupported by the audit findings.<sup>62</sup>

The claimant contends that application of the formula is incorrect, alleging that it "did not claim landfill costs, so there are none to be offset. The adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed."<sup>63</sup> Moreover, the Controller's calculation method prevents the claimant from receiving full reimbursement for its actual increased program costs. The claimant contends, using audit results for 26 other claimants under the *Integrated Waste Management* program, the application of the Controller's formula has arbitrary results because the percentages of allowed costs for those claimants ranges from zero to 83.4 percent of costs claimed.<sup>64</sup>

Finally, the claimant argues: (1) the Controller used the wrong standard of review in that the claimed costs were not found to be excessive or unreasonable, as required by Government Code section 17561(d)(2); and (2) the Controller has the burden of proof as to the propriety of its audit findings "because it bears the burden of going forward and because it is the party with the power

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<sup>61</sup> Exhibit A, IRC, pages 13. Emphasis in original.

<sup>62</sup> Exhibit A, IRC, pages 13-16.

<sup>63</sup> Exhibit A, IRC, page 17.

<sup>64</sup> Exhibit A, IRC, pages 18-19.

to create, maintain, and provide evidence regarding its auditing methods and procedures, as well as the specific facts relied upon for its audit findings.”<sup>65</sup>

The claimant did not file comments on the Draft Proposed Decision.

### **B. State Controller’s Office**

The Controller maintains that the audit findings are correct and that the claimant realized total offsetting savings of \$245,268 from implementation of its IWM plan.<sup>66</sup>

Regarding the claimant’s statement that there is only a presumption to incur landfill disposal fees to dispose of solid waste, the Controller notes that the claimant does not indicate how solid waste that is not diverted would be disposed of if not at a landfill. Nor does the claimant state that it disposed of its solid waste at any location other than a landfill or used other means to dispose of its waste than to contract with a commercial waste hauler, so the Controller concludes that the claimant’s comments relating to alternatives for the disposal of solid waste are irrelevant.<sup>67</sup>

The Controller also cites statements in some of the claimant’s annual reports regarding claimant’s diversion from a landfill, as well as reports of tonnage disposed of annually and claimant’s acknowledgment that it contracted with a waste management company.<sup>68</sup> According to the Controller, the evidence reviewed by it “supports that the district normally disposes of its waste at a landfill with the use of a commercial waste hauler.”<sup>69</sup> The Controller states:

Unless the district had an arrangement with its waste hauler that it did not disclose to us or CalRecycle, the district did not dispose of its solid waste at a landfill for no cost. Long Beach Community College is located in Long Beach, California. An internet search for landfill fees revealed that the South Gate Transfer Station in South Gate, California (9 miles from Long Beach Community College), currently charges \$53.91 per ton to dispose of solid waste [Tab 5]. Thus, the higher the rate of diversion results in less trash that is disposed of at a landfill, which creates cost savings for the district.<sup>70</sup>

The Controller also argues that the claimant realized offsetting cost savings by implementing its IWM plan because claimant reported diversion of the following amounts of solid waste: 232.0 tons of in calendar year 2001, 329.4 tons in calendar year 2002, 329.7 tons in calendar year 2003, 4,952.4 tons in calendar year 2004, 393.8 tons in calendar year 2005, 609.8 tons in calendar year 2006, and 356.4 tons in calendar year 2007. According to the Controller: “The savings is

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<sup>65</sup> Exhibit A, IRC, page 21.

<sup>66</sup> Exhibit B, Controller’s Late Comments on the IRC, page 17.

<sup>67</sup> Exhibit B, Controller’s Late Comments on the IRC, page 17.

<sup>68</sup> Exhibit B, Controller’s Late Comments on the IRC, page 17.

<sup>69</sup> Exhibit B, Controller’s Late Comments on the IRC, page 18.

<sup>70</sup> Exhibit B, Controller’s Late Comments on the IRC, page 18.

supported when the tonnage diverted is multiplied by the cost to dispose of one ton of solid waste at the landfill (e.g., \$53.91 per ton at the South Gate Transfer Station).<sup>71</sup>

As to the claimant not remitting cost savings from the implementation of its IWM plan into the Integrated Waste Management Account in compliance with the Public Contract Code, the Controller asserts that the claimant is not precluded from the requirement to do so, as indicated in the Parameters and Guidelines and the court ruling. The Controller says the evidence supports that the claimant realized cost savings that should have been remitted to the State and that must be used to fund IWM plan costs.<sup>72</sup>

In response to the claimant's argument that the Controller's formula is a standard of general application that is an underground regulation, the Controller asserts that it used a "court approved methodology" to determine the "required offset." The Controller also states that the claimant did not amend any of its reimbursement claims after the Parameters and Guidelines were amended in September 2008. According to the Controller: "We believe that this "court-identified" approach provides a reasonable methodology to identify the required offset."<sup>73</sup>

The Controller also states that it "allocated" the offsetting savings every year of the audit period except calendar years 2002 and 2003 to avoid penalizing the claimant for diverting more than the minimum rate of diversion required.<sup>74</sup> According to the Controller:

As there is no State mandate to exceed solid waste diversion for amounts in excess of 25% for calendar years 2000 through 2003 or greater than 50% for calendar year 2004 and beyond, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceeded the levels set by statute.<sup>75</sup>

The Controller defended its use of the 2001 data to calculate the claimant's diversion rates for the last half of fiscal year 2000-2001, using it because the district did not report diversion information for calendar year 2000. When the district was asked what is *currently* being done to reduce waste, the district stated in its 2000 report: "... green waste is collected and disposed of separately, construction waste that can be recycled is." The district also claimed more than \$10,000 in 2000 for a contractor to "divert solid waste from landfill disposal or transformation facilities." Therefore, in the absence of diversion information for 2000, the Controller used information reported for 2001.<sup>76</sup>

The Controller notes that after the passage of Statutes 2008, chapter 343, CIWMB no longer required districts to report their tonnage or percentage diverted, but they are still required to divert 50 percent of their solid waste.<sup>77</sup>

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<sup>71</sup> Exhibit B, Controller's Late Comments on the IRC, page 18.

<sup>72</sup> Exhibit B, Controller's Late Comments on the IRC, pages 18-19.

<sup>73</sup> Exhibit B, Controller's Late Comments on the IRC, page 19.

<sup>74</sup> Exhibit B, Controller's Late Comments on the IRC, page 19.

<sup>75</sup> Exhibit B, Controller's Late Comments on the IRC, page 20.

<sup>76</sup> Exhibit B, Controller's Late Comments on the IRC, page 20.

<sup>77</sup> Exhibit B, Controller's Late Comments on the IRC, page 21.

Defending its use of the claimant's 2007 reported diversion rate to calculate offsetting savings for subsequent years, the Controller calls the 2007 report a "fair representation" of the 2008 through 2010 diversion rate because the Controller found that the "district's annual per-capita disposal rate for both the employee and student populations to be equivalent or near the target rate," so the district is meeting its requirement to divert 50% of its solid waste.<sup>78</sup> The Controller also cites the claimant's 2009 annual report, in which the claimant reported increased recycling locations and the beginning of a green waste program. Thus, the district's diversion percentages could have increased since 2007 and the calculations for 2007-2008 through 2010-2011 could be understated.<sup>79</sup>

The Controller also responded to the claimant's argument against the assumption that all tonnage diverted would have been disposed in a landfill, even though some waste may have been composted or may not apply to the mandate (e.g. paint). The Controller notes that the district does not say where its composted material would go for disposal if it were not composted. The Controller also states that the district's reference to paint disposal is irrelevant because hazardous waste is not included in the diversion amounts that the claimant reported, and therefore, are not included in the Controller's offsetting savings calculation.<sup>80</sup>

Regarding the data for the statewide disposal fee, the Controller states the information was provided by CIWMB, is included in the record, and is based on a private survey of a large percentage of landfills across California. The Controller also cites its internet search for landfill fees that revealed that the South Gate Transfer Station in South Gate, California, currently charges \$53.91 per ton to dispose of solid waste, so the \$36 to \$56 "statewide average disposal fee" used to calculate the offsetting savings realized by the district is reasonable. In addition, the district "did not provide any information, such as its contract with or invoices received from its commercial waste hauler to support either the landfill fees actually incurred by the district or to confirm that the statewide average landfill fee was greater than the actual landfill fees incurred by the district."<sup>81</sup>

In response to the claimant's argument that it did not claim landfill costs, so there are none to offset, the Controller answers that the mandated program does not reimburse claimants for landfill costs incurred to dispose of solid waste. Rather, the program reimburses claimants' costs to divert solid waste from disposal, which according to the Controller, results in both a reduction of solid waste going to a landfill and the associated costs of having the waste hauled there. This creates offsetting savings that the claimant is required to identify in its mandated cost claims.<sup>82</sup>

In response to the claimant's argument that "the adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed," the Controller quotes Public Resources Code section 42925 which provides that "cost savings realized as a result of the IWM

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<sup>78</sup> Exhibit B, Controller's Late Comments on the IRC, page 21.

<sup>79</sup> Exhibit B, Controller's Late Comments on the IRC, page 21.

<sup>80</sup> Exhibit B, Controller's Late Comments on the IRC, page 22.

<sup>81</sup> Exhibit B, Controller's Late Comments on the IRC, page 23.

<sup>82</sup> Exhibit B, Controller's Late Comments on the IRC, page 23.

plan are to “fund plan *implementation and administration costs*.”<sup>83</sup> The Controller argues that “district did not identify, and we did not find, any statute or provision limiting offsetting savings solely to solid waste diversion activities included in the district's IWM claims.”<sup>84</sup> The Controller cites the reimbursable activities in the Parameters and Guidelines that refer to “implementation of the IWM plan,” concluding that it is reasonable that offsetting savings from implementing the plan be offset against direct costs to implement the plan. The Controller asserts that the claimant’s reference to other IWM audits is irrelevant to the current issue.<sup>85</sup>

The Controller also disagrees with claimant’s argument that the Controller used the wrong standard of review. The Controller cites the statute that authorizes it to audit the claimant’s records to verify actual mandate-related costs *and* reduce any claim that is excessive or unreasonable. In this case, the claims were excessive because the claimant’s “mandated cost claims exceeded the proper amount based on the reimbursable costs allowable per statutory language and the program’s parameters and guidelines.”<sup>86</sup> As to the burden of proof, the Controller states that it used data from the claimant’s annual reports to CIWMB from implementing its IWM program.<sup>87</sup>

In comments on the Draft Proposed Decision, the Controller agreed with the conclusion that the audit reductions for all years in the audit period were correct except for calendar years 2002 and 2003. The Controller also agreed to reinstate \$5,107 to the claimant for calendar years 2002 and 2003 “which the Commission concluded was incorrect as a matter of law.”<sup>88</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 if the Controller determines that the claim 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 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

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<sup>83</sup> Public Resources Code section 42925. Emphasis added in Controller’s comments.

<sup>84</sup> Exhibit B, Controller’s Late Comments on the IRC, page 23.

<sup>85</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 23-24.

<sup>86</sup> Exhibit B, Controller’s Late Comments on the IRC, page 26.

<sup>87</sup> Exhibit B, Controller’s Late Comments on the IRC, page 26.

<sup>88</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

the California Constitution.<sup>89</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>90</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>91</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>92</sup>

The Commission must review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>93</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>94</sup>

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<sup>89</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>90</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>91</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space Dist.* (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>92</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>93</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>94</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.

**The Controller’s Reduction of Costs Claimed Is Generally Correct as a Matter of Law; However, the Reduction for Calendar Years 2002 and 2003, Based on a 100 Percent Diversion Rate, Is Incorrect as a Matter of Law and Arbitrary, Capricious, and Entirely Lacking in Evidentiary Support.**

1. The test claim statutes presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized.

The test claim statute added Public Resources Code section 42925(a), which provides: “Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code.”

The court’s Ruling on Submitted Matter states that community colleges are “likely to experience costs savings in the form of reduced or avoided costs of landfill disposal” as a result of the mandated activities in Public Resources Code section 42921 because reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.” The court noted that “diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates.” The statutory definition of diversion provides that “activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division.” And the statutory definition of disposal is “the management of solid waste through landfill disposal or transformation at a permitted solid waste facility.”<sup>95</sup> The court explained:

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(l) of Public Resources Code section 42926.<sup>96</sup>

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<sup>95</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 78-79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>96</sup> Exhibit B, Controller’s Late Comments on the IRC, page 79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>97</sup>

Thus, the court found that offsetting savings are, by statutory definition, likely to occur as a result of implementing the mandated activities. Reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.”<sup>98</sup> As the court held, “landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs. . . .”<sup>99</sup>

The statutes, therefore, presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. As indicated in the court’s ruling, the amount or value of the cost savings may be determined from

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<sup>97</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 80-81 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>98</sup> Exhibit B, Controller’s Late Comments on the IRC, page 78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>99</sup> Exhibit B, Controller’s Late Comments on the IRC, page 79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB.<sup>100</sup> The amount of cost savings realized must be identified by the claimant and used to offset the costs incurred to comply with IWM plan implementation and administration activities approved for reimbursement in the Parameters and Guidelines. Accordingly, the court's ruling requires claimants to report in their reimbursement claims the costs incurred to comply with the reimbursable activities (which includes the activities and costs to divert at least 25 or 50 percent of all solid waste from landfill disposal) and the cost savings from the avoided landfill disposal fees, for a reimbursement claim of the net increased costs.

The Parameters and Guidelines are consistent with the court's ruling and require in Section IV. that "[t]he claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate."<sup>101</sup> Section VIII. requires that "[r]educed or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1."<sup>102</sup> The court's decision and the amended Parameters and Guidelines are binding.<sup>103</sup>

2. During the audit period, the claimant exceeded the mandated solid waste diversion rate, but has filed no evidence to rebut the presumption that cost savings were realized. Thus, the Controller's finding that the claimant realized cost savings is correct as a matter of law.

In this case, the claimant asserts that no cost savings were realized, but does not explain why.<sup>104</sup>

The record shows that during the audit period, the claimant complied with the mandate and diverted more solid waste than the state-mandated percentages.<sup>105</sup> The mandate requires community colleges to divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, through source reduction, recycling, and composting activities, and at least 50 percent of all solid waste from landfill disposal or

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<sup>100</sup> Exhibit B, Controller's Late Comments on the IRC, page 79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>101</sup> Exhibit A, IRC, page 57 (Parameters and Guidelines).

<sup>102</sup> Exhibit A, IRC, page 62 (Parameters and Guidelines).

<sup>103</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

<sup>104</sup> Exhibit A, IRC, page 9.

<sup>105</sup> Exhibit B, Controller's Late Comments on the IRC, page 86 (The Controller calculated the 2000 diversion at 25.47 percent). The Controller found that the claimant did not divert the mandated percentage in calendar years 2002 and 2003, but as discussed below, that finding is incorrect.

transformation facilities by January 1, 2004.<sup>106</sup> The claimant's annual report to CIWMB for calendar year 2001 indicates a diversion percentage of 25.50 percent.<sup>107</sup> The claimant's annual reports to CIWMB for calendar years 2002 and 2003 indicate diversion percentages from 31.9 percent and 31.6 percent of the total waste generated, which exceed the mandated diversion requirement of 25 percent.<sup>108</sup> The claimant's annual reports to CIWMB for calendar years 2004 through 2007 also report diversion percentages that exceed the mandated diversion requirement of 50 percent, ranging from 50.9 percent to 92.1 percent of the waste generated.<sup>109</sup>

In 2000, the claimant did not report its annual tonnage diverted or disposed,<sup>110</sup> so the Controller applied the claimant's 2001 diversion data to determine the applicable offset for the first half of fiscal year 2000-2001.<sup>111</sup> The claimant filed a 2000 annual report that indicates it was diverting waste, stating: "green waste is collected and disposed of separately, construction waste that can be recycled is. Examples are steel, brick, ground, asphalt, and concrete, copper and aluminum products and glass."<sup>112</sup> Moreover, the claimant filed a claim for \$24,995 for 2000-2001.<sup>113</sup>

In 2008, CIWMB stopped requiring community college districts to report the amount and percentage of tonnage diverted, and instead required them to report the "per-capita disposal" of waste.<sup>114</sup> As amended, each community college now has a disposal target that is the equivalent to a 50 percent diversion, and is expressed on a per capita basis. So if the district's per-capita disposal rate is less than the target, it means that the district is meeting the requirement to divert 50 percent of its solid waste.<sup>115</sup>

The claimant, in its report for 2008, 2009, and 2010, reported annual per capita disposal rates for both the employee and student populations to be at or below the target rates, thereby satisfying the requirement to divert 50 percent of its solid waste.<sup>116</sup> The claimant's annual reports also indicate it had waste reduction programs in place. For example, the 2008 report listed:

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<sup>106</sup> Public Resources Code sections 42921. Exhibit A, IRC, pages 54 and 58 (Parameters and Guidelines, section IV.(B)(5)).

<sup>107</sup> Exhibit B, Controller's Late Comments on the IRC, page 36 (2001 Report).

<sup>108</sup> Exhibit B, Controller's Late Comments on the IRC, pages 39, 42 and 86.

<sup>109</sup> Exhibit B, Controller's Late Comments on the IRC, pages 45-54 and 86.

<sup>110</sup> Exhibit B, Controller's Late Comments on the IRC, page 34 (2000 Report).

<sup>111</sup> Exhibit B, Controller's Late Comments on the IRC, page 20.

<sup>112</sup> Exhibit B, Controller's Late Comments on the IRC, page 20 (2000 Report).

<sup>113</sup> Exhibit A, IRC, page 226 (2000-2001 reimbursement claim).

<sup>114</sup> The new requirement was a result of Statutes 2008, chapter 343 (SB 1016).

<sup>115</sup> Exhibit B, Controller's Late Comments on the IRC, pages 93-101 ["Understanding SB 1016 Solid Waste Per Capita Disposal Measurement Act", <http://www.calrecycle.ca.gov/lgcentral/goalmeasure/Tools/SimplePresen.pdf>.]

<sup>116</sup> Exhibit B, Controller's Late Comments on the IRC, pages 58 (2008 Report, showing an employee population target of 1.10, and 1.10 was achieved; and a student population target of 0.10, and 0.10 was achieved); 62 (2009 Report, showing an employee population target of 1.10,

Business Source Reduction: Purchase of products that contain recycled materials. Electronic Communications and web postings have been instituted for staff, faculty and students. Online forms, rolled paper towels [sic], preventative maintenance, double sided copies, reuseable [sic] inter office envelopes, toner, Printer Cartridges. A paperless system has been implemented for student registration and files are now being stored electronically. Materials Exchange: Used Book Buy back, Auctions, Sales to the Public, Non- Profit Donations, computer recycling excluding monitors Recycling: Office paper & cardboard, plastic bottles and cans, scrap metal, and toner cartridges [sic]. Composting: Xeriscaping/Grasscycling, on-site Composting and self-haul green waste. Special Waste: Scrap Metal and wood waste. C&D.<sup>117</sup>

The claimant also reported on changes in 2008 to its waste diversion programs, such as: “a proactive program to divert used equipment that is still serviceable and salable, has been implemented to divert waste from landfills to other acceptable means. In addition, construction waste is being diverted from landfills to recycling sites.”<sup>118</sup> The 2008 report also states:

The district recieved [sic] a 175 million dollar grant for new building construction [sic] and renovation of old. Work began in the 06 calender [sic] year. As a result, C&D is significantly higher than previous years” and “[w]astes previously [sic] being disposed of as hazardous are now being recycled whenever possible. This includes, batteries, oil waste and automotive fluids.<sup>119</sup>

The 2009 report also mentions higher C&D (construction and demolition) recycling, and states: “[f]or contract approval, contractors are required to minimize landfill waste and recycle whenever possible. Language [sic] was added to the contracts requiring them to recycle and provide evidence to the district.”<sup>120</sup> The 2009 report also states: “The waste has decreased as a result of our efforts to find methods to recycle materials and are in line with our expectations. The waste reduction is consistant [sic] with the education taking place on campus and our efforts to expand and provide collection locations on our campuses.”<sup>121</sup> The claimant also reported in 2009 that it added collection locations for paper plastic and metals and started a green waste recycling campaign.<sup>122</sup>

The 2010 report again mentioned the C&D recycling and the contractor requirement to recycle 50 percent of C&D-related waste. The claimant also left blank the question on the report

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and 1.10 was achieved; and a student population target of 0.10, and 0.11 was achieved); 67 (2010 Report, showing an employee population target of 1.10, and 1.10 was achieved; and a student population target of 0.10, and 0.11 was achieved).

<sup>117</sup> Exhibit B, Controller’s Late Comments on the IRC, page 58 (2008 Report).

<sup>118</sup> Exhibit B, Controller’s Late Comments on the IRC, page 58 (2008 Report).

<sup>119</sup> Exhibit B, Controller’s Late Comments on the IRC, page 58 (2008 Report).

<sup>120</sup> Exhibit B, Controller’s Late Comments on the IRC, page 62 (2009 Report).

<sup>121</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 62-63 (2009 Report).

<sup>122</sup> Exhibit B, Controller’s Late Comments on the IRC, page 63 (2009 Report).

regarding starting, discontinuing, or making significant changes to waste reduction/recycling programs.<sup>123</sup>

The record also shows that the claimant's solid waste that was not diverted was disposed of at a landfill by a waste hauler. The claimant's annual reports filed with CIWMB during most of the audit period (all calendar years except 2000, 2008, 2009, and 2010) identify the total tonnage of waste disposed<sup>124</sup> and the use of a waste hauler.<sup>125</sup> The record also shows the claimant used landfill disposal for the solid waste it did not divert. For example, in its 2001 annual report, the claimant states: "Less of the above items [cardboard, e-mail, furniture, scrap metal and biomass] now enter the landfills."<sup>126</sup> The claimant's 2002 report states: "diversion of used equipment that is still servicable [sic] and saleable is now being diverted [sic] from the normal landfill waste streams. The diversion of construction waste from traditional waste landfills to material recycle sites."<sup>127</sup> The claimants' reports for 2003, 2004, 2005, 2006, 2007, 2008, 2009 and 2010 contain similar statements regarding diversion from "landfills."<sup>128</sup>

The avoided landfill disposal fee was based on the statewide average disposal fee provided by CIWMB for each fiscal year in the audit period, since the claimant did not provide any information to the Controller regarding the landfill fees it was charged.<sup>129</sup>

Based on this documentation, the Controller correctly presumed, consistent with the presumption in the test claim statutes and the court's interpretation of those statutes and with no evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted.

The statutory presumption of cost savings controls unless the claimant files evidence to rebut the presumption and shows that cost savings were not realized.<sup>130</sup> The claimant has the burden of

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<sup>123</sup> Exhibit B, Controller's Late Comments on the IRC, page 67 (2010 Report).

<sup>124</sup> Exhibit B, Controller's Late Comments on the IRC, pages 36 (2001 Report) 39 (2002 Report), 42 (2003 Report), 45 (2004 Report), 48 (2005 Report), 51 (2006 Report), 54 (2007 Report).

<sup>125</sup> For example, the 2001 annual report mentions it obtained information from its "recycler." The claimant's 2002 tonnage information was obtained from "the District's contracted waste management company." The 2003, 2004, 2005, 2006, 2007, and 2008 tonnage information was obtained from "the District's contracted waste management recycling companies" or "waste management services recycling companies." The 2009 and 2010 reports cite the claimant's "waste hauler" for tonnage information. See Exhibit B, Controller's Late Comments on the IRC, pages 37, 40, 43, 46, 49, 52, 55, 59, 63, and 67.

<sup>126</sup> Exhibit B, Controller's Late Comments on the IRC, page 37 (2001 Report).

<sup>127</sup> Exhibit B, Controller's Late Comments on the IRC, page 40 (2002 Report).

<sup>128</sup> Exhibit B, Controller's Late Comments on the IRC, pages 43 (2003 Report), 46 (2004 Report), 49 (2005 Report), 52 (2006 Report), 55 (2007 Report), 58 (2008 Report), 62 (2009 Report), 67 (2010 Report).

<sup>129</sup> Exhibit B, Controller's Late Comments on the IRC, pages 23-24, 110-132.

<sup>130</sup> Government Code section 17559, which requires that the Commission's decisions be supported by substantial evidence in the record. See also, *Coffy v. Shiomoto* (2015) 60 Cal.4th

proof on this issue. Under the mandates statutes and regulations, the claimant is required to show that it has incurred increased costs mandated by the state when submitting a reimbursement claim to the Controller's Office, and the burden to show that any reduction made by the Controller is incorrect.<sup>131</sup> The Parameters and Guidelines, as amended pursuant to the court's writ, also require claimants to show the costs incurred to divert solid waste and to perform the administrative activities, and *to report and identify* the costs saved or avoided by diverting solid waste: "Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans *shall be* identified and offset from this claim as cost savings."<sup>132</sup> Thus, the claimant has the burden to rebut the statutory presumption and to show, with substantial evidence in the record, that the costs of complying with the mandate exceed any cost savings realized by diverting solid waste.

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1198, 1209, a case interpreting the rebuttable presumption in Vehicle Code section 23152 that if a person had 0.08 percent or more, by weight, of alcohol in the blood at the time of testing, then it is presumed by law that he or she had 0.08 percent or more, by weight, of alcohol in the blood at the time of driving, unless he or she files evidence to rebut the presumption. The court states that unless and until evidence is introduced that would support a finding that the presumption does not exist, the statutory presumption that the person was driving over the legal limit remains the finding of fact.

<sup>131</sup> Evidence Code section 500, which states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." See also, *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 24, where the court recognized that "the general principle of Evidence Code 500 is that a party who seeks a court's action in his favor bears the burden of persuasion thereon." This burden of proof is recognized throughout the architecture of the mandates statutes and regulations. Government Code section 17551(a) requires the Commission to hear and decide a claim filed by a local agency or school district that it is entitled to reimbursement under article XIII B, section 6. Section 17551(d) requires the Commission to hear and decide a claim by a local agency or school district that the Controller has incorrectly reduced payments to the local agency or school district. In these claims, the claimant must show that it has incurred increased costs mandated by the state. (Gov. Code, §§ 17514 [defining "costs mandated by the state"], 17560(a) ["A local agency or school district may . . . file an annual reimbursement claim that details the costs actually incurred for that fiscal year."]; 17561 [providing that the issuance of the Controller's claiming instructions constitutes a notice of the right of local agencies and school districts to file reimbursement claims based upon the parameters and guidelines, and authorizing the Controller to audit the records of any local agency or school district to "verify the actual amount of the mandated costs."]; 17558.7(a) ["If the Controller reduces a claim approved by the commission, the claimant may file with the commission an incorrect reduction claim pursuant to regulations adopted by the commission."]. By statute, only the local agency or school district may bring these claims, and the local entity must present and prove its claim that it is entitled to reimbursement. (See also, Cal. Code Regs., tit. 2, §§ 1185.1, et seq., which requires that the IRC contain a narrative that describes the alleged incorrect reductions, and be signed under penalty of perjury.)

<sup>132</sup> Exhibit A, IRC, page 62 (Amended Parameters and Guidelines). Emphasis added.

The Commission finds that since the claimant has not filed any evidence to rebut the statutory presumption of cost savings, the Controller’s finding that cost savings have been realized is correct as a matter of law.

3. For all years of the audit period except calendar years 2002 and 2003, the Controller’s calculation of cost savings is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

The Controller correctly determined that for every year during the audit period (except for calendar years 2002 and 2003 as discussed below), the claimant diverted more solid waste than the percentage mandated by the test claim statute.<sup>133</sup> For years the claimant exceeded the mandate, the Controller calculated offsetting savings by allocating the diversion to reflect the mandate. The Controller allocated the diversion by dividing the mandated solid waste diversion rate (either 25 percent or 50 percent) by the actual rate diverted (as annually reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized.<sup>134</sup>

$$\begin{array}{rcccl}
 & \text{Allocated Diversion \%} & & & \\
 & \text{-----} & & & \\
 & \text{Maximum} & & & \text{Avoided} \\
 & \text{Allowable} & & & \text{Landfill} \\
 \text{Offsetting} & \text{Diversion \%} & \times & \text{Tonnage} & \text{Disposal Fee} \\
 \text{Savings} & \text{-----} & & \text{Diverted} & \text{(per Ton)} \\
 \text{Realized} & \text{Actual} & & & \\
 & \text{Diversion \%} & & & 
 \end{array}$$

The formula allocates or reduces cost savings based on the mandated rate, and is intended to avoid penalizing the claimant for diverting more solid waste than the percentage mandated by law.<sup>135</sup>

The formula is consistent with the statutory presumption of cost savings, as interpreted by the court for this program and the requirements in the Parameters and Guidelines. The court found that the test claim statutes require that reduced or avoided landfill fees represent savings that must be offset against the cost of diversion. The court stated: “The amount or value of the [offsetting cost] savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report” to CIWMB.<sup>136</sup> The Parameters and Guidelines state: “Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be

<sup>133</sup> Exhibit A, IRC, page 34, fn. 2 (Final Audit Report). Exhibit B, Controller’s Late Comments on the IRC, page 86.

<sup>134</sup> Exhibit A, IRC, page 36 (Final Audit Report); Exhibit B, Controller’s Late Comments on the IRC, page 20.

<sup>135</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 20.

<sup>136</sup> Exhibit B, Controller’s Late Comments on the IRC, page 79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

identified and offset from this claim as cost savings . . . .”<sup>137</sup> Thus, the Controller’s formula correctly presumes, based on the record and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted. And when the claimant exceeded the mandated diversion rates, the Controller’s formula limited the offset to reflect the mandated rate.

The claimant raises several arguments, unsupported by the law or evidence in the record, that the Controller’s calculation of cost savings is incorrect.

The claimant first alleges that cost savings cannot be realized because the chain of events required by Public Contract Code sections 12167 and 12167.1 did not occur: that savings have to be converted to cash, and amounts in excess of \$2,000 per year must be deposited in the state fund and appropriated back by the Legislature to mitigate the costs.<sup>138</sup> It is undisputed that the claimant did not remit to the state any savings realized from the implementation of the IWM plan.<sup>139</sup> However, as indicated above, cost savings are presumed by the statutes and the claimant has not filed evidence to rebut that-presumption. Thus, the claimant should have deposited the cost savings into the state’s account as required by the test claim statutes, and the claimant’s failure to comply with the law does not make the Controller’s calculations of cost savings incorrect as a matter of law, or arbitrary or capricious. Since cost savings are presumed by the statutes, the claimant has the burden to show increased costs mandated by the state. As the court stated: “[r]eimbursement is not available under section 6 and section 17514 to the extent that a local government or school district is able to provide the mandated program or increased level of service without actually incurring increased costs.”<sup>140</sup>

The claimant next asserts that the Controller’s formula is an underground regulation.<sup>141</sup> The Commission disagrees. Government Code section 11340.5 provides that no state agency shall enforce or attempt to enforce a rule or criterion which is a regulation, as defined in section 11342.600, unless it has been adopted pursuant to the Administrative Procedures Act. As discussed above, however, the formula is consistent with the statutory presumption of cost savings, as interpreted by the court for this program. Interpretations that arise in the course of case-specific adjudications are not regulations.<sup>142</sup>

The claimant also argues that using landfill fees in the calculation of offsetting savings is not relevant because “[t]he District did not claim landfill costs, so there are none to be offset.”<sup>143</sup> The claimant’s interpretation of the cost savings requirement is not correct. The cost of

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<sup>137</sup> Exhibit A, IRC page 62 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>138</sup> Exhibit A, IRC, page 13.

<sup>139</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 12, 18.

<sup>140</sup> Exhibit B, Controller’s Late Comments on the IRC, page 78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>141</sup> Exhibit A, IRC, page 14.

<sup>142</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>143</sup> Exhibit A, IRC, page 17.

disposing waste at a landfill is not eligible for reimbursement. Reimbursement is authorized to *divert* solid waste from the landfill through source reduction, recycling, and composting activities.<sup>144</sup> As explained by the court:

In complying with the mandated solid waste diversion requirements of Public Resources Code section 42921, California Community Colleges are likely to experience cost savings in the form of reduced or avoided costs of landfill disposal. The reduced or avoided costs are a direct result and an integral part of the mandated IWM plan ....

Such reduction or avoidance of landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings which must be offset against the costs of the diversion activities to determine the reimbursable costs of IWM plan implementation -- i.e., the actual increased costs of diversion -- under section 6 and section 17514.<sup>145</sup>

The court also noted that diversion is defined as “activities which reduce or eliminate the amount of solid waste from solid waste disposal.”<sup>146</sup>

In addition, the claimant argues that the formula assumes facts without evidence in the record. For example, the claimant questions the Controller’s assumption that the diversion rate achieved in 2001 applies to 2000, or the rate achieved in 2007 applies to subsequent years.<sup>147</sup> The claimant also questions the assumption that all diverted waste would have been disposed in a landfill, and that the statewide average cost to dispose of waste at a landfill actually applied to the claimant.<sup>148</sup>

The Controller’s assumptions, however, are supported by evidence in the record and the claimant has filed no evidence to rebut them. The Controller applied the diversion rate achieved in 2001 to the second half of fiscal year 2000-2001 (calendar year 2000) because the claimant’s 2000 annual report stated “No facilities exist for this agency.”<sup>149</sup> However, the claimant included some information in its 2000 report. Regarding what is being done to currently reduce waste, the claimant reported: “green waste is collected and disposed of separately, construction waste that can be recycled is. Examples are steel, brick, ground, asphalt, and concrete, copper and

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<sup>144</sup> Exhibit A, IRC, page 58 (Parameters and Guidelines).

<sup>145</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 78-79 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>146</sup> Public Resources Code section 40124. Exhibit B, Controller’s Late Comments on the IRC, page 78 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>147</sup> Exhibit A, IRC, page 15.

<sup>148</sup> Exhibit A, IRC, pages 15-16.

<sup>149</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 20 and 34 (2000 Report).

aluminum products and glass.”<sup>150</sup> Moreover, the claimant filed a claim for \$24,995 for 2000-2001, including \$10,000 for a contractor (Steven’s Tree Experts) to “divert solid waste from landfill disposal or transformation facilities - source reduction.”<sup>151</sup>

Evidence in the record also supports the Controller’s application of the claimant’s 2007 tonnage data to subsequent years because CIWMB stopped requiring community college districts to report the actual amount and percent of tonnage diverted in 2008. As the Controller notes, the 2007 data is “a fair representation of the 2008 through 2010 diversion information because the district’s recycling processes have already been established and committed to.”<sup>152</sup> As discussed above, the data and the narrative in the claimant’s reports for 2008, 2009, and 2010 reveal that the claimant’s annual per capita disposal rate for both the employee and student populations were below the target rate.<sup>153</sup> Overall, the evidence indicates that the claimant satisfied the requirement to divert 50 percent or more of its solid waste during 2008, 2009, and 2010.<sup>154</sup>

The Controller obtained the statewide average cost for landfill disposal fees from CIWMB. The fees were based on private surveys of a large percentage of landfills across California.<sup>155</sup> The Controller’s audit report indicates that the claimant did not provide documentation to support a different disposal fee.<sup>156</sup> In addition, the Controller states:

The district did not provide any information, such as its contract with or invoices received from its commercial waste hauler to support either the landfill fees actually incurred by the district or to confirm that the statewide average landfill fee was greater than the actual landfill fees incurred by the district.<sup>157</sup>

On these audit issues, the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. The Commission must only ensure that the Controller’s decision is not arbitrary, capricious, or entirely lacking in evidentiary support, and adequately considered all

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<sup>150</sup> Exhibit B, Controller’s Late Comments on the IRC, page 20 (2000 Report).

<sup>151</sup> Exhibit A, IRC, page 226-228 (2000-2001 reimbursement claim).

<sup>152</sup> Exhibit B, Controller’s Late Comments on the IRC, page 21.

<sup>153</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 58 (2008 Report, showing an employee population target of 1.10, and 1.10 was achieved; and a student population target of 0.10, and 0.10 was achieved); 62 (2009 Report, showing an employee population target of 1.10, and 1.10 was achieved; and a student population target of 0.10, and 0.11 was achieved); 67 (2010 Report, showing an employee population target of 1.10, and 1.10 was achieved; and a student population target of 0.10, and 0.11 was achieved).

<sup>154</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 63 (2008 report), listing the waste reduction programs in place, stating that “Increased monitoring of paper/cardboard recycling have also contributed to landfill diversion” and reporting there was “more communication to the college to help with our recycling efforts.” Claimant also reported that in 2008: “No new programs were implemented, or discontinued.”

<sup>155</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 23-24, 110-132.

<sup>156</sup> Exhibit A, IRC, page 37.

<sup>157</sup> Exhibit B, Controller’s Late Comments on the IRC, page 23.

relevant factors.<sup>158</sup> There is no evidence that the Controller's assumptions are wrong or arbitrary or capricious with regard to the statewide average landfill fee.

The claimant also points to the Controller's audits of other community college districts, arguing that the Controller's audit results in those cases vary and are arbitrary.<sup>159</sup> The Controller's audits of other community college district reimbursement claims are not relevant to the Controller's audit here. Each audit depends on the documentation and evidence provided by the claimant to show increased costs mandated by the state.

Accordingly, the Controller's calculation of cost savings for all years of the audit period except calendar years 2002 and 2003 is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

4. The Controller's finding that the claimant did not achieve the mandated diversion rate for calendar years 2002 and 2003 (the second half of fiscal year 2001-2002, all of fiscal year 2002-2003, and the first half of fiscal year 2003-2004) is incorrect as a matter of law, and the Controller's recalculation of cost savings for those years is arbitrary, capricious, and entirely lacking in evidentiary support.

The Controller found that the claimant did not achieve the mandated "50 percent" diversion in calendar years 2002 and 2003 (the second half of fiscal year 2001-2002, all of fiscal year 2002-2003, and the first half of fiscal year 2003-2004),<sup>160</sup> although only 25 percent diversion was required at that time. For these years, the Controller did not allocate the diversion to reflect the mandate, but used 100 percent of the reported diversion to calculate offsetting savings. This resulted in an audit reduction of \$24,057 for these years (329.4 tons of waste diverted in 2002, multiplied by the avoided statewide average disposal fee of \$36.17, and 329.7 tons of waste diverted in 2003, multiplied by the avoided statewide average disposal fee of \$36.83).<sup>161</sup>

As indicated in the Parameters and Guidelines, the mandate is to divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities.<sup>162</sup> Thus, from July 1, 2003, through December 31, 2003, community college districts were mandated to achieve diversion rates of only 25 percent. The claimant's 2002 report to CIWMB shows it achieved 31.91 percent diversion, and its 2003 report shows it achieved 31.57 percent diversion,<sup>163</sup> thereby exceeding

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<sup>158</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>159</sup> Exhibit A, IRC, pages 18-19.

<sup>160</sup> Exhibit A, IRC, pages 32 and 34, footnote 2 (Final Audit Report).

<sup>161</sup> Exhibit A, IRC, page 34, footnote 2. Exhibit B, Controller's Late Comments on the IRC, page 86. The Controller calculated these years at \$24,056 due to rounding.

<sup>162</sup> Exhibit A, IRC, page 94 (Parameters and Guidelines). This is based on Public Resources Code sections 42921.

<sup>163</sup> Exhibit B, Controller's Late Comments on the IRC, pages 39 (2002 Report) 42 (2003 Report), and 86. The claimant rounded to 31.9 percent and 31.6 percent in its reports.

the mandated diversion rate of 25 percent in both years. The Controller admits that, “[a]s there is no State mandate to exceed solid waste diversion greater than 25% for calendar years 2000 through 2003 or greater than 50% for calendar year 2004 and beyond, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceed the levels set by statute.”<sup>164</sup> Therefore, the Controller’s finding that the claimant’s diversion of solid waste did not achieve the mandated diversion rate in calendar years 2002 and 2003, is incorrect as a matter of law.

Moreover, the Controller’s calculation of offsetting savings, which did not reduce cost savings by allocating the diversion to reflect the mandate as it did for other years when the claimant exceeded the mandate, is arbitrary, capricious, and entirely lacking in evidentiary support. As indicated above, the Controller’s formula for offsetting cost savings for years in which the claimant exceeded the diversion mandate, which allocates the diversion based on the mandated rate, is consistent with the test claim statutes and the court’s decision on this program.

Applying the Controller’s cost savings formula (that allocates cost savings for years when the claimant exceeded the mandate) to the second half of fiscal year 2001-2002, all of fiscal year 2002-2003, and the first half of fiscal year 2003-2004, results in offsetting savings of:

- \$9,334 for 2002 (25 percent divided by 31.91 percent, multiplied by 329.4 tons diverted multiplied by the statewide average landfill disposal fee of \$36.17) rather than \$11,914; and
- \$9,616 for 2003 (25 percent divided by 31.57 percent, multiplied by 329.7 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$12,143.

Therefore, the Commission finds that the difference of \$5,107 (\$24,057 - \$18,950) has been incorrectly reduced.

Accordingly, the Commission finds that the reduction of costs claimed for calendar years 2002 and 2003 is incorrect as a matter of law, and is arbitrary, capricious, and entirely lacking in evidentiary support.

## **V. Conclusion**

Based on the foregoing, the Commission concludes that the Controller’s reduction of costs claimed for all years in the audit period except calendar years 2002 and 2003 is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

The Commission further concludes that the Controller’s reduction of costs claimed for calendar years 2002 and 2003 (the second half of fiscal year 2001-2002, all of fiscal year 2002-2003, and the first half of fiscal year 2003-2004), is incorrect as a matter of law, and is arbitrary, capricious, and entirely lacking in evidentiary support. The law and the record support offsetting cost savings for these years of \$18,950 rather than \$24,057. Therefore, the difference of \$5,107 has been incorrectly reduced and should be reinstated to claimant.

Accordingly, the Commission partially approves this IRC and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission’s regulations, that the Controller reinstate \$5,107 to the claimant.

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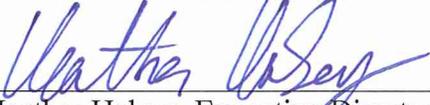
<sup>164</sup> Exhibit B, Controller’s Late Comments on the IRC, page 20.



RE: **Decision**

*Integrated Waste Management*, 14-0007-I-09  
Public Resources Code Sections 40148, 40196.3, 42920-42928;  
Public Contract Code Sections 12167 and 12167.1  
Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75)  
State Agency Model Integrated Waste Management Plan (February 2000)  
Fiscal Years: 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006,  
2006-2007, 2007-2008, 2008-2009, 2009-2010, and 2010-2011  
Long Beach Community College District, Claimant

On March 23, 2018, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

  
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Heather Halsey, Executive Director

Dated: March 27, 2018

BEFORE THE  
 COMMISSION ON STATE MANDATES  
 STATE OF CALIFORNIA

**IN RE INCORRECT REDUCTION CLAIM  
 ON:**

Public Resources Code Sections 40148, 40196.3, 42920-42928; Public Contract Code Sections 12167 and 12167.1; Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75); State Agency Model Integrated Waste Management Plan (February 2000)

Fiscal Years 1999-2000, 2000-2001, 2003-2004, 2004-2005, and 2005-2006

Redwoods Community College District,  
 Claimant

Case No.: 14-0007-I-10

*Integrated Waste Management*

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

*(Adopted May 25, 2018)*

*(Served May 30, 2018)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on May 25, 2018. The claimant, Redwoods Community College District, did not attend the hearing. Lisa Kurokawa appeared on behalf of the State Controller’s Office (Controller).

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 the Proposed Decision to partially approve the IRC by a vote of 4-0 as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	Yes
Ken Alex, Director of the Office of Planning and Research	Yes
Richard Chivaro, Representative of the State Controller	Absent
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	Yes
Sarah Olsen, Public Member	Absent
Carmen Ramirez, City Council Member	Absent
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	Yes

## **Summary of the Findings**

This IRC addresses reductions made by the Controller to reimbursement claims of the Redwoods Community College District (claimant) for fiscal years 1999-2000, 2000-2001 and 2003-2004 through 2005-2006 (the audit period), under the *Integrated Waste Management* program, 00-TC-07. The Controller made the audit reductions because the claimant did not identify and deduct from its reimbursement claims offsetting cost savings from its diversion of solid waste and the associated reduced or avoided landfill disposal fees.

The test claim statutes require community college districts to adopt and implement, in consultation with California Integrated Waste Management Board (CIWMB, which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste<sup>1</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of solid waste by January 1, 2002, and at least 50 percent by January 1, 2004.<sup>2</sup> The test claim statutes also provide that “Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs . . .”<sup>3</sup>

The statutes, therefore, presume that by diverting solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. The amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB.<sup>4</sup>

The Commission finds that the Controller timely initiated the audit of the fiscal year 2003-2004 reimbursement claim and timely completed the audit for all of the reimbursement claims at issue pursuant to Government Code section 17558.5. Government Code section 17558.5(a) tolls the time to initiate the audit to three years from the date of initial payment on the claim, rather than three years from the date the claim was filed, “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 record shows that the Controller first made payment on the 2003-2004 reimbursement claim on either January 18, 2011,<sup>5</sup> or January 28, 2011,<sup>6</sup> within three years of the date the audit was initiated on January 17, 2014,<sup>7</sup> so the audit was timely initiated. The audit was complete for all

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<sup>1</sup> Public Resources Code section 42920(b).

<sup>2</sup> Public Resources Code section 40124.

<sup>3</sup> Public Resources Code section 42925(a).

<sup>4</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 36-37 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>5</sup> Exhibit A, IRC, page 188.

<sup>6</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 10-11, 27-29.

<sup>7</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 25. Exhibit A, IRC, page 10.

reimbursement claims when the final audit report was issued April 11, 2014,<sup>8</sup> well before the two-year deadline of January 17, 2016.

On the merits, the Commission finds that the audit reductions are partially correct.

During the audit period, the claimant diverted solid waste, exceeding the mandated diversion rate in all years. The Controller correctly presumed, consistent with the test claim statutes and the court's interpretation of those statutes, and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill disposal fee per ton of waste required to be diverted.

Based on the evidence in the record, the Commission finds that the Controller's calculation of offsetting cost savings for all years in the audit period except the first half of fiscal year 2003-2004 is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support. Because the claimant exceeded the mandate every year of the audit period, the Controller calculated offsetting savings by allocating the diversion to reflect the mandate. To allocate the diversion, the Controller divided the percentage of solid waste required to be diverted by the test claim statute (either 25 percent or 50 percent) by the actual percentage of solid waste diverted (as annually reported by the claimant to the California Integrated Waste Management Board (CIWMB)). The allocated tonnage of solid waste diverted was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized.<sup>9</sup> The formula allocates cost savings based on the mandated rate of diversion, and is intended to avoid penalizing the claimant for diverting more solid waste than the percentage mandated by law.<sup>10</sup> The claimant has not filed any evidence to rebut the statutory presumption of cost savings or to show that the statewide average disposal fee is incorrect or arbitrary. Thus, the Controller's reduction of costs claimed for these fiscal years is correct.

However, the Controller's calculation of cost savings for the first half of fiscal year 2003-2004, based on an incorrect mandated diversion rate, is incorrect as a matter of law. The Controller allocated the diversion rate for 2003-2004, as it did for the other fiscal years, because the claimant exceeded the mandate. However, the Controller used a 50 percent rate to calculate the allocated diversion rate although the test claim statutes required only 25 percent diversion in calendar year 2003.<sup>11</sup> The requirement to divert 50 percent of solid waste did not become operative until January 1, 2004,<sup>12</sup> so the calculation of cost savings for fiscal year 2003-2004 is incorrect as a matter of law.

Applying the Controller's cost savings formula (using the mandated 25 percent diversion rate to calculate offsetting cost savings) to the first half of fiscal year 2003-2004, results in offsetting savings of \$2,430 (25 percent divided by 57.68 percent, multiplied by 152.25 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$4,861. The

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<sup>8</sup> Exhibit A, IRC, page 27 (Final Audit Report).

<sup>9</sup> Exhibit A, IRC, pages 33; Exhibit B, Controller's Late Comments on the IRC, page 16-18.

<sup>10</sup> Exhibit B, Controller's Late Comments on the IRC, page 16.

<sup>11</sup> Exhibit B, Controller's Late Comments on the IRC, page 82.

<sup>12</sup> Public Resources Code sections 42921; Exhibit A, IRC, page 90 (Parameters and Guidelines).

Commission finds that the difference of \$2,431 has been incorrectly reduced and should be reinstated to the claimant.

The claimant also questions the Controller's adjustment of \$5,130, contending that the \$5,130 was offsetting revenues and not offsetting savings. The claimant's reimbursement claims, however, identify the \$5,130 as offsetting savings. Thus, the Controller calculated the total realized offsetting savings by subtracting the offsetting savings reported by the claimant, resulting in an overall reduction of \$38,247 instead of \$43,377.<sup>13</sup> This adjustment did not result in a reduction of costs claimed within the meaning of Government Code section 17551(d) and thus, the Commission does not have jurisdiction to determine if the adjustment was correct.

Therefore, the Commission partially approves this IRC, and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission's regulations, that the Controller reinstate \$2,431 to the claimant.

## COMMISSION FINDINGS

### I. Chronology

- 10/07/2005 The claimant filed its fiscal year 1999-2000, 2000-2001, 2003-2004, and 2004-2005 reimbursement claims.<sup>14</sup>
- 01/16/2007 The claimant filed its 2005-2006 reimbursement claim.<sup>15</sup>
- 01/17/2014 The Controller notified the claimant of the audit.<sup>16</sup>
- 04/11/2014 The Controller issued the Final Audit Report.<sup>17</sup>
- 08/14/2014 The claimant filed this IRC.<sup>18</sup>
- 12/30/2014 The Controller filed late comments on the IRC.<sup>19</sup>

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<sup>13</sup> Exhibit A, IRC, pages 31-32 (Final Audit Report).

<sup>14</sup> Exhibit B, Controller's Late Comments on the IRC, page 16. According to Exhibit A, IRC, pages 151-175, these claims were signed on September 30, 2005.

<sup>15</sup> Exhibit B, Controller's Late Comments on the IRC, page 16. According to Exhibit A, IRC, page 177, this claim was signed on January 5, 2007.

<sup>16</sup> Exhibit B, Controller's Late Comments on the IRC, page 25.

<sup>17</sup> Exhibit A, IRC, page 27 (Final Audit Report).

<sup>18</sup> Exhibit A, IRC, page 1.

<sup>19</sup> Exhibit B, Controller's Late Comments on the IRC, page 1. Note that Government Code section 17553(d) states: "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.

02/16/2018 Commission staff issued the Draft Proposed Decision.<sup>20</sup>

02/23/2018 The Controller filed comments on the Draft Proposed Decision.<sup>21</sup>

## II. Background

### A. The *Integrated Waste Management Program*

The test claim statutes require community college districts<sup>22</sup> to adopt and implement, in consultation with CIWMB (which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste, reuse materials whenever possible, recycle recyclable materials, and procure products with recycled content in all agency offices and facilities.<sup>23</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent by January 1, 2004. To divert means to “reduce or eliminate the amount of solid waste from solid waste disposal...”<sup>24</sup>

CIWMB developed and adopted a model IWM plan on February 15, 2000, and the test claim statutes provide that if a district does not adopt an IWM plan, the CIWMB model plan governs the community college.<sup>25</sup> Each district is also required to report annually to CIWMB on its progress in reducing solid waste; and the reports’ minimum contents are specified in statute.<sup>26</sup> The test claim statutes also require a community college, when entering into or renewing a lease, to ensure that adequate areas are provided for and adequate personnel are available to oversee collection, storage, and loading of recyclable materials in compliance with CIWMB’s requirements.<sup>27</sup> Additionally, the test claim statutes added Public Resources Code section 42925(a), which addressed cost savings from IWM plan implementation:

Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code.

The Public Contract Code sections referenced in section 42925(a) require that revenue received as a result of the community college’s IWM plan be deposited in CIWMB’s Integrated Waste Management Account. After July 1, 1994, CIWMB is authorized to spend the revenue upon

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<sup>20</sup> Exhibit C, Draft Proposed Decision.

<sup>21</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

<sup>22</sup> The test claim statutes apply to “state agencies” and define them to include “the California Community Colleges” (Pub. Res. Code, § 40196.3).

<sup>23</sup> Public Resources Code section 42920(b).

<sup>24</sup> Public Resources Code section 40124.

<sup>25</sup> Public Resources Code section 42920(b)(3).

<sup>26</sup> Public Resources Code section 42926.

<sup>27</sup> Public Resources Code section 42924(b).

appropriation by the Legislature to offset recycling program costs. Annual revenue under \$2,000 is to be continuously appropriated for expenditure by the community colleges, whereas annual revenue over \$2,000 is available for expenditures upon appropriation by the Legislature.<sup>28</sup>

On March 24, 2004, the Commission adopted the *Integrated Waste Management* Statement of Decision and determined that the test claim statutes impose a reimbursable state-mandated program on community college districts. The Commission also found that cost savings under Public Resources Code section 42925(a) did not preclude a reimbursable mandate under Government Code section 17556(e) because there was no evidence that offsetting savings would result in no net costs to a community college implementing an IWM plan, nor was there evidence that revenues received from plan implementation would be "in an amount sufficient to fund" the cost of the state-mandated program. The Commission found that any revenues received would be identified as offsetting revenue in the Parameters and Guidelines.

The Parameters and Guidelines were adopted on March 30, 2005, and authorize reimbursement for the increased costs to perform the following activities:

A. One-Time Activities (*Reimbursable starting January 1, 2000*)

1. Develop the necessary district policies and procedures for the implementation of the integrated waste management plan.
2. Train district staff on the requirements and implementation of the integrated waste management plan (one-time per employee). Training is limited to the staff working directly on the plan.

B. Ongoing Activities (*Reimbursable starting January 1, 2000*)

1. Complete and submit to the [Integrated Waste Management] Board the following as part of the State Agency Model Integrated Waste Management Plan (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.):
  - a. state agency or large state facility information form;
  - b. state agency list of facilities;
  - c. state agency waste reduction and recycling program worksheets that describe program activities, promotional programs, and procurement

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<sup>28</sup> Public Contract Code sections 12167 and 12167.1 are part of the State Assistance for Recycling Markets Act, which was originally enacted in 1989 to foster the procurement and use of recycled paper products and other recycled resources in daily state operations (See Pub. Contract Code, §§ 12153, 12160; Stats. 1989, ch. 1094). The Act, including sections 12167 and 12167.1, applies to California community colleges only to the limited extent that these sections are referenced in Public Resources Code section 42925. Community colleges are not defined as state agencies or otherwise subject to the Act's provisions for the procurement and use of recycled products in daily state operations. See Exhibit B, Controller's Late Comments on the IRC, pages 88-89 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355)).

activities, and other questionnaires; and

d. state agency integrated waste management plan questions.

NOTE: Although reporting on promotional programs and procurement activities in the model plan is reimbursable, implementing promotional programs and procurement activities is not.

2. Respond to any Board reporting requirements during the approval process. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
3. Consult with the Board to revise the model plan, if necessary. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
4. Designate one solid waste reduction and recycling coordinator for each college in the district to perform new duties imposed by chapter 18.5 (Pub. Resources Code, §§ 42920 – 42928). The coordinator shall implement the integrated waste management plan. The coordinator shall act as a liaison to other state agencies (as defined by section 40196.3) and coordinators. (Pub. Resources Code, § 42920, subd. (c).)
5. Divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities. Maintain the required level of reduction, as approved by the Board. (Pub. Resources Code, §§ 42921 & 42922, subd. (i).)

C. Alternative Compliance (*Reimbursable from January 1, 2000 – December 31, 2005*)

1. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2002 deadline to divert 25 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42923 subds. (a) & (c).)
  - a. Notify the Board in writing, detailing the reasons for its inability to comply.
  - b. Request of the Board an alternative to the January 1, 2002 deadline.
  - c. Provide evidence to the Board that the college is making a good faith effort to implement the source reduction, recycling, and composting programs identified in its integrated waste management plan.
  - d. Provide information that describes the relevant circumstances that contributed to the request for extension, such as lack of markets for recycled materials, local efforts to implement source reduction, recycling and composting programs, facilities built or planned, waste disposal patterns, and the type of waste disposed of by the community college.

- e. Submit a plan of correction that demonstrates that the college will meet the requirements of Section 42921 [the 25 and 50 percent diversion requirements] before the time extension expires, including the source reduction, recycling, or composting steps the community college will implement, a date prior to the expiration of the time extension when the requirements of Section 42921 will be met, the existing programs that it will modify, any new programs that will be implemented to meet those requirements, and the means by which these programs will be funded.
2. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2004 deadline to divert 50 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42922, subds. (a) & (b).)
- a. Notify the Board in writing, detailing the reasons for its inability to comply.
  - b. Request of the Board an alternative to the 50-percent requirement.
  - c. Participate in a public hearing on its alternative requirement.
  - d. Provide the Board with information as to:
    - (i) the community college's good faith efforts to implement the source reduction, recycling, and composting measures described in its integrated waste management plan, and demonstration of its progress toward meeting the alternative requirement as described in its annual reports to the Board;
    - (ii) the community college's inability to meet the 50 percent diversion requirement despite implementing the measures in its plan;
    - (iii) how the alternative source reduction, recycling, and composting requirement represents the greatest diversion amount that the community college may reasonably and feasibly achieve; and,
    - (iv) the circumstances that support the request for an alternative requirement, such as waste disposal patterns and the types of waste disposed by the community college.<sup>29</sup>

D. Accounting System (*Reimbursable starting January 1, 2000*)

Developing, implementing, and maintaining an accounting system to enter and track the college's source reduction, recycling and composting activities, the cost of those activities, the proceeds from the sale of any recycled materials, and such other accounting systems which will allow it to make its annual reports to the state and determine waste reduction. Note: only the pro-

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<sup>29</sup> These alternative compliance and time extension provisions in part C were sunset on January 1, 2006, but were included in the adopted Parameters and Guidelines.

rata portion of the costs incurred to implement the reimbursable activities can be claimed.

E. Annual Report (*Reimbursable starting January 1, 2000*)

Annually prepare and submit, by April 1, 2002, and by April 1 each subsequent year, a report to the Board summarizing its progress in reducing solid waste. The information in the report must encompass the previous calendar year and shall contain, at a minimum, the following as outlined in section 42926, subdivision (b): (Pub. Resources Code, §§ 42926, subd. (a) & 42922, subd. (i).)

1. calculations of annual disposal reduction;
2. information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors;
3. a summary of progress made in implementing the integrated waste management plan;
4. the extent to which the community college intends to use programs or facilities established by the local agency for handling, diversion, and disposal of solid waste (If the college does not intend to use those established programs or facilities, it must identify sufficient disposal capacity for solid waste that is not source reduced, recycled or composted.);
5. for a community college that has been granted a time extension by the Board, it shall include a summary of progress made in meeting the integrated waste management plan implementation schedule pursuant to section 42921, subdivision (b), and complying with the college's plan of correction, before the expiration of the time extension;
6. for a community college that has been granted an alternative source reduction, recycling, and composting requirement by the Board pursuant to section 42922, it shall include a summary of progress made towards meeting the alternative requirement as well as an explanation of current circumstances that support the continuation of the alternative requirement.

F. Annual Recycled Material Reports (*Reimbursable starting July 1, 1999*)

Annually report to the Board on quantities of recyclable materials collected for recycling. (Pub. Contract Code, § 12167.1.) (See Section VII. regarding offsetting revenues from recyclable materials.)<sup>30</sup>

The Parameters and Guidelines further require that each claimed reimbursable cost be supported by contemporaneous source documentation.<sup>31</sup>

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<sup>30</sup> Exhibit A, IRC, page 40-43 (Parameters and Guidelines, adopted March 30, 2005).

<sup>31</sup> Exhibit A, IRC, page 40 (Parameters and Guidelines, adopted March 30, 2005).

And as originally adopted, the Parameters and Guidelines required community college districts to identify and deduct from their reimbursement claims all of the offsetting revenues received from the sale of recyclable materials, limited by the provisions of Public Resources Code section 42925 and Public Contract Code section 12167.1. The original Parameters and Guidelines did not require community colleges to identify and deduct from their claims any offsetting cost savings resulting from the solid waste diversion activities required by the test claim statutes.<sup>32</sup>

### **B. Superior Court Decision on Cost Savings and Offsets Under the Program**

After the Parameters and Guidelines were adopted, the Department of Finance (Finance) and CIWMB filed a petition for writ of mandate requesting the court to direct the Commission to set aside the Test Claim Statement of Decision and Parameters and Guidelines and to issue a new Decision and Parameters and Guidelines that give full consideration to the cost savings and offsetting revenues community college districts will achieve by complying with the test claim statutes, including all cost savings realized from avoided landfill disposal fees and revenues received from the collection and sale of recyclable materials. The petitioners further argued that Public Contract Code sections 12167 and 12167.1 do not require community college districts to deposit revenues received from the collection and sale of recyclable materials into the Integrated Waste Management Account, as determined by the Commission, but instead allow community college districts to retain all revenues received. The petitioners argued that such revenues must be identified as offsetting revenues and applied to the costs of the program, without the community college district obtaining the approval of the Legislature or CIWMB.

On May 29, 2008, the Sacramento County Superior Court granted the petition for writ of mandate, finding that the Commission's treatment of cost savings and revenues in the Parameters and Guidelines was erroneous and required that the Parameters and Guidelines be amended. The court said:

There is no indication in the administrative record or in the legal authorities provided to the court that, as respondent [Commission] argues, a California Community College might not receive the full reimbursement of its actual increased costs required by section 6 if its claims for reimbursement of IWM plan costs were offset by realized cost savings and all revenues received from the plan activities.<sup>33</sup>

Instead, the court recognized that community colleges are “*likely* to experience costs savings in the form of reduced or avoided costs of landfill disposal” as a result of the mandated activities in Public Resources Code section 42921 because reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill

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<sup>32</sup> Exhibit A, IRC, pages 37-46 (Parameters and Guidelines, adopted March 30, 2005).

<sup>33</sup> Exhibit B, Controller's Late Comments on the IRC, page 36, footnote 1 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter, Footnote 1).

disposal costs are reduced or avoided.”<sup>34</sup> The court noted that “diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates” and cited the statutory definition of diversion: “activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division [i.e., division 30, including § 42920 et seq.]” as well as the statutory definition of disposal: “the management of solid waste through landfill disposal or transformation at a permitted solid waste facility.”<sup>35</sup> The court explained:

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(l) of Public Resources Code section 42926.<sup>36</sup>

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies

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<sup>34</sup> Exhibit B, Controller’s Late Comments on the IRC, page 36 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

<sup>35</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 36-37 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>36</sup> Exhibit B, Controller’s Late Comments on the IRC, page 37 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>37</sup>

The court issued a writ of mandate directing the Commission to amend the Parameters and Guidelines to require community college districts claiming reimbursable costs of an IWM plan to:

1. Identify and offset from their claims, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1, cost savings realized as a result of implementing their plans; and
2. Identify and offset from their claims all of the revenue generated as a result of implementing their plans, without regard to the limitations or conditions described in sections 12167 and 12167.1 of the Public Contract Code.<sup>38</sup>

### **C. Parameters and Guidelines Amendment Pursuant to the Writ**

In compliance with the writ, the Commission amended the Parameters and Guidelines on September 26, 2008 to add section VIII. Offsetting Cost Savings, which states:

Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1. Pursuant to these statutes, community college districts are required to deposit cost savings resulting from their Integrated Waste Management plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the California Integrated Waste Management Board for the purpose of offsetting Integrated Waste Management plan costs. Subject to the approval of the California Integrated Waste Management Board, cost savings by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting Integrated Waste Management program costs. Cost savings exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature. To the extent so approved or appropriated and applied to the college, these

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<sup>37</sup> Exhibit B, Controller's Late Comments on the IRC, pages 30-39 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>38</sup> Exhibit B, Controller's Late Comments on the IRC, page 45 (Judgment Granting Petition for Writ of Administrative Mandamus).

amounts shall be identified and offset from the costs claimed for implementing the Integrated Waste Management Plan.<sup>39</sup>

Section VII. of the Parameters and Guidelines, on Offsetting Revenues, was amended as follows (amendments in ~~strikeout~~ and underline):

Reimbursement for this mandate from any source, including but not limited to, services fees collected, federal funds, and other state funds allocated to any service provided under this program, shall be identified and ~~deducted~~ offset from this claim. Offsetting revenue shall include all revenues generated from implementing the Integrated Waste Management Plan. ~~the revenues cited in Public Resources Code section 42925 and Public Contract Code sections 12167 and 12167.1.~~

~~Subject to the approval of the California Integrated Waste Management Board, revenues derived from the sale of recyclable materials by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting recycling program costs. Revenues exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature. To the extent so approved or appropriated and applied to the college, these amounts are a reduction to the recycling costs mandated by the state to implement Statutes 1999, chapter 764.~~

In addition, revenue from a building-operating fee imposed pursuant to Education Code section 76375, subdivision (a) if received by a claimant and the revenue is applied to this program, shall be deducted from the costs claimed.<sup>40</sup>

All other requirements in the Parameters and Guidelines remained the same.

CIWMB requested additional amendments to the Parameters and Guidelines at this September 2008 hearing, including a request to alter the offsetting savings provision to require community college districts to provide offsetting savings information *whether or not* the offsetting savings generated in a fiscal year exceeded the \$2,000 continuous appropriation required by Public Contract Code sections 12167 and 12167.1. The Commission denied the request because the proposed language went beyond the scope of the court's judgment and writ.<sup>41</sup>

CIWMB also requested adding a requirement for community college districts to analyze specified categories of potential cost savings when filing their reimbursement claims. The Commission found that the court determined that the amount or value of cost savings is already available from the annual reports the community college districts provide to CIWMB pursuant to Public Resources Code section 42926(b). This report is required to include the district's "calculations of annual disposal reduction" and "information on the changes in waste generated

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<sup>39</sup> Exhibit A, IRC page 58 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>40</sup> Exhibit A, IRC, pages 45, 58-59 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>41</sup> Exhibit E, Commission on State Mandates, Excerpt from the Minutes for the September 26, 2008 Meeting.

or disposed of due to increases or decreases in employees, economics, or other factors.” Thus, the Commission denied CIWMB’s request and adopted the staff analysis finding that the request was beyond the scope of the court’s writ and judgment. The Commission also noted that the request was the subject of separate pending request filed by CIWMB to amend the Parameters and Guidelines and would therefore be further analyzed for that matter.

**D. Subsequent Request by CIWMB to Amend the Parameters and Guidelines to Require Detailed Reports on Cost Savings and Revenues**

CIWMB filed a request to amend the Parameters and Guidelines to require community college districts to submit with their reimbursement claims a separate worksheet and report analyzing the costs incurred and avoided and any fees received relating to staffing, overhead, materials, storage, transportation, equipment, the sale of commodities, avoided disposal fees, and any other revenue received relating to the mandated program as specified by CIWMB. At its January 30, 2009 meeting, the Commission denied the request for the following reasons: there is no requirement in statute or regulation that community college districts perform the analysis specified by CIWMB; the Commission has no authority to impose additional requirements on community college districts regarding this program; the offsetting cost savings paragraph in the Parameters and Guidelines already identifies the offsetting savings consistent with the language of Public Resources Code section 42925(a), Public Contract Code sections 12167 and 12167.1, and the court’s judgment and writ; and information on cost savings is already available in the community colleges’ annual reports submitted to CIWMB, as required by Public Resources Code section 42926(b)(1).<sup>42</sup>

**E. The *Integrated Waste Management* Program Made Optional**

This program was made optional by Statutes 2010, chapter 724 (AB 1610), section 34, effective October 19, 2010 and has remained so since that time.<sup>43</sup>

**F. The Controller’s Audit**

The Controller audited the claimant’s reimbursement claims for fiscal years 1999-2000, 2000-2001 and 2003-2004 through 2005-2006. The claims for fiscal years 2001-2002 and 2002-2003 were not audited because the Controller stated that the statute of limitations to initiate the review had expired for those years.<sup>44</sup>

Of the \$230,988 claimed during the audit period, the Controller found that \$192,741 is allowable and \$38,247 is unallowable because the claimant did not report offsetting savings from implementation of its IWM plan.<sup>45</sup> The Controller found that the claimant reported offsetting savings of \$5,130 during the audit period, but realized total offsetting savings of \$43,377 from

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<sup>42</sup> Exhibit E, Commission on State Mandates, Item 9, Final Staff Analysis of Proposed Amendments to the Parameters and Guidelines for *Integrated Waste Management*, 05-PGA-16, January 30, 2009, pages 2-3.

<sup>43</sup> See Government Code section 17581.5.

<sup>44</sup> Exhibit A, IRC, page 27 (Final Audit Report).

<sup>45</sup> Exhibit A, IRC, page 27 (Final Audit Report). Exhibit B, Controller’s Late Comments on the IRC, page 23.

implementation of its IWM plan. Thus, the claimant understated offsetting savings by \$38,247 (the difference between \$43,377 and \$5,130), which the Controller reduced.<sup>46</sup>

The Controller’s audit finding is based on the court’s ruling, which states, “the amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California community colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926,”<sup>47</sup> the resulting amendment to the Parameters and Guidelines, and the claimant’s annual reports to CIWMB.

The Controller determined that the claimant diverted more solid waste than the percentage mandated by the test claim statute each year of the audit period.<sup>48</sup> Thus, the Controller found that the claimant realized cost savings in each year of the audit period.

For the years the claimant exceeded the diversion mandate, the Controller calculated offsetting cost savings by allocating the diversion to reflect the mandate. To allocate the diversion, the Controller divided the percentage of solid waste required to be diverted (either 25 or 50 percent) by the actual percentage of solid waste diverted (as reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized in those years.<sup>49</sup>

$$\begin{array}{rcccl}
 & & \text{Allocated Diversion \%} & & \\
 & & \left\{ \begin{array}{c} \text{Maximum} \\ \text{Allowable} \end{array} \right. & & \\
 \text{Offsetting} & & \text{Diversion \%} & \times & \text{Tonnage} & \times & \text{Avoided} \\
 \text{Savings} & = & \frac{\text{Actual}}{\text{Actual}} & \times & \text{Diverted} & \times & \text{Landfill} \\
 \text{Realized} & & \text{Diversion \%} & & & & \text{Disposal Fee} \\
 & & & & & & \text{(per Ton)}
 \end{array}$$

The Controller provided an example of how the formula works. For calendar year 2005, the claimant reported diversion of 248 tons of solid waste and disposal of 223.4 tons generated that year. Diverting 248 tons out of the 223.4 tons of waste generated results in a diversion rate of 52.61 percent (exceeding the 50 percent required).<sup>50</sup> To avoid penalizing the claimant for diverting more solid waste than the percentage mandated,<sup>51</sup> the Controller allocated the diversion by dividing the diversion rate mandated by the test claim statute (50 percent) by the actual diversion rate (52.61 percent), which equals 95.04 percent. The 95.04 percent allocated diversion is then multiplied by the 248 tons diverted that year, which equals 235.7 tons of

<sup>46</sup> Exhibit A, IRC, pages 31-32 (Final Audit Report).

<sup>47</sup> Exhibit B, Controller’s Late Comments on the IRC, page 37 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>48</sup> Exhibit B, Controller’s Late Comments on the IRC, page 82.

<sup>49</sup> Exhibit A, IRC, pages 33 (Final Audit Report).

<sup>50</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 16, 82 (Controller’s calculation of offsetting savings).

<sup>51</sup> Exhibit B, Controller’s Late Comments on the IRC, page 16.

diverted solid waste, instead of the 248 tons actually diverted. The allocated 235.7 tons of diverted waste is then multiplied by the statewide average disposal fee per ton, which in calendar year 2005 was \$39, resulting in “offsetting cost savings” for calendar year 2005 of \$9,192.<sup>52</sup>

The Controller pointed out in the audit report that the claimant did not provide documentation supporting different disposal fees to calculate offsetting cost savings.<sup>53</sup>

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

#### **A. Redwoods Community College District**

The claimant maintains that the audit reductions are incorrect and requests the reinstatement of the \$38,247 reduced.

The claimant first argues that the three-year deadline to initiate the audit had expired for fiscal year 2003-2004 when the Controller commenced the audit. According to the claimant: “Pursuant to Chapter 724, Statutes of 2010, an appropriation was made to the District by January 14, 2011, for FY 2003-2004 for \$6,088. The date of payment is a matter of record not available to the District but that can be produced by the Controller.”<sup>54</sup> The claimant cites the audit report that states that the claimant was first contacted by the Controller on January 17, 2014 regarding the audit, which is more than three years after the January 14, 2011 appropriation for the 2003-2004 claim, so the Controller did not have jurisdiction to audit fiscal year 2003-2004.<sup>55</sup>

The claimant next alleges that it did not realize any cost savings as a result of the mandate and quotes the Superior Court decision (discussed above) that cost savings will “most likely” occur as a result of reduced or avoided costs of landfill disposal, arguing:

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<sup>52</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 16, 82 (Controller’s calculations of offsetting savings). Page 16 of the Controller’s Late Comments on the IRC describe the calculation differently than the formula identified in the audit report, but the result is the same. The Controller states that cost savings can be calculated by multiplying the total tonnage generated (solid waste diverted + disposed) by the mandated diversion percentage (25 or 50 percent), times the avoided landfill disposal fee:

For example, in calendar 2005, the district reported to CalRecycle that it diverted 248 tons of solid waste and disposed of 223.40 tons, which results in an overall diversion percentage of 52.61 % (Tab 7). Since the district was required to divert 50% for that year to meet the mandated requirements and comply with the Public Resources Code, it needed to have diverted 235.70 tons (471.4 total tonnage generated x 50%) in order to satisfy the 50% requirement. Therefore, we adjusted our calculation to compute offsetting savings based on 235.70 tons of diverted solid waste rather than 248 tons.

Using this formula also results in cost savings for calendar year 2005 of \$47,832 (471.4 tons generated x 50 percent = 235.7 tons x \$39 = \$9,192).

<sup>53</sup> Exhibit A, IRC, page 34 (Final Audit Report).

<sup>54</sup> Exhibit A, IRC, page 9.

<sup>55</sup> Exhibit A, IRC, page 10.

The court presupposes a previous legal requirement for districts to incur landfill disposal fees to divert solid waste. Thus, potentially relieved of the need to incur new or additional landfill fees for increased waste diversion, a cost savings would occur. There is no finding of fact or law in the court decision or from the Commission Statement of Decision for the test claim for this assumed duty to use landfills.<sup>56</sup>

The claimant further argues that the offsetting savings provision in the Parameters and Guidelines does not assume that the cost savings occurred, but instead requires that the cost savings be *realized*. For the savings to be realized, the claimant contends that the following chain of events are required:

[T]he cost savings must exist (avoided landfill costs); be converted to cash; amounts in excess of \$2,000 per year deposited in the state fund; and, these deposits by the districts appropriated by the Legislature to districts for purposes of mitigating the cost of implementing the plan. None of those prerequisite events occurred so no cost savings were "realized" by the District. Regardless, the adjustment cannot be applied to the District since no state appropriation of the cost savings was made to the District.<sup>57</sup>

The claimant also argues that the Parameters and Guidelines are silent as to how to calculate the avoided costs, but that the court provided two alternative methods, either disposal reduction or diversion reported by districts. The Controller used the diversion percentage, which assumes, without findings of fact, that all diversion tonnage is landfill disposal tonnage reduction. The claimant contends that the Controller's calculation of cost savings is wrong because: (1) the formula is a standard of general application that was not adopted pursuant to the Administrative Procedure Act and is therefore an unenforceable underground regulation; (2) the Controller's formula assumes facts not in evidence, such as applying the diversion percentage reported by the claimant, and assumes that all tonnage diverted would have been disposed in a landfill, although some waste may have been composted or may not apply to the mandate (e.g. paint); and (3) the landfill disposal fee, a statewide average calculated by CIWMB, does not include the data used to generate the average fee amounts, so the average is unknown and unsupported by the audit findings.<sup>58</sup>

The claimant further contends that application of the cost savings formula is incorrect, alleging that:

The District did not claim landfill costs, so there are none to be offset. The adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed. Instead, the total adjustment amount for avoided landfill costs is applied to the total annual claim amounts and thus reduces unrelated salary and benefit costs....<sup>59</sup>

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<sup>56</sup> Exhibit A, IRC, pages 8-10.

<sup>57</sup> Exhibit A, IRC, pages 13-14. Emphasis in original.

<sup>58</sup> Exhibit A, IRC, pages 14-17.

<sup>59</sup> Exhibit A, IRC, page 17.

Moreover, the Controller's calculation method prevents the claimant from receiving full reimbursement for its actual increased program costs. The claimant contends, using audit results for 26 other claimants under the *Integrated Waste Management* program, the application of the Controller's formula has arbitrary results because the percentages of allowed costs for those claimants ranges from zero to 83.4 percent.<sup>60</sup>

According to the claimant, the audit report erroneously recognized \$5,130 as reported offsetting savings, when in fact, that amount is offsetting recycling revenue.<sup>61</sup> The claimant therefore contends that it "properly reported the recycling income as a reduction of total claimed cost[s] and also not subject to state appropriation in the form of cost savings."<sup>62</sup> The claimant requests that the Commission make a finding on this adjustment.<sup>63</sup>

Finally, the claimant argues: (1) the Controller used the wrong standard of review in that the claimed costs were not found to be excessive or unreasonable, as required by Government Code section 17561(d)(2); and (2) the Controller has the burden of proof as to the propriety of its audit findings "because it bears the burden of going forward and because it is the party with the power to create, maintain, and provide evidence regarding its auditing methods and procedures, as well as the specific facts relied upon for its audit findings."<sup>64</sup>

The claimant did not file comments on the Draft Proposed Decision.

#### **B. State Controller's Office**

The Controller maintains that the audit findings are correct. The Controller first argues that it complied with the three-year audit deadline in Government Code section 17558.5, in that it paid the claimant for the fiscal year 2003-2004 reimbursement claim on January 28, 2011, and notified the district of payments made pursuant to Chapter 724, Statutes 2010, totaling \$101,410. Because it initiated the audit on January 17, 2014, within the three-year deadline, the Controller had jurisdiction to audit the claim for fiscal year 2003-2004.<sup>65</sup>

The Controller states that the claimant understated offsetting cost savings of \$38,247 from implementation of its IWM plan.<sup>66</sup>

Regarding the claimant's statement that there is only a presumption to incur landfill disposal fees to dispose of solid waste, the Controller notes that the claimant does not indicate "that it disposed of its solid waste at any location other than a landfill or used any other methodology to dispose of its waste rather than to contract with a commercial waste hauler. Therefore, comments relating to legal requirements regarding alternatives for the disposal of solid waste are

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<sup>60</sup> Exhibit A, IRC, pages 17-18.

<sup>61</sup> Exhibit A, IRC, page 19.

<sup>62</sup> Exhibit A, IRC, page 20.

<sup>63</sup> Exhibit A, IRC, page 22.

<sup>64</sup> Exhibit A, IRC, page 21.

<sup>65</sup> Exhibit B, Controller's Late Comments on the IRC, pages 10-11.

<sup>66</sup> Exhibit B, Controller's Late Comments on the IRC, page 11.

irrelevant.”<sup>67</sup> The Controller cites some of the claimant’s annual reports to indicate that it disposed of solid waste and contracted with a waste hauler during the audit period.<sup>68</sup> The Controller also found that the claimant’s website referred to diversion from a landfill.<sup>69</sup> As the Controller points out:

Unless the district had an undisclosed arrangement with its contract waste hauler, the district did not dispose of its solid waste at a landfill for no cost. As noted by the district in its reports to CalRecycle (**Tab 7**) and on its website (**Tab 8**), the district realized savings as a direct result of its IWM plan. For example, two of the district’s campus sites are located in Eureka, California. An internet search for landfill fees revealed that the Hawthorne Street Transfer Station in Eureka, California, currently charges \$154.28 per ton to dispose of solid waste (**Tab 9**). Therefore, the higher the rate of diversion, the less trash that is disposed at a landfill, resulting in cost savings to the district.<sup>70</sup>

The Controller also pointed to a statement on the claimant’s website in which the claimant acknowledged cost savings from its diversion activities, noting: “the district states ‘With the advent of AB 939 and the continuous increase of costs at the landfill, the College realized that reduction in waste to the landfill also equated to a reduction in budgetary costs.’”<sup>71</sup>

As to the claimant not remitting cost savings from the implementation of its IWM plan into the Integrated Waste Management Account in compliance with the Public Contract Code, the Controller asserts that the claimant is not precluded from the requirement to do so, as indicated in the Parameters and Guidelines and the court ruling. The Controller says the claimant’s statements support that the claimant realized cost savings from implementing its IWM plan.<sup>72</sup>

The Controller disagrees with the claimant’s argument that the formula is a standard of general application that is an underground regulation because it used a “court approved methodology” to determine the “required offset.” The Controller also states that the claimant did not amend any of its reimbursement claims after the Parameters and Guidelines were amended in September 2008. According to the Controller: “We believe that this ‘court identified’ approach provides a reasonable methodology to identify the applicable offsets.”<sup>73</sup>

The Controller also states that it “allocated” the offsetting savings to avoid penalizing the claimant for diverting more than the minimum rate of diversion required during the audit period.<sup>74</sup> According to the Controller:

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<sup>67</sup> Exhibit B, Controller’s Late Comments on the IRC, page 14.

<sup>68</sup> Exhibit B, Controller’s Late Comments on the IRC, page 14.

<sup>69</sup> Exhibit B, Controller’s Late Comments on the IRC, page 14.

<sup>70</sup> Exhibit B, Controller’s Late Comments on the IRC, page 14.

<sup>71</sup> Exhibit B, Controller’s Late Comments on the IRC, page 14.

<sup>72</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>73</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 15-16.

<sup>74</sup> Exhibit B, Controller’s Late Comments on the IRC, page 16.

Since there is no State mandate to exceed solid waste diversion greater than 25% for calendar years 2002 and 2003 or greater than 50% for calendar year 2004 and beyond, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceeded the levels set by statute.<sup>75</sup>

The Controller also responded to the claimant's argument against the assumption that all tonnage diverted would have been disposed in a landfill, even though some waste may have been composted or may not apply to the mandate. The Controller states,

We believe that the district is stating that they have always composted green waste and would not incur a cost to dispose of this waste at the landfill; therefore, to include the composted tonnage in the offsetting savings calculation is incorrect. We disagree. As a result of this mandated program, the district is claiming approximately \$9,000 in salaries and benefits for its gardeners to 'divert solid waste from landfill disposal or transformation facilities - composting.' (**Tab 13**) Therefore, it seems reasonable that the correlated landfill fees that the district did not incur for the composted materials resulted in savings to the district.<sup>76</sup>

The Controller also states that the claimant's reference to paint disposal is irrelevant because hazardous waste is not included in the diversion amounts that the claimant reported, and therefore, are not included in the Controller's offsetting savings calculation.<sup>77</sup>

Regarding the data for the statewide disposal fee, the Controller states the information was provided by CIWMB, is included in the record, and is based on private surveys of a large percentage of landfills across California. The Controller cites its internet search for landfill fees that revealed that "the Hawthorne Street Transfer Station in Eureka, California, currently charges \$154.28 per ton to dispose of solid waste (**Tab 9**). Therefore, we believe that the \$36 to \$46 'statewide average disposal fee' used to calculate the offsetting savings realized by the district is reasonable."<sup>78</sup> The Controller also notes that "the district did not provide any information, such as its contract with or invoices received from its commercial waste hauler (Eel River Disposal) to support either the landfill fees actually incurred by the district or to confirm that the statewide average landfill fee was greater than landfill fees incurred by the district."<sup>79</sup>

In response to the claimant's argument that it did not claim landfill costs, so there are none to offset, the Controller answers that the mandated program does not reimburse claimants for landfill costs incurred to dispose of solid waste, so none would be claimable. Rather, the program reimburses claimants' costs to divert solid waste from disposal, which according to the Controller, results in both a reduction of solid waste going to a landfill and the associated costs

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<sup>75</sup> Exhibit B, Controller's Late Comments on the IRC, page 16.

<sup>76</sup> Exhibit B, Controller's Late Comments on the IRC, page 17.

<sup>77</sup> Exhibit B, Controller's Late Comments on the IRC, page 17.

<sup>78</sup> Exhibit B, Controller's Late Comments on the IRC, page 17.

<sup>79</sup> Exhibit B, Controller's Late Comments on the IRC, pages 17-18.

of having the waste hauled there, which creates offsetting savings that the claimant is required to identify in its mandated cost claims.<sup>80</sup>

In response to the claimant's argument that "the adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed," the Controller quotes Public Resources Code section 42925 which provides that "cost savings realized as a result of the IWM plan are to "fund plan *implementation and administration costs*."<sup>81</sup> The Controller argues that offsetting savings applies to the whole program and is not limited to solid waste diversion activities. The Controller also cites the reimbursable activities in the Parameters and Guidelines that refer to "implementation of the IWM plan," concluding that it is reasonable that offsetting savings from implementing the plan be offset against direct costs to implement the plan.<sup>82</sup>

The Controller also commented on the claimant's allegation that the audit report erroneously recognized \$5,130 as the claimed offsetting recycling revenues, although \$7,941 of offsetting revenue and other reimbursements was reported and offset by the District. The Controller states:

The district's statement that the review report recognized \$5,130 as offsetting recycling revenues is incorrect. The review report (Exhibit A page 30 of 190) shows \$2,811 of offsetting revenues and reimbursements and \$5,130 as offsetting savings on page 2 of the report's Summary of Program Costs schedule (Attachment 1). In addition, the report identifies \$5,130 as offsetting savings reported by the district in the report's Finding and Recommendation (Attachment 3). ... In its response, the district states that the total amount of \$7,941 (\$5,130 plus \$2,811) was entirely related to recycling revenues. If that is the case, then the district did not properly follow SCO's Claiming Instructions (**Exhibit C**) for reporting offsetting savings and other reimbursements. The district did not provide any evidence in its claims or in its IRC filing supporting the amounts that it realized as recycling revenues.<sup>83</sup>

Finally, the Controller disagrees with claimant's argument that the Controller used the wrong standard of review. The Controller cites the statute that authorizes it to audit the claimant's records to verify actual mandate-related costs *and* reduce any claim that is excessive or unreasonable. In this case, the claims were excessive because the claimant's "mandated cost claims exceeded the proper amount based on the reimbursable costs allowable per statutory language and the program's parameters and guidelines."<sup>84</sup> As to the burden of proof, the Controller states that it used data from the claimant's annual reports to CIWMB from implementing its IWM program.<sup>85</sup>

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<sup>80</sup> Exhibit B, Controller's Late Comments on the IRC, page 18.

<sup>81</sup> Public Resources Code section 42925. Emphasis added.

<sup>82</sup> Exhibit B, Controller's Late Comments on the IRC, pages 18-19.

<sup>83</sup> Exhibit B, Controller's Late Comments on the IRC, pages 20-21.

<sup>84</sup> Exhibit B, Controller's Late Comments on the IRC, page 22.

<sup>85</sup> Exhibit B, Controller's Late Comments on the IRC, pages 22.

In comments on the Draft Proposed Decision, the Controller agreed with the conclusions that the audit was initiated and completed on time, and that the reductions for all years in the audit period were correct except for the first half of fiscal year 2003-2004. The Controller also agreed to reinstate \$2,431 to the claimant for the first half of fiscal year 2003-2004, “the reduction of which the Commission concluded was incorrect as a matter of law.”<sup>86</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 if the Controller determines that the claim 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 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>87</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>88</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>89</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

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<sup>86</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

<sup>87</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>88</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>89</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space Dist.* (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.

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>90</sup>

The Commission must review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>91</sup> In addition, sections 1185.1(f)(3) and 1185.2(d) and (e) 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>92</sup>

**A. The Controller Timely Initiated the Audit for Fiscal Year 2003-2004 and Timely Completed the Audit of All Claims.**

Government Code section 17558.5 requires an audit to be initiated no later than three years after the date the reimbursement claim is filed or last amended. However, section 17558.5 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>93</sup> “In any case,” section 17558.5 requires the audit to be completed no later than two years after it is commenced.<sup>94</sup>

1. The audit of the 2003-2004 reimbursement claim was timely initiated.

The claimant signed its 2003-2004 reimbursement claim on September 30, 2005,<sup>95</sup> and filed the reimbursement claim with the State Controller’s Office on October 7, 2005.<sup>96</sup> However, the State did not apportion funds or pay the 2003-2004 reimbursement claim until January 2011. The claimant alleges that appropriations were made to the claimant by January 14, 2011 for the 2003-2004 reimbursement claim, and that the Controller initiated the audit more than three years later on January 17, 2014, according to the final audit report. Therefore, the claimant asserts that the Controller did not timely initiate the audit.<sup>97</sup>

Government Code section 17558.5(a) tolls the time to initiate the audit to three years from the date of initial payment on the claim, rather than three years from the date the claim was filed, “if

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<sup>90</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>91</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>92</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>93</sup> Government Code section 17558.5 (as amended, Stats. 2002, ch. 1128 (AB 2834)).

<sup>94</sup> Government Code section 17558.5 (as amended, Stats. 2004, ch. 890 (AB 2856)).

<sup>95</sup> Exhibit A, IRC, page 164.

<sup>96</sup> Exhibit B, Controller’s Late Comments on the IRC, page 16.

<sup>97</sup> Exhibit A, IRC, pages 9-10.

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,” as follows:

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, whichever is later. However, 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*. In any case, an audit shall be completed not later than two years after the date that the audit is commenced.<sup>98</sup>

Although the Controller agrees that payment was first made on the 2003-2004 claim in January 2011, the parties dispute the date of payment. The claimant alleges:

Pursuant to Chapter 724, Statutes of 2010, appropriations were made to the District by January 14, 2011, for FY 2003-2004 for \$6,088. The date of payment is a matter of record not available to the District but that can be produced by the Controller.<sup>99</sup>

There is no evidence in the record, however, to support the claimant’s assertion that payment was made on January 14, 2011. Rather, the record supports a finding that payment was first made on the 2000-2001 reimbursement claims on either January 18, 2011, or January 28, 2011.

The claimant filed, as part of its IRC, a copy of a notice from the Controller to the claimant dated April 18, 2014 (following the audit), showing the audit adjustment to the 2003-2004 reimbursement claim, and noting a payment on this reimbursement claim on *January 18, 2011* by “Schedule No. AP00123A” of \$6,088. The letter states in pertinent part:

FIELD AUDIT FINDINGS	-	8,625.00
TOTAL ADJUSTMENTS		<u>- 8,625.00</u>
LESS PRIOR PAYMENT: SCHEDULE NO. AP00123A		
<b>PAID 01-18-2011</b>		<u>- 6,088.00</u>
AMOUNT DUE CLAIMANT		- 47,101.00 <sup>100</sup>

The Controller asserts that payment was first made on the reimbursement claims on *January 28, 2011*, pursuant to Statutes of 2010, chapter 724 (AB 1610, eff. Oct. 19, 2010).<sup>101</sup>

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<sup>98</sup> Emphasis added. This is the current version of section 17558.5, and the version in effect when these reimbursement claim was filed in October 2005 (Exhibit A, IRC, p. 171).

<sup>99</sup> Exhibit A, IRC, page 9.

<sup>100</sup> Exhibit A, IRC, page 188. Emphasis added.

<sup>101</sup> Exhibit A, IRC, pages 29, 30 footnote 3 (Final Audit Report – “Payment from funds appropriated under Chapter 724, Statutes of 2010.”). Exhibit B, Controller’s Late Comments on the IRC, page 11 (“The SCO sent a remittance advice to the district dated January 28, 2011 (Tab

That statute appropriated funds to offset the outstanding balance of the State's minimum funding obligation under Proposition 98 to school districts and community college districts, and required that funds first be paid in satisfaction of any outstanding claims for reimbursement of state-mandated costs. The Controller filed a copy of a remittance advice showing payments to the claimant under AB 1610 for several state-mandated programs, including \$6,088 for the *Integrated Waste Management* program for fiscal year 2003-2004 in "CLAIM SCHEDULE NUMBER: 1000149A, PAYMENT ISSUE DATE: 01/28/2011."<sup>102</sup>

The Controller has not explained the discrepancy between the notice indicating payment of \$6,088 for the 2003-2004 reimbursement claim on January 18, 2011 by "Schedule No. AP00123A," and the remittance advice indicating payment for the 2003-2004 reimbursement claims on January 28, 2011 by "Schedule Number: 1000149A." Nevertheless, the Controller issued both documents that support a finding that payment was first made on the 2003-2004 reimbursement claim on either January 18, 2011, or January 28, 2011.

As indicated above, Government Codes section 17558.5(a) tolls the time to initiate the audit of a claim "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," to three years from the date of initial payment on the claim. Therefore, using the earlier of the two dates in documents showing payment on the 2003-2004 reimbursement claim on January 18, 2011, the Controller had until January 18, 2014 to initiate the audit of the 2003-2004 reimbursement claim.

The Legislature has not specifically defined the event that initiates the audit and, unlike other auditing agencies,<sup>103</sup> the Controller has not adopted formal regulations (which can be viewed as the controlling interpretation of a statute), to clarify when the audit of a mandate reimbursement claim begins. Therefore, the Commission cannot, as a matter of law, state the event that initiates an audit in all cases, but must determine when the audit was initiated based on evidence in the record. Initiating an audit requires a unilateral act of the Controller. In this respect, Government Code section 17558.5(a) can be characterized as a statute of repose because it provides a period during which an audit has been commenced, and after which claimants may enjoy repose, dispose of evidence to support their claims, and assert a defense that the audit is not timely and therefore void.<sup>104</sup> Since the Controller's authority to audit must be exercised within a specified time, it must be within the Controller's exclusive control to meet or fail to meet the deadline. The Controller has the burden of proof on this issue and must show with evidence in the record that the claimant was notified that an audit was being initiated by the statutory deadline to ensure that the claimant does not dispose of any evidence or documentation to support its claim for reimbursement.

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4), notifying the district of payments made on that date pursuant to Chapter 724, Statutes 2010 (Assembly Bill No. 1610) totaling \$101,410.")

<sup>102</sup> Exhibit B, Controller's Late Comments on the IRC, pages 28-30.

<sup>103</sup> See, e.g., regulations adopted by the California Board of Equalization (title 18, section 1698.5, stating that an "audit engagement letter" is a letter "used by Board staff to confirm the start of an audit or establish contact with the taxpayer").

<sup>104</sup> *Giest v. Sequoia Ventures, Inc.* (2000) 83 Cal.App.4th 300, 305.

The Controller asserts that the audit began on January 17, 2014, before the January 18, 2014 deadline. In support, the Controller filed a declaration by Jim Spano (Chief, Mandated Cost Audits Bureau, Division of Audits), stating under penalty of perjury that “a review of the claims . . . commenced on January 17, 2014, . . . .”<sup>105</sup> The Controller also filed a copy of an email dated January 17, 2014, from an audit manager at the Controller’s Office to the claimant, as evidence of the Controller’s initial contact with the claimant about the audit. The email states in relevant part:

I am contacting you because the State Controller’s Office will be adjusting the district’s Integrated Waste Management claims for FY 1999-2000 through FY 2000-01, and FY 2003-04 through FY 2005-06 because the district did not offset any savings (e.g. avoided landfill disposal fees) received as a result of implementing the districts’ IWM Plan.

I will notify you, via email, of the exact adjustment amount later next week. Also, included in this email, will be documentation to support the adjustment.<sup>106</sup>

The claimant concurs that the audit was initiated by the Controller’s initial contact on January 17, 2014.<sup>107</sup>

Accordingly, the Commission finds that the Controller timely initiated the audit of the fiscal year 2003-2004 reimbursement claim, pursuant to Government Code section 17558.5(a), on January 17, 2014.

2. The audit was timely completed.

Government Code section 17558.5 provides that an audit must be completed “not later than two years after the date that the audit is commenced.”<sup>108</sup> As indicated above, the audit was initiated on January 17, 2014, the date of the Controller’s initial contact with the claimant about the audit and thus, had to be completed no later than January 17, 2016. 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 the claimant with written notice of the claim components adjusted, the amounts adjusted, and the reasons for the adjustment.<sup>109</sup> This notice enables the claimant to file an IRC. Here, the final audit report was issued April 11, 2014, well before the January 17, 2016 deadline.<sup>110</sup>

Therefore, the Commission finds that the Controller’s audit of all reimbursement claims in the audit period was timely completed in accordance with Government Code section 17558.5.

**B. The Controller’s Reduction of Costs Claimed Is Generally Correct as a Matter of Law; However, the Calculation of Offsetting Savings for the First Half of Fiscal**

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<sup>105</sup> Exhibit B, Controller’s Late Comments on the IRC, page 5.

<sup>106</sup> Exhibit B, Controller’s Late Comments on the IRC, page 25. Emphasis in original.

<sup>107</sup> Exhibit A, IRC, page 25.

<sup>108</sup> Government Code section 17558.5 (Stats. 2004, ch. 890).

<sup>109</sup> Government Code section 17558(c).

<sup>110</sup> Exhibit A, IRC, page 27 (Final Audit Report).

**Year 2003-2004, Based on a 50 Percent Mandated Diversion Rate, Is Incorrect as a Matter of Law.**

1. The test claim statutes presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized.

The test claim statute added Public Resources Code section 42925(a), which provides: “Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code.”

The court’s Ruling on Submitted Matter states that community colleges are “likely to experience costs savings in the form of reduced or avoided costs of landfill disposal” as a result of the mandated activities in Public Resources Code section 42921 because reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.” The court noted that “diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates.” The statutory definition of diversion provides that “activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division.” And the statutory definition of disposal is “the management of solid waste through landfill disposal or transformation at a permitted solid waste facility.”<sup>111</sup> The court explained:

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926.<sup>112</sup>

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost

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<sup>111</sup> Public Resources Code sections 40124 and 40192(b). Exhibit B, Controller’s Late Comments on the IRC, pages 36-37 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>112</sup> Exhibit B, Controller’s Late Comments on the IRC, page 37 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

savings realized from state agencies' IWM plans are handled in a manner consistent with the handling of revenues received from state agencies' recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>113</sup>

Thus, the court found that offsetting savings are, by statutory definition, likely to occur as a result of implementing the mandated activities. Reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.”<sup>114</sup> As the court held, “landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs. . . .”<sup>115</sup>

The statutes, therefore, presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. As indicated in the court's ruling, the amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB. The amount of cost savings realized must be identified by the claimant and used to offset the costs incurred to comply with IWM plan implementation and administration activities approved for reimbursement in the Parameters and Guidelines. Accordingly, the court's ruling requires claimants to report in their reimbursement

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<sup>113</sup> Exhibit B, Controller's Late Comments on the IRC, pages 38-39 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>114</sup> Exhibit B, Controller's Late Comments on the IRC, page 36 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>115</sup> Exhibit B, Controller's Late Comments on the IRC, page 37 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

claims the costs incurred to comply with the reimbursable activities (which includes the activities and costs to divert at least 25 or 50 percent of all solid waste from landfill disposal) and the cost savings from the avoided landfill disposal fees, for a reimbursement claim of the net increased costs.

The Parameters and Guidelines are consistent with the court's ruling and require in Section IV. that "[t]he claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate."<sup>116</sup> Section VIII. requires that "[r]educed or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1."<sup>117</sup> The court's decision and the amended Parameters and Guidelines are binding.<sup>118</sup>

2. During the audit period, the claimant exceeded the mandated solid waste diversion rate, but has filed no evidence to rebut the presumption that cost savings were realized. Thus, the Controller's finding that the claimant realized cost savings is correct as a matter of law.

In this case, the claimant asserts that no cost savings were realized, but does not explain why.<sup>119</sup>

The mandate requires community colleges to divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, through source reduction, recycling, and composting activities, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004.<sup>120</sup> The record shows that the claimant exceeded the mandated diversion rate in each year of the audit period. The claimant's annual reports to CIWMB for the audit period report diversion percentages that range from 52.22 percent to 83.99 percent of the total waste generated.<sup>121</sup>

The record shows that the claimant's solid waste that was not diverted was disposed of at a landfill by a waste hauler. The claimant's annual reports filed with CIWMB during the audit period identify the total tonnage of waste disposed<sup>122</sup> and the use of a waste hauler.<sup>123</sup> For example, in its 2000 report, the claimant states: "The contract with the waste hauler contains language that provides recycling bins for free, and hauling of the recycled materials is also

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<sup>116</sup> Exhibit A, IRC, page 53 (Parameters and Guidelines).

<sup>117</sup> Exhibit A, IRC, page 58 (Parameters and Guidelines).

<sup>118</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

<sup>119</sup> Exhibit A, IRC, page 10.

<sup>120</sup> Public Resources Code sections 42921. Exhibit A, IRC, pages 50 and 54 (Parameters and Guidelines, section IV.(B)(5)).

<sup>121</sup> Exhibit B, Controller's Late Comments on the IRC, pages 48-73 and 82.

<sup>122</sup> Exhibit B, Controller's Late Comments on the IRC, pages 48-73.

<sup>123</sup> Exhibit B, Controller's Late Comments on the IRC, pages 50, 52, 57, 61, 66, 71.

free.”<sup>124</sup> The annual reports also mention, in response to the question regarding calculation of tonnage of waste disposed and diverted, that the claimant relied on quarterly reports from its waste hauler.<sup>125</sup> Reports from 2003 forward state that claimant collaborated with a waste hauler.<sup>126</sup>

The claimant also mentions landfill diversion in its reports, stating: “to lower costs and decrease the amount of waste being disposed into landfills, College of the Redwoods has instituted waste reduction programs at all CR campuses”<sup>127</sup> Additionally, statements from the claimant’s website indicate the use of a landfill. For example, after beginning its recycling program, “the College reduced waste to the landfill by 60%.”<sup>128</sup> The website also speaks of seeking ways to “reduce, recycle, and re-use material that in the past have normally gone to the landfill.”<sup>129</sup>

The avoided landfill disposal fee was based on the statewide average disposal fee provided by CIWMB for each fiscal year in the audit period, since the claimant did not provide any information to the Controller regarding the landfill fees it was charged.<sup>130</sup>

Based on this documentation, the Controller correctly presumed, consistent with the presumption in the test claim statutes and the court’s interpretation of those statutes and with no evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted.

The statutory presumption of cost savings controls unless the claimant files evidence to rebut the presumption and shows that cost savings were not realized.<sup>131</sup> The claimant has the burden of proof on this issue. Under the mandates statutes and regulations, the claimant is required to show that it has incurred increased costs mandated by the state when submitting a reimbursement claim to the Controller’s Office, and the burden to show that any reduction made by the

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<sup>124</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 50.

<sup>125</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 52, 57, 61, 66, 71.

<sup>126</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 56, 60, 65, 70.

<sup>127</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 56, 61, 66, 71.

<sup>128</sup> Exhibit B, Controller’s Late Comments on the IRC, page 75.

<sup>129</sup> Exhibit B, Controller’s Late Comments on the IRC, page 77.

<sup>130</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 17-18, 101-123.

<sup>131</sup> Government Code section 17559, which requires that the Commission’s decisions be supported by substantial evidence in the record. See also, *Coffy v. Shiimoto* (2015) 60 Cal.4th 1198, 1209, a case interpreting the rebuttable presumption in Vehicle Code section 23152 that if a person had 0.08 percent or more, by weight, of alcohol in the blood at the time of testing, then it is presumed by law that he or she had 0.08 percent or more, by weight, of alcohol in the blood at the time of driving, unless he or she files evidence to rebut the presumption. The court states that unless and until evidence is introduced that would support a finding that the presumption does not exist, the statutory presumption that the person was driving over the legal limit remains the finding of fact.

Controller is incorrect.<sup>132</sup> The Parameters and Guidelines, as amended pursuant to the court’s writ, also require claimants to show the costs incurred to divert solid waste and to perform the administrative activities, and *to report and identify* the costs saved or avoided by diverting solid waste: “Reduced or avoided costs realized from implementation of the community college districts’ Integrated Waste Management plans *shall be* identified and offset from this claim as cost savings.”<sup>133</sup> Thus, the claimant has the burden to rebut the statutory presumption and to show, with substantial evidence in the record, that the costs of complying with the mandate exceed any cost savings realized by diverting solid waste.

The Commission finds that since the claimant has not filed any evidence to rebut the statutory presumption of cost savings, the Controller’s finding that cost savings have been realized is correct as a matter of law.

3. For all years of the audit period except the first half of fiscal year 2003-2004, the Controller’s calculation of cost savings is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

The Controller correctly determined that during the audit period, the claimant diverted solid waste, as mandated by the test claim statute, and exceeded the minimum required diversion rate

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<sup>132</sup> Evidence Code section 500, which states: “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” See also, *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 24, where the court recognized that “the general principle of Evidence Code 500 is that a party who seeks a court’s action in his favor bears the burden of persuasion thereon.” This burden of proof is recognized throughout the architecture of the mandates statutes and regulations. Government Code section 17551(a) requires the Commission to hear and decide a claim filed by a local agency or school district that it is entitled to reimbursement under article XIII B, section 6. Section 17551(d) requires the Commission to hear and decide a claim by a local agency or school district that the Controller has incorrectly reduced payments to the local agency or school district. In these claims, the claimant must show that it has incurred increased costs mandated by the state. (Gov. Code, §§ 17514 [defining “costs mandated by the state”], 17560(a) [“A local agency or school district may . . . file an annual reimbursement claim that details the costs actually incurred for that fiscal year.”]; 17561 [providing that the issuance of the Controller’s claiming instructions constitutes a notice of the right of local agencies and school districts to file reimbursement claims based upon the parameters and guidelines, and authorizing the Controller to audit the records of any local agency or school district to “verify the actual amount of the mandated costs.”]; 17558.7(a) [“If the Controller reduces a claim approved by the commission, the claimant may file with the commission an incorrect reduction claim pursuant to regulations adopted by the commission.”]. By statute, only the local agency or school district may bring these claims, and the local entity must present and prove its claim that it is entitled to reimbursement. (See also, Cal. Code Regs., tit. 2, §§ 1185.1, et seq., which requires that the IRC contain a narrative that describes the alleged incorrect reductions, and be signed under penalty of perjury.)

<sup>133</sup> Exhibit A, IRC, page 58 (Amended Parameters and Guidelines). Emphasis added.

every year of the audit period.<sup>134</sup> Because the claimant exceeded the mandate, the Controller calculated offsetting savings by allocating the diversion to reflect the mandate. The Controller allocated the diversion by dividing the percentage of solid waste required to be diverted by the test claim statute (either 25 percent or 50 percent) by the actual percentage of solid waste diverted (as annually reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized.<sup>135</sup>

$$\begin{array}{rcc}
 & \text{Allocated Diversion \%} & \\
 & \text{Maximum Allowable} & \\
 \text{Offsetting Savings} & = \frac{\text{Diversion \%}}{\text{Actual Diversion \%}} & \times \text{Tonnage Diverted} \times \text{Avoided Landfill Disposal Fee (per Ton)} \\
 \text{Realized} & & 
 \end{array}$$

The formula allocates or reduces cost savings based on the mandated rate, and is intended to avoid penalizing the claimant for diverting more solid waste than the percentage mandated by law.<sup>136</sup>

This formula is consistent with the statutory presumption of cost savings, as interpreted by the court for this program, and the requirements in the Parameters and Guidelines. The court found that the test claim statutes require that reduced or avoided landfill fees represent savings that must be offset against the cost of diversion. The court stated: “The amount or value of the [offsetting cost] savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report” to CIWMB.<sup>137</sup> The Parameters and Guidelines state: “Reduced or avoided costs realized from implementation of the community college districts’ Integrated Waste Management plans shall be identified and offset from this claim as cost savings . . . .”<sup>138</sup> Thus, the Controller’s formula correctly presumes, based on the record and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted. And when the claimant exceeded the mandated diversion rates, the Controller’s formula limited the offset to reflect the mandated rate.

The claimant raises several arguments, unsupported by the law or evidence in the record, that the Controller’s calculation of cost savings is incorrect.

The claimant first alleges that cost savings cannot be realized because the chain of events required by Public Contract Code sections 12167 and 12167.1 did not occur: that savings have

<sup>134</sup> Exhibit B, Controller’s Late Comments on the IRC, page 82.

<sup>135</sup> Exhibit A, IRC, pages 33; Exhibit B, Controller’s Late Comments on the IRC, page 16.

<sup>136</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 16.

<sup>137</sup> Exhibit B, Controller’s Late Comments on the IRC, page 37 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>138</sup> Exhibit A, IRC page 58 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

to be converted to cash, and amounts in excess of \$2,000 per year must be deposited in the state fund and appropriated back by the Legislature to mitigate the costs.<sup>139</sup> It is undisputed that the claimant did not remit to the state any savings realized from the implementation of the IWM plan.<sup>140</sup> However, as indicated above, cost savings are presumed by the statutes and the claimant has not filed evidence to rebut that presumption. Thus, the claimant should have deposited the cost savings into the state's account as required by the test claim statutes, and the claimant's failure to comply with the law does not make the Controller's calculations of cost savings incorrect as a matter of law, or arbitrary or capricious. Since cost savings are presumed by the statutes, the claimant has the burden to show increased costs mandated by the state. As the court stated: "[r]eimbursement is not available under section 6 and section 17514 to the extent that a local government or school district is able to provide the mandated program or increased level of service without actually incurring increased costs."<sup>141</sup>

The claimant next asserts that the Controller's formula is an underground regulation.<sup>142</sup> The Commission disagrees. Government Code section 11340.5 provides that no state agency shall enforce or attempt to enforce a rule or criterion which is a regulation, as defined in section 11342.600, unless it has been adopted pursuant to the Administrative Procedures Act. As discussed above, however, the formula is consistent with the statutory presumption of cost savings, as interpreted by the court for this program. Interpretations that arise in the course of case-specific adjudications are not regulations.<sup>143</sup>

The claimant also argues that using landfill fees in the calculation of offsetting savings is not relevant because "[t]he District did not claim landfill costs, so there are none to be offset."<sup>144</sup> The claimant's interpretation of the cost savings requirement is not correct. The cost of disposing waste at a landfill is not eligible for reimbursement. Reimbursement is authorized to *divert* solid waste from the landfill through source reduction, recycling, and composting activities.<sup>145</sup> As explained by the court:

In complying with the mandated solid waste diversion requirements of Public Resources Code section 42921, California Community Colleges are likely to experience cost savings in the form of reduced or avoided costs of landfill disposal. The reduced or avoided costs are a direct result and an integral part of the mandated IWM plan ....

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<sup>139</sup> Exhibit A, IRC, pages 13-14.

<sup>140</sup> Exhibit B, Controller's Late Comments on the IRC, page 15.

<sup>141</sup> Exhibit B, Controller's Late Comments on the IRC, page 36 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>142</sup> Exhibit A, IRC, page 15.

<sup>143</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>144</sup> Exhibit A, IRC, page 17.

<sup>145</sup> Exhibit A, IRC, page 54 (Parameters and Guidelines).

Such reduction or avoidance of landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings which must be offset against the costs of the diversion activities to determine the reimbursable costs of IWM plan implementation -- i.e., the actual increased costs of diversion -- under section 6 and section 17514.<sup>146</sup>

The court also noted that diversion is defined as “activities which reduce or eliminate the amount of solid waste from solid waste disposal.”<sup>147</sup>

In addition, the claimant argues that the formula assumes facts without evidence in the record. For example, the claimant questions the Controller’s assumption that all diverted waste would have been disposed in a landfill, and that the statewide average cost to dispose of waste at a landfill actually applied to the claimant.<sup>148</sup>

The Controller’s assumptions, however, are supported by evidence in the record and the claimant has filed no evidence to rebut them.

The Controller obtained the statewide average cost for landfill disposal fees from CIWMB. The fees were based on a private survey of a large percentage of landfills across California.<sup>149</sup> The Controller’s audit report indicates that the claimant did not provide documentation to support a different disposal fee.<sup>150</sup> In addition, the Controller states:

[A]n internet search for landfill fees revealed that the Hawthorne Street Transfer Station in Eureka, California, currently charges \$154.28 per ton to dispose of solid waste (Tab 9). Therefore, we believe that the \$36 to \$46 "statewide average disposal fee" used to calculate the offsetting savings realized by the district is reasonable. In addition, the district did not provide any information, such as its contract with or invoices received from its commercial waste hauler (Eel River Disposal) to support either the landfill fees actually incurred by the district or to confirm that the statewide average landfill fee was greater than landfill fees incurred by the district.<sup>151</sup>

On these audit issues, the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. The Commission must only ensure that the Controller’s decision is not

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<sup>146</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 36-37 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>147</sup> Public Resources Code section 40124. Exhibit B, Controller’s Late Comments on the IRC, page 36 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>148</sup> Exhibit A, IRC, pages 15-17.

<sup>149</sup> Exhibit B, Controller’s Late Comments on the IRC, page 17.

<sup>150</sup> Exhibit A, IRC, page 34.

<sup>151</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 17-18.

arbitrary, capricious, or entirely lacking in evidentiary support, and adequately considered all relevant factors.<sup>152</sup> There is no evidence that the Controller's assumptions are wrong or arbitrary or capricious with regard to the statewide average landfill fee.

The claimant also points to the Controller's audits of other community college districts, arguing that the Controller's audit results in those cases vary and are arbitrary.<sup>153</sup> The Controller's audits of other community college district reimbursement claims are not relevant to the Controller's audit here. Each audit depends on the documentation and evidence provided by the claimant to show increased costs mandated by the state.

Accordingly, the Controller's calculation of cost savings for all years of the audit period except the first half of fiscal year 2003-2004 is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

4. The Controller's calculation of offsetting cost savings for the first half of fiscal year 2003-2004, based on an incorrect mandated diversion rate, is incorrect as a matter of law.

The claimant achieved an actual diversion rate of 57.7 percent in the first half of fiscal year 2003-2004.<sup>154</sup> The Controller allocated the diversion rate, as it did for the other fiscal years, because the claimant exceeded the mandate. However, the Controller used a 50 percent mandated rate to calculate the allocated diversion rate although the test claim statutes required only 25 percent diversion in calendar year 2003.<sup>155</sup> The requirement to divert 50 percent of solid waste did not become operative until January 1, 2004,<sup>156</sup> so the calculation of cost savings for the first half of fiscal year 2003-2004 using a 25 percent diversion rate is incorrect.

As indicated in the Parameters and Guidelines, the mandate is to divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities.<sup>157</sup> Thus, from July 1, 2003, through December 31, 2003, community college districts were mandated to achieve diversion rates of only 25 percent. The Controller admits that, "[s]ince there is no state mandate to exceed solid waste diversion greater than 25% for calendar years 2002 and 2003 or greater than 50% for

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<sup>152</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>153</sup> Exhibit A, IRC, pages 17-18.

<sup>154</sup> Exhibit B, Controller's Late Comments on the IRC, page 56 (2003 Annual Report). The Controller did not round this figure and calculated it at 57.68 percent. See page 82.

<sup>155</sup> Exhibit B, Controller's Late Comments on the IRC, page 16.

<sup>156</sup> Public Resources Code sections 42921; Exhibit A, IRC, page 90 (Parameters and Guidelines).

<sup>157</sup> Exhibit A, IRC, page 90 (Parameters and Guidelines). This is based on Public Resources Code sections 42921.

calendar year 2004 and beyond, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceeded the levels set by statute.”<sup>158</sup>

The Controller’s calculation of offsetting cost savings, using a 50 percent diversion rate from July 1, 2003 through December 31, 2003, instead of the mandated 25 percent diversion rate, is incorrect as a matter of law.<sup>159</sup> As discussed above, the Controller’s formula for offsetting cost savings, which allocates the diversion based on the mandated rate, is consistent with the test claim statutes and the court’s decision on this program.

Applying the Controller’s cost savings formula (that allocates cost savings for years the claimant exceeded the mandate) to the first half of fiscal year 2003-2004, results in offsetting savings of \$2,430 (25 percent divided by 57.68 percent, multiplied by 152.25 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$4,861. Therefore, the difference of \$2,431 (\$4,861 - \$2,430) has been incorrectly reduced.

Accordingly, the Commission finds that the difference of \$2,431 (\$4,861 - \$2,430) reduced from costs claimed for the first half of fiscal year 2003-2004 is incorrect as a matter of law.

**C. The Adjustment of \$5,130 Deducted From the Controller’s Calculation of Offsetting Savings Did Not Result in a Reduction of Costs Pursuant to Government Code Section 17551(d), and thus, the Commission Does Not Have Jurisdiction to Determine if the Adjustment Is Correct.**

As indicated in the Background, the Controller found that the claimant reported offsetting savings of \$5,130 during the audit period, but realized total offsetting savings of \$43,377 from implementation of its IWM plan. Thus, the Controller calculated the total realized offsetting savings by subtracting the offsetting savings reported by the claimant, resulting in an overall reduction of \$38,247 instead of \$43,377.<sup>160</sup>

The claimant states that \$5,130 identified as reported offsetting savings is *not* offsetting savings, but actually offsetting recycling revenue.<sup>161</sup> The claimant therefore contends that it “properly reported the recycling income as a reduction of total claimed cost[s] and also not subject to state appropriation in the form of cost savings.”<sup>162</sup> The claimant requests that the Commission make a finding on “each and every adjustment made by the Controller.”<sup>163</sup>

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. The \$5,130 adjustment does not result in a reduction of the claimant’s payment.

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<sup>158</sup> Exhibit B, Controller’s Late Comments on the IRC, page 16.

<sup>159</sup> Exhibit B, Controller’s Late Comments on the IRC, page 82.

<sup>160</sup> Exhibit A, IRC, pages 31-32 (Final Audit Report).

<sup>161</sup> Exhibit A, IRC, page 19.

<sup>162</sup> Exhibit A, IRC, page 20.

<sup>163</sup> Exhibit A, IRC, page 22.

As indicated in the Final Audit Report and on the claimant's reimbursement claims, \$5,130 was reported by the claimant as offsetting savings and not offsetting revenues.<sup>164</sup> Had the \$5,130 not been reporting as offsetting savings, the Controller would have reduced the reimbursement claims by the full amount of offsetting savings realized (\$43,377) and not subtracted the cost savings by \$5,130.<sup>165</sup>

Thus, the adjustment of \$5,130 decreased the audit reduction, giving more money to the claimant, and did not result in a reduction of costs claimed within the meaning of Government Code section 17551(d). Accordingly, the Commission does not have jurisdiction to determine if the adjustment is correct.

## **V. Conclusion**

Based on the foregoing, the Commission finds that the Controller timely initiated the audit of the fiscal year 2003-2004 reimbursement claim, and timely completed the audit of all claims.

The Commission concludes that the Controller's reduction of costs claimed for all years in the audit period except the first half of fiscal year 2003-2004 is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

The Commission further concludes that the Controller's calculation of offsetting savings for the first half of fiscal year 2003-2004, based on an incorrect mandated diversion rate, is incorrect as a matter of law. The law and the record support offsetting cost savings for this time period of \$2,430 rather than \$4,861. Therefore, the difference of \$2,431 has been incorrectly reduced and should be reinstated to claimant.

Finally, the Commission finds that the adjustment of \$5,130, which was reported by the claimant as offsetting savings, decreased the audit reduction, and did not result in a reduction of costs claimed within the meaning of Government Code section 17551(d). Therefore, the Commission does not have jurisdiction to determine if the adjustment is correct.

Accordingly, the Commission partially approves this IRC and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission's regulations, that the Controller reinstate \$2,431 to the claimant.

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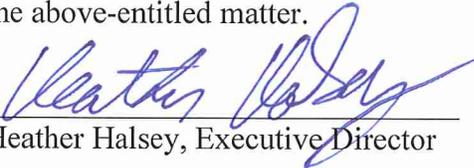
<sup>164</sup> Exhibit A, IRC, page 32 (Final Audit Report); page 152 (fiscal year 1999-2000 reimbursement claim identifying \$75.70 as offsetting savings); page 158 (fiscal year 2000-2001 reimbursement claim identifying \$916.46 as offsetting savings); page 165 (fiscal year 2003-2004 reimbursement claim identifying \$1,326.59 as offsetting savings); and page 172 (fiscal year 2004-2005 reimbursement claim identifying \$2,811.26 as offsetting savings).

<sup>165</sup> Exhibit B, Controller's Late Comments on the IRC, page 21.

RE: **Decision**

*Integrated Waste Management*, 14-0007-I-10  
Public Resources Code Sections 40148, 40196.3, 42920-42928;  
Public Contract Code Sections 12167 and 12167.1  
Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75)  
State Agency Model Integrated Waste Management Plan (February 2000)  
Fiscal Years: 1999-2000, 2000-2001, 2003-2004, 2004-2005, and 2005-2006  
Redwoods Community College District, Claimant

On May 25, 2018, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

  
\_\_\_\_\_  
Heather Halsey, Executive Director

Dated: May 30, 2018

BEFORE THE  
 COMMISSION ON STATE MANDATES  
 STATE OF CALIFORNIA

**IN RE INCORRECT REDUCTION CLAIM  
 ON:**

Public Resources Code Sections 40148, 40196.3, 42920-42928; Public Contract Code Sections 12167 and 12167.1; Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75); State Agency Model Integrated Waste Management Plan (February 2000)

Fiscal Years 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, and 2010-2011

San Bernardino Community College District,  
 Claimant

Case No.: 14-0007-I-11

*Integrated Waste Management*

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

*(Adopted May 25, 2018)*

*(Served May 30, 2018)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on May 25, 2018. The claimant, San Bernardino Community College District, did not attend the hearing. Lisa Kurokawa appeared on behalf of the State Controller’s Office (Controller).

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 the Proposed Decision to partially approve the IRC by a vote of 4-0 as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	Yes
Ken Alex, Director of the Office of Planning and Research	Yes
Richard Chivaro, Representative of the State Controller	Absent
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	Yes
Sarah Olsen, Public Member	Absent
Carmen Ramirez, City Council Member	Absent
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	Yes

## **Summary of the Findings**

This IRC addresses reductions made by the Controller to reimbursement claims of the San Bernardino Community College District (claimant) for fiscal years 1999-2000 through 2008-2009, and fiscal year 2010-2011 (the audit period), under the *Integrated Waste Management* program, 00-TC-07. The Controller made the audit reductions because the claimant did not identify and deduct from its reimbursement claims offsetting cost savings from its diversion of solid waste and the associated reduced or avoided landfill disposal costs.

The test claim statutes require community college districts to adopt and implement, in consultation with California Integrated Waste Management Board (CIWMB, which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste.<sup>1</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent of generated solid waste by January 1, 2004.<sup>2</sup> The test claim statutes also provide that “Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs . . .”<sup>3</sup>

The statutes, therefore, presume that by diverting solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. The amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB.<sup>4</sup>

The claimant diverted solid waste, exceeding the mandated diversion rate (25 or 50 percent) in all years of the audit period. Thus, the Controller correctly presumed, consistent with the test claim statutes and the court’s interpretation of those statutes, and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill disposal fee per ton of waste required to be diverted. The Commission finds, based on the evidence in the record, that the Controller’s calculation of offsetting cost savings for all years in the audit period, except calendar years 2002 and 2003, is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support. Because the claimant diverted more solid waste than required by law, the Controller derived a cost savings formula that “allocated” the diversion by dividing the mandated solid waste diversion rate, either 25 or 50 percent, by the actual diversion rate, as reported by the claimant to CIWMB. The resulting quotient was then multiplied by the tons of solid waste diverted, as annually reported by the claimant to CIWMB, multiplied by the avoided landfill disposal fee (based on the statewide

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<sup>1</sup> Public Resources Code section 42920(b).

<sup>2</sup> Public Resources Code section 40124.

<sup>3</sup> Public Resources Code section 42925(a).

<sup>4</sup> Exhibit B, Controller’s Late Comments on the IRC, page 83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

average fee).<sup>5</sup> The formula allocates cost savings based on the mandated rates of diversion, and was intended to avoid penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>6</sup> The claimant has not filed any evidence to rebut the statutory presumption of cost savings or to show that the statewide average disposal fee is incorrect or arbitrary. Thus, the Controller's reduction of costs claimed for these years is correct.

However, the Controller's reduction of costs claimed for calendar years 2002 and 2003, is incorrect as a matter of law and arbitrary, capricious, and entirely lacking in evidentiary support.

During calendar year 2002, the claimant achieved a 37.57 percent diversion rate.<sup>7</sup> Although the mandated diversion rate for 2002 was 25 percent, the Controller mistakenly found that the claimant did not exceed the "50 percent" mandated diversion rate. The mandate to divert at least 50 percent of all solid waste was not operative until January 1, 2004.<sup>8</sup> Therefore, the Controller's finding that the claimant did not divert the mandated rate in calendar year 2002 is incorrect as a matter of law. To calculate the offsetting cost savings for calendar year 2002, the Controller did not allocate the diversion as it had for rest of the audit period, but instead used 100 percent of the diversion to calculate the offsetting savings.<sup>9</sup> Thus, the calculation of offsetting savings for calendar year 2002 is arbitrary, capricious, and entirely lacking in evidentiary support.

For calendar year 2003, the Controller correctly found that the claimant exceeded the mandated diversion rate but used a 50 percent rate to calculate the allocated diversion rate, although the test claim statutes required only 25 percent diversion in calendar year 2003.<sup>10</sup> The requirement to divert 50 percent of solid waste did not become operative until January 1, 2004,<sup>11</sup> so the calculation of cost savings for calendar year 2003 is incorrect as a matter of law.

Applying the Controller's calculation of cost savings to calendar years 2002 and 2003 (using the mandated 25 percent rate to calculate the allocated diversion) results in offsetting savings of:

- \$14,167 for 2002 (25 percent divided by 37.57 percent, multiplied by 588.6 tons diverted multiplied by the statewide average landfill disposal fee of \$36.17) rather than \$21,290; and
- \$15,761 for 2003 (25 percent divided by 56.37 percent, multiplied by 964.9 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$31,522.

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<sup>5</sup> Exhibit A, IRC, pages 35-36 (Final Audit Report); Exhibit B, Controller's Comments on the IRC, page 20.

<sup>6</sup> Exhibit B, Controller's Comments on the IRC, page 20.

<sup>7</sup> Exhibit B, Controller's Comments on the IRC, pages 39, 42, 86.

<sup>8</sup> Public Resources Code sections 42921; Exhibit A, IRC, pages 53 and 57 (Parameters and Guidelines, section IV.(B)(5)).

<sup>9</sup> Exhibit B, Controller's Comments on the IRC, page 89.

<sup>10</sup> Exhibit B, Controller's Comments on the IRC, pages 31-32, 89.

<sup>11</sup> Public Resources Code sections 42921; Exhibit A, IRC, pages 53 and 57 (Parameters and Guidelines, section IV.(B)(5)).

Therefore, the Commission finds that the difference of \$22,884 (\$52,812 - \$29,928) has been incorrectly reduced. Accordingly, the Commission partially approves this IRC, and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission's regulations, that the Controller reinstate \$22,884 to the claimant.

## COMMISSION FINDINGS

### I. Chronology

- 09/18/2006 The claimant filed its 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004 and 2004-2005 reimbursement claims.<sup>12</sup>
- 01/11/2007 The claimant filed its 2005-2006 reimbursement claim.<sup>13</sup>
- 01/27/2008 The claimant filed its 2006-2007 reimbursement claim.<sup>14</sup>
- 02/02/2009 The claimant filed its 2007-2008 reimbursement claim.<sup>15</sup>
- 02/02/2010 The claimant filed its 2008-2009 reimbursement claim.<sup>16</sup>
- 01/11/2013 The claimant filed its 2010-2011 reimbursement claim.<sup>17</sup>
- 06/13/2014 The Controller notified the claimant of the pending audit adjustment.<sup>18</sup>
- 06/23/2014 The Controller issued the Final Audit Report.<sup>19</sup>
- 06/09/2015 The claimant filed this IRC.<sup>20</sup>
- 07/10/2015 The Controller filed comments on the IRC.<sup>21</sup>
- 02/16/2018 Commission staff issued the Draft Proposed Decision.<sup>22</sup>
- 03/01/2018 The Controller filed comments on the Draft Proposed Decision.<sup>23</sup>

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<sup>12</sup>Exhibit A, IRC, pages 283, 287, 291, 295, 299, and 303. Exhibit B, Controller's Comments on the IRC, page 19.

<sup>13</sup> Exhibit A, IRC, page 308; Exhibit B, Controller's Comments on the IRC, page 19.

<sup>14</sup> Exhibit A, IRC, page 308; Exhibit B, Controller's Comments on the IRC, page 19.

<sup>15</sup> Exhibit A, IRC, page 318. According to the State Controller, this claim was filed on February 10, 2009. See Exhibit B, Controller's Comments on the IRC, page 19.

<sup>16</sup> Exhibit A, IRC, page 322.

<sup>17</sup> Exhibit A, IRC, page 326.

<sup>18</sup> Exhibit B, Controller's Comments on the IRC, pages 20, 91-92.

<sup>19</sup> Exhibit A, IRC, page 24 (Final Audit Report).

<sup>20</sup> Exhibit A, IRC, page 1.

<sup>21</sup> Exhibit B, Controller's Comments on the IRC, page 1.

<sup>22</sup> Exhibit C, Draft Proposed Decision.

<sup>23</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision.

## II. Background

### A. The *Integrated Waste Management Program*

The test claim statutes require community college districts<sup>24</sup> to adopt and implement, in consultation with CIWMB (which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste, reuse materials whenever possible, recycle recyclable materials, and procure products with recycled content in all agency offices and facilities.<sup>25</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent by January 1, 2004. To divert means to “reduce or eliminate the amount of solid waste from solid waste disposal...”<sup>26</sup>

CIWMB developed and adopted a model IWM plan on February 15, 2000, and the test claim statutes provide that if a district does not adopt an IWM plan, the CIWMB model plan governs the community college.<sup>27</sup> Each district is also required to report annually to CIWMB on its progress in reducing solid waste; and the reports’ minimum contents are specified in statute.<sup>28</sup> The test claim statutes also require a community college, when entering into or renewing a lease, to ensure that adequate areas are provided for and adequate personnel are available to oversee collection, storage, and loading of recyclable materials in compliance with CIWMB’s requirements.<sup>29</sup> Additionally, the test claim statutes added Public Resources Code section 42925(a), which addressed cost savings from IWM plan implementation:

Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code.

The Public Contract Code sections referenced in section 42925(a) require that revenue received as a result of the community college’s IWM plan be deposited in CIWMB’s Integrated Waste Management Account. After July 1, 1994, CIWMB is authorized to spend the revenue upon appropriation by the Legislature to offset recycling program costs. Annual revenue under \$2,000 is to be continuously appropriated for expenditure by the community colleges, whereas annual revenue over \$2,000 is available for expenditures upon appropriation by the Legislature.<sup>30</sup>

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<sup>24</sup> The test claim statutes apply to “state agencies” and define them to include “the California Community Colleges” (Pub. Res. Code, § 40196.3).

<sup>25</sup> Public Resources Code section 42920(b).

<sup>26</sup> Public Resources Code section 40124.

<sup>27</sup> Public Resources Code section 42920(b)(3).

<sup>28</sup> Public Resources Code section 42926.

<sup>29</sup> Public Resources Code section 42924(b).

<sup>30</sup> Public Contract Code sections 12167 and 12167.1 are part of the State Assistance for Recycling Markets Act, which was originally enacted in 1989 to foster the procurement and use of recycled paper products and other recycled resources in daily state operations (See Pub.

On March 24, 2004, the Commission adopted the *Integrated Waste Management* Statement of Decision and determined that the test claim statutes impose a reimbursable state-mandated program on community college districts. The Commission also found that cost savings under Public Resources Code section 42925(a) did not preclude a reimbursable mandate under Government Code section 17556(e) because there was no evidence that offsetting savings would result in no net costs to a community college implementing an IWM plan, nor was there evidence that revenues received from plan implementation would be "in an amount sufficient to fund" the cost of the state-mandated program. The Commission found that any revenues received would be identified as offsetting revenue in the Parameters and Guidelines.

The Parameters and Guidelines were adopted on March 30, 2005, and authorize reimbursement for the increased costs to perform the following activities:

A. One-Time Activities (*Reimbursable starting January 1, 2000*)

1. Develop the necessary district policies and procedures for the implementation of the integrated waste management plan.
2. Train district staff on the requirements and implementation of the integrated waste management plan (one-time per employee). Training is limited to the staff working directly on the plan.

B. Ongoing Activities (*Reimbursable starting January 1, 2000*)

1. Complete and submit to the [Integrated Waste Management] Board the following as part of the State Agency Model Integrated Waste Management Plan (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.):
  - a. state agency or large state facility information form;
  - b. state agency list of facilities;
  - c. state agency waste reduction and recycling program worksheets that describe program activities, promotional programs, and procurement activities, and other questionnaires; and
  - d. state agency integrated waste management plan questions.

NOTE: Although reporting on promotional programs and procurement activities in the model plan is reimbursable, implementing promotional programs and procurement activities is not.

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Contract Code, §§ 12153, 12160; Stats. 1989, ch. 1094). The Act, including sections 12167 and 12167.1, applies to California community colleges only to the limited extent that these sections are referenced in Public Resources Code section 42925. Community colleges are not defined as state agencies or otherwise subject to the Act's provisions for the procurement and use of recycled products in daily state operations. See Exhibit B, Controller's Comments on the IRC, pages 88-89 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355)).

2. Respond to any Board reporting requirements during the approval process. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
3. Consult with the Board to revise the model plan, if necessary. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
4. Designate one solid waste reduction and recycling coordinator for each college in the district to perform new duties imposed by chapter 18.5 (Pub. Resources Code, §§ 42920 – 42928). The coordinator shall implement the integrated waste management plan. The coordinator shall act as a liaison to other state agencies (as defined by section 40196.3) and coordinators. (Pub. Resources Code, § 42920, subd. (c).)
5. Divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities. Maintain the required level of reduction, as approved by the Board. (Pub. Resources Code, §§ 42921 & 42922, subd. (i).)

C. Alternative Compliance (*Reimbursable from January 1, 2000 – December 31, 2005*)

1. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2002 deadline to divert 25 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42923 subds. (a) & (c).)
  - a. Notify the Board in writing, detailing the reasons for its inability to comply.
  - b. Request of the Board an alternative to the January 1, 2002 deadline.
  - c. Provide evidence to the Board that the college is making a good faith effort to implement the source reduction, recycling, and composting programs identified in its integrated waste management plan.
  - d. Provide information that describes the relevant circumstances that contributed to the request for extension, such as lack of markets for recycled materials, local efforts to implement source reduction, recycling and composting programs, facilities built or planned, waste disposal patterns, and the type of waste disposed of by the community college.
  - e. Submit a plan of correction that demonstrates that the college will meet the requirements of Section 42921 [the 25 and 50 percent diversion requirements] before the time extension expires, including the source reduction, recycling, or composting steps the community college will implement, a date prior to the expiration of the time extension when the requirements of Section 42921 will be met, the

existing programs that it will modify, any new programs that will be implemented to meet those requirements, and the means by which these programs will be funded.

2. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2004 deadline to divert 50 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42922, subds. (a) & (b).)
  - a. Notify the Board in writing, detailing the reasons for its inability to comply.
  - b. Request of the Board an alternative to the 50-percent requirement.
  - c. Participate in a public hearing on its alternative requirement.
  - d. Provide the Board with information as to:
    - (i) the community college's good faith efforts to implement the source reduction, recycling, and composting measures described in its integrated waste management plan, and demonstration of its progress toward meeting the alternative requirement as described in its annual reports to the Board;
    - (ii) the community college's inability to meet the 50 percent diversion requirement despite implementing the measures in its plan;
    - (iii) how the alternative source reduction, recycling, and composting requirement represents the greatest diversion amount that the community college may reasonably and feasibly achieve; and,
    - (iv) the circumstances that support the request for an alternative requirement, such as waste disposal patterns and the types of waste disposed by the community college.<sup>31</sup>

D. Accounting System (*Reimbursable starting January 1, 2000*)

Developing, implementing, and maintaining an accounting system to enter and track the college's source reduction, recycling and composting activities, the cost of those activities, the proceeds from the sale of any recycled materials, and such other accounting systems which will allow it to make its annual reports to the state and determine waste reduction. Note: only the pro-rata portion of the costs incurred to implement the reimbursable activities can be claimed.

E. Annual Report (*Reimbursable starting January 1, 2000*)

Annually prepare and submit, by April 1, 2002, and by April 1 each subsequent year, a report to the Board summarizing its progress in reducing

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<sup>31</sup> These alternative compliance and time extension provisions in part C were sunset on January 1, 2006, but were included in the adopted Parameters and Guidelines.

solid waste. The information in the report must encompass the previous calendar year and shall contain, at a minimum, the following as outlined in section 42926, subdivision (b): (Pub. Resources Code, §§ 42926, subd. (a) & 42922, subd. (i).)

1. calculations of annual disposal reduction;
2. information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors;
3. a summary of progress made in implementing the integrated waste management plan;
4. the extent to which the community college intends to use programs or facilities established by the local agency for handling, diversion, and disposal of solid waste (If the college does not intend to use those established programs or facilities, it must identify sufficient disposal capacity for solid waste that is not source reduced, recycled or composted.);
5. for a community college that has been granted a time extension by the Board, it shall include a summary of progress made in meeting the integrated waste management plan implementation schedule pursuant to section 42921, subdivision (b), and complying with the college's plan of correction, before the expiration of the time extension;
6. for a community college that has been granted an alternative source reduction, recycling, and composting requirement by the Board pursuant to section 42922, it shall include a summary of progress made towards meeting the alternative requirement as well as an explanation of current circumstances that support the continuation of the alternative requirement.

F. Annual Recycled Material Reports (*Reimbursable starting July 1, 1999*)

Annually report to the Board on quantities of recyclable materials collected for recycling. (Pub. Contract Code, § 12167.1.) (See Section VII. regarding offsetting revenues from recyclable materials.)<sup>32</sup>

The Parameters and Guidelines further require that each claimed reimbursable cost be supported by contemporaneous source documentation.<sup>33</sup>

And as originally adopted, the Parameters and Guidelines required community college districts to identify and deduct from their reimbursement claims all of the offsetting revenues received from the sale of recyclable materials, limited by the provisions of Public Resources Code section 42925 and Public Contract Code section 12167.1. The original Parameters and Guidelines did

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<sup>32</sup> Exhibit A, IRC, page 43-46 (Parameters and Guidelines, adopted March 30, 2005).

<sup>33</sup> Exhibit A, IRC, page 43 (Parameters and Guidelines, adopted March 30, 2005).

not require community colleges to identify and deduct from their claims any offsetting cost savings resulting from the solid waste diversion activities required by the test claim statutes.<sup>34</sup>

### **B. Superior Court Decision on Cost Savings and Offsets Under the Program**

After the Parameters and Guidelines were adopted, the Department of Finance (Finance) and CIWMB filed a petition for writ of mandate requesting the court to direct the Commission to set aside the Test Claim Statement of Decision and Parameters and Guidelines and to issue a new Decision and Parameters and Guidelines that give full consideration to the cost savings and offsetting revenues community college districts will achieve by complying with the test claim statutes, including all cost savings realized from avoided landfill disposal fees and revenues received from the collection and sale of recyclable materials. The petitioners further argued that Public Contract Code sections 12167 and 12167.1 do not require community college districts to deposit revenues received from the collection and sale of recyclable materials into the Integrated Waste Management Account, as determined by the Commission, but instead allow community college districts to retain all revenues received. The petitioners argued that such revenues must be identified as offsetting revenues and applied to the costs of the program, without the community college district obtaining the approval of the Legislature or CIWMB.

On May 29, 2008, the Sacramento County Superior Court granted the petition for writ of mandate, finding that the Commission's treatment of cost savings and revenues in the Parameters and Guidelines was erroneous and required that the Parameters and Guidelines be amended. The court said:

There is no indication in the administrative record or in the legal authorities provided to the court that, as respondent [Commission] argues, a California Community College might not receive the full reimbursement of its actual increased costs required by section 6 if its claims for reimbursement of IWM plan costs were offset by realized cost savings and all revenues received from the plan activities.<sup>35</sup>

Instead, the court recognized that community colleges are “likely to experience costs savings in the form of reduced or avoided costs of landfill disposal” as a result of the mandated activities in Public Resources Code section 42921 because reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.”<sup>36</sup> The court noted that “diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates” and cited the statutory definition of

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<sup>34</sup> Exhibit A, IRC, pages 48 (Parameters and Guidelines, adopted March 30, 2005).

<sup>35</sup> Exhibit B, Controller's Comments on the IRC, page 82 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter, Footnote 1).

<sup>36</sup> Exhibit B, Controller's Comments on the IRC, page 82 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

diversion: “activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division [i.e., division 30, including § 42920 et seq.]” as well as the statutory definition of disposal: “the management of solid waste through landfill disposal or transformation at a permitted solid waste facility.”<sup>37</sup> The court explained:

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926.<sup>38</sup>

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans

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<sup>37</sup> Public Resources Code sections 40124 & 40192. Exhibit B, Controller’s Comments on the IRC, pages 82-83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>38</sup> Exhibit B, Controller’s Comments on the IRC, page 83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>39</sup>

The court issued a writ of mandate directing the Commission to amend the Parameters and Guidelines to require community college districts claiming reimbursable costs of an IWM plan to:

1. Identify and offset from their claims, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1, cost savings realized as a result of implementing their plans; and
2. Identify and offset from their claims all of the revenue generated as a result of implementing their plans, without regard to the limitations or conditions described in sections 12167 and 12167.1 of the Public Contract Code.<sup>40</sup>

### **C. Parameters and Guidelines Amendment Pursuant to the Writ**

In compliance with the writ, the Commission amended the Parameters and Guidelines on September 26, 2008 to add section VIII. Offsetting Cost Savings, which states:

Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1. Pursuant to these statutes, community college districts are required to deposit cost savings resulting from their Integrated Waste Management plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the California Integrated Waste Management Board for the purpose of offsetting Integrated Waste Management plan costs. Subject to the approval of the California Integrated Waste Management Board, cost savings by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting Integrated Waste Management program costs. Cost savings exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature. To the extent so approved or appropriated and applied to the college, these amounts shall be identified and offset from the costs claimed for implementing the Integrated Waste Management Plan.<sup>41</sup>

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<sup>39</sup> Exhibit B, Controller's Comments on the IRC, pages 84-85 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>40</sup> Exhibit B, Controller's Comments on the IRC, page 31 (Judgment Granting Petition for Writ of Administrative Mandamus).

<sup>41</sup> Exhibit A, IRC page 61 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

Section VII. of the Parameters and Guidelines, on Offsetting Revenues, was amended as follows (amendments in ~~strikeout~~ and underline):

Reimbursement for this mandate from any source, including but not limited to, services fees collected, federal funds, and other state funds allocated to any service provided under this program, shall be identified and ~~deducted~~ offset from this claim. Offsetting revenue shall include all revenues generated from implementing the Integrated Waste Management Plan. ~~the revenues cited in Public Resources Code section 42925 and Public Contract Code sections 12167 and 12167.1.~~

~~Subject to the approval of the California Integrated Waste Management Board, revenues derived from the sale of recyclable materials by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting recycling program costs. Revenues exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature. To the extent so approved or appropriated and applied to the college, these amounts are a reduction to the recycling costs mandated by the state to implement Statutes 1999, chapter 764.~~

In addition, revenue from a building-operating fee imposed pursuant to Education Code section 76375, subdivision (a) if received by a claimant and the revenue is applied to this program, shall be deducted from the costs claimed.<sup>42</sup>

All other requirements in the Parameters and Guidelines remained the same.

CIWMB requested additional amendments to the Parameters and Guidelines at this September 2008 hearing, including a request to alter the offsetting savings provision to require community college districts to provide offsetting savings information *whether or not* the offsetting savings generated in a fiscal year exceeded the \$2,000 continuous appropriation required by Public Contract Code sections 12167 and 12167.1. The Commission denied the request because the proposed language went beyond the scope of the court's judgment and writ.<sup>43</sup>

CIWMB also requested adding a requirement for community college districts to analyze specified categories of potential cost savings when filing their reimbursement claims. The Commission found that the court determined that the amount or value of cost savings is already available from the annual reports the community college districts provide to CIWMB pursuant to Public Resources Code section 42926(b). This report is required to include the district's "calculations of annual disposal reduction" and "information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors." Thus, the Commission denied CIWMB's request and adopted the staff analysis finding that the request was beyond the scope of the court's writ and judgment. The Commission also noted that the

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<sup>42</sup> Exhibit A, IRC, pages 48, 60-61 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>43</sup> Exhibit E, Commission on State Mandates, Excerpt from the Minutes for the September 26, 2008 Meeting.

request was the subject of separate pending request filed by CIWMB to amend the Parameters and Guidelines and would therefore be further analyzed for that matter.

**D. Subsequent Request by CIWMB to Amend the Parameters and Guidelines to Require Detailed Reports on Cost Savings and Revenues**

CIWMB filed a request to amend the Parameters and Guidelines to require community college districts to submit with their reimbursement claims a separate worksheet and report analyzing the costs incurred and avoided and any fees received relating to staffing, overhead, materials, storage, transportation, equipment, the sale of commodities, avoided disposal fees, and any other revenue received relating to the mandated program as specified by CIWMB. At its January 30, 2009 meeting, the Commission denied the request for the following reasons: there is no requirement in statute or regulation that community college districts perform the analysis specified by CIWMB; the Commission has no authority to impose additional requirements on community college districts regarding this program; the offsetting cost savings paragraph in the Parameters and Guidelines already identifies the offsetting savings consistent with the language of Public Resources Code section 42925(a), Public Contract Code sections 12167 and 12167.1, and the court's judgment and writ; and information on cost savings is already available in the community colleges' annual reports submitted to CIWMB, as required by Public Resources Code section 42926(b)(1).<sup>44</sup>

**E. The *Integrated Waste Management* Program Made Optional**

This program was made optional by Statutes 2010, chapter 724 (AB 1610), section 34, effective October 19, 2010 and has remained so since that time.<sup>45</sup>

**F. The Controller's Audit**

The Controller audited the reimbursement claims for fiscal years 1999-2000 through 2008-2009, and fiscal year 2010-2011. The claimant did not claim program costs for fiscal year 2009-2010.<sup>46</sup> Of the \$382,484 claimed during the audit period, the Controller found that \$77,792 is allowable (\$86,436 minus a \$8,644 penalty for filing late claims) and \$304,692 is unallowable because the claimant did not report offsetting savings from implementation of its IWM plan.<sup>47</sup>

The Controller found that the claimant realized total offsetting savings of \$1,997,947 from implementation of its IWM plan. But because the audit adjustment exceeded the costs claimed for some fiscal years, the Controller found that \$77,792 is allowable.<sup>48</sup>

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<sup>44</sup> Exhibit E, Commission on State Mandates, Item 9, Final Staff Analysis of Proposed Amendments to the Parameters and Guidelines for *Integrated Waste Management*, 05-PGA-16, January 30, 2009, pages 2-3.

<sup>45</sup> See Government Code section 17581.5.

<sup>46</sup> Exhibit A, IRC, page 24 (Final Audit Report).

<sup>47</sup> Exhibit A, IRC, pages 16-17, 27-29 (Final Audit Report). Exhibit B, Controller's Comments on the IRC, pages 7 and 27.

<sup>48</sup> Exhibit A, IRC, pages 17, 25-38 (Final Audit Report).

The Controller’s audit finding is based on the court’s ruling, which states, “the amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California community colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(l) of Public Resources Code section 42926,”<sup>49</sup> the resulting amendment to the Parameters and Guidelines, and the claimant’s annual reports to CIWMB.

The Controller determined that the claimant diverted more solid waste than the amount mandated by the test claim statute each year of the audit period, except for calendar year 2002, when the Controller found that the claimant diverted solid waste, but not to the mandated diversion rate.<sup>50</sup> Thus, the Controller found that the claimant realized cost savings in each year of the audit period.

For the years the Controller found that the claimant exceeded the diversion mandate, the Controller calculated offsetting cost savings by allocating the diversion to reflect the mandate. To allocate the diversion, the Controller divided the mandated diversion rate (either 25 or 50 percent) by the actual diversion rate (as reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized in those years.<sup>51</sup>

$$\begin{array}{rcccl}
 & \text{Allocated Diversion \%} & & & \\
 & \text{Maximum Allowable} & & & \text{Avoided} \\
 \text{Offsetting} & \text{Diversion \%} & \times & \text{Tonnage} & \text{Landfill} \\
 \text{Savings} & \text{Actual} & \times & \text{Diverted} & \text{Disposal Fee} \\
 \text{Realized} & \text{Diversion \%} & & & \text{(per Ton)}
 \end{array}$$

The Controller provided an example of how the formula works. For calendar year 2006, the claimant reported diversion of 7,481.1 tons of solid waste, and disposal of 1,342.5 tons generated.<sup>52</sup> Diverting 7,481.1 tons out of the 8,823.1 tons of waste generated results in a diversion rate of 84.8 percent (exceeding the 50 percent required).<sup>53</sup> To avoid penalizing the claimant for diverting more solid waste than the amount mandated,<sup>54</sup> the Controller allocated the diversion by dividing the diversion rate mandated by the test claim statute (50 percent) by the actual diversion rate (84.8 percent), which equals 58.97 percent. The 58.97 allocated diversion

<sup>49</sup> Exhibit B, Controller’s Comments on the IRC, page 83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>50</sup> Exhibit A, IRC, page 33, fn. 2 (Final Audit Report); Exhibit B, Controller’s Comments on the IRC, page 89.

<sup>51</sup> Exhibit A, IRC, pages 35 (Final Audit Report).

<sup>52</sup> Exhibit B, Controller’s Comments on the IRC, page 54 (2007 Report).

<sup>53</sup> Exhibit B, Controller’s Comments on the IRC, pages 20, 89 (Controller’s calculation of offsetting savings).

<sup>54</sup> Exhibit B, Controller’s Comments on the IRC, page 20.

rate is then multiplied by the 7,481.1 tons diverted that year, which equals 4,411.6 tons of diverted solid waste, instead of the 7,481.1 tons actually diverted. The allocated 4,411.6 tons of diverted waste is then multiplied by the statewide average disposal fee per ton, which in calendar year 2006 was \$46, resulting in “offsetting cost savings” for calendar year 2006 of \$202,934.<sup>55</sup>

For calendar year 2002, the Controller found that the claimant did not exceed the mandated diversion rate (which the Controller found to be 50 percent), so the Controller did not allocate the diversion of solid waste to the mandated rate. Instead, the Controller multiplied 100 percent of the claimant’s diversion by the avoided landfill disposal fee (based on the statewide average fee) to calculate offsetting savings.<sup>56</sup>

For calendar year 2003, the Controller found that the claimant exceeded the mandated diversion rate (which the Controller found to be 50 percent) and therefore allocated the diversion as it had for other years using a 50 percent rate to calculate the allocated diversion rate.

In 2008, CIWMB stopped requiring community college districts to report the actual tonnage diverted, instead requiring a report based on “per-capita disposal.” Consequently, the Controller used the claimant’s reported 2007 percentage of tons diverted to calculate the offsetting savings for fiscal years 2007-2008, 2008-2009, and 2010-2011.<sup>57</sup>

The Controller pointed out in the audit report that the claimant did not provide documentation supporting different diversion rates or disposal fees to calculate offsetting cost savings.<sup>58</sup>

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<sup>55</sup> Exhibit B, Controller’s Comments on the IRC, pages 20, 89 (Controller’s calculations of offsetting savings). Page 20 of the Controller’s Comments on the IRC describe the calculation differently than the formula identified in the audit report, but the result is the same. The Controller states that cost savings can be calculated by multiplying the total tonnage generated (solid waste diverted + disposed) by the mandated diversion percentage (25 or 50 percent), times the avoided landfill disposal fee:

For example, in calendar year 2006, the district reported to CalRecycle that it diverted 7,481.1 tons of solid waste and disposed of 1,342.0 tons, which results in an overall diversion percentage of 84.8% [**Tab 4, page 19**]. Because the district was required to divert 50% for that year to meet the mandated requirements and comply with the Public Resources Code, it needed to divert only 4,411.55 tons (8,823.1 total tonnage generated x 50%) in order to satisfy the 50% requirement. Therefore, we adjusted our calculation to compute offsetting savings based on 4,411.55 tons of diverted solid waste rather than a total of 7,481.1 tons diverted.

Using this formula results in cost savings for calendar year 2006 of \$202,931 (8,823.1 tons generated x 50 percent = 4411.55 tons x \$46 = \$202,931). Slight differences are due to rounding.

<sup>56</sup> Exhibit A, IRC, page 33, fn. 2 (Final Audit Report); Exhibit B, Controller’s Comments on the IRC, page 89.

<sup>57</sup> Exhibit A, IRC, page 36 (Final Audit Report). Exhibit B, Controller’s Comments on the IRC, pages 20-21, 89.

<sup>58</sup> Exhibit A, IRC, page 36 (Final Audit Report).

### III. Positions of the Parties

#### A. San Bernardino Community College District

The claimant maintains that the audit reductions are incorrect and requests the reinstatement of the full amount reduced.

The claimant first alleges that it did not realize any cost savings as a result of the mandate and quotes the Superior Court decision (discussed above) that cost savings will “most likely” occur as a result of reduced or avoided costs of landfill disposal, arguing:

The court presupposes a previous legal requirement for districts to incur landfill disposal fees to divert solid waste. Thus, potentially relieved of the need to incur new or additional landfill fees for increased waste diversion, a cost savings would occur. There is no finding of fact or law in the court decision or from the Commission Statement of Decision for the test claim for this assumed duty to use landfills.<sup>59</sup>

The claimant further argues that the offsetting savings provision in the Parameters and Guidelines does not assume that the cost savings occurred, but instead requires that the cost savings be *realized*. For the savings to be realized, the claimant contends that the following chain of events are required:

[T]he cost savings must exist (avoided landfill costs); be converted to cash; amounts in excess of \$2,000 per year deposited in the state fund; and, these deposits by the districts appropriated by the Legislature to districts for purposes of mitigating the cost of implementing the plan. None of those prerequisite events occurred so no cost savings were "realized" by the District. Regardless, the adjustment cannot be applied to the District since no state appropriation of the cost savings was made to the District.<sup>60</sup>

The claimant also argues that the Parameters and Guidelines are silent as to how to calculate the avoided costs, but that the court provided two alternative methods, either disposal reduction or diversion reported by districts. The Controller used the diversion percentage, which assumes, without findings of fact, that all diversion tonnage is landfill disposal tonnage reduction. The claimant contends that the Controller’s calculation of cost savings is wrong because: (1) the formula is a standard of general application that was not adopted pursuant to the Administrative Procedure Act and is therefore an unenforceable underground regulation; (2) the Controller’s formula assumes facts not in evidence, such as applying the 2007 diversion rate to subsequent years without evidence in the record, and assumes that all tonnage diverted would have been disposed in a landfill, although some waste may have been composted or may not apply to the mandate (e.g. paint); and (3) the landfill disposal fee, a statewide average calculated by CIWMB, does not include the data used to generate the average fee amounts, so the average is unknown and unsupported by the audit findings.<sup>61</sup>

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<sup>59</sup> Exhibit A, IRC, page 9-11.

<sup>60</sup> Exhibit A, IRC, pages 13. Emphasis in original.

<sup>61</sup> Exhibit A, IRC, pages 13-16.

The claimant contends that application of the formula is incorrect, alleging that it “did not claim landfill costs, so there are none to be offset. The adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed.”<sup>62</sup> Moreover, the Controller's calculation method prevents the claimant from receiving full reimbursement for its actual increased program costs. The claimant contends, using audit results for 27 other claimants under the *Integrated Waste Management* program, the application of the Controller’s formula has arbitrary results because the percentages of allowed costs for those claimants ranges from zero to 83.4 percent of costs claimed.<sup>63</sup>

Finally, the claimant argues: (1) the Controller used the wrong standard of review because the claimed costs were not found to be excessive or unreasonable, as required by Government Code section 17561(d)(2); and (2) the Controller has the burden of proof as to the propriety of its audit findings “because it bears the burden of going forward and because it is the party with the power to create, maintain, and provide evidence regarding its auditing methods and procedures, as well as the specific facts relied upon for its audit findings.”<sup>64</sup>

The claimant did not file comments on the Draft Proposed Decision.

### **B. State Controller’s Office**

The Controller maintains that the audit findings are correct and that the claimant realized total offsetting savings of \$1,997,947 from implementation of its IWM plan, but “because the offsetting savings adjustment exceeded claimed costs, we applied only \$296,048 against claimed costs.”<sup>65</sup>

Regarding the claimant’s statement that there is only a presumption to incur landfill disposal fees to dispose of solid waste, the Controller notes that the claimant does not indicate how solid waste that is not diverted would be disposed of if not at a landfill. Nor does the claimant state that it disposed of its solid waste at any location other than a landfill or used other means to dispose of its waste than to contract with a commercial waste hauler, so the Controller concludes that the claimant’s comments relating to alternatives for the disposal of solid waste are irrelevant.<sup>66</sup>

The Controller cites statements in some of the claimant’s annual reports and claim filings regarding claimant’s diversion from a landfill, as well as reports of tonnage disposed of annually.<sup>67</sup> According to the Controller, the evidence reviewed by it “supports that the district normally disposes of its waste at a landfill.”<sup>68</sup> The Controller states:

Unless the district had an arrangement with its waste hauler that it did not disclose to us or CalRecycle, the district did not dispose of its solid waste at a landfill for

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<sup>62</sup> Exhibit A, IRC, page 17.

<sup>63</sup> Exhibit A, IRC, pages 18-19.

<sup>64</sup> Exhibit A, IRC, pages 20-21.

<sup>65</sup> Exhibit B, Controller’s Comments on the IRC, pages 12, 16, and 23.

<sup>66</sup> Exhibit B, Controller’s Comments on the IRC, page 17.

<sup>67</sup> Exhibit B, Controller’s Comments on the IRC, page 17.

<sup>68</sup> Exhibit B, Controller’s Comments on the IRC, page 18.

no cost. San Bernardino Valley College is located in San Bernardino, California. An internet search for landfill fees revealed that San Bernardino County, which operates the Mid-Valley Landfill in Rialto, California (12 miles from the SBVC), currently charges \$59.94 per ton to dispose of solid waste [Tab 6]. Therefore, the higher rate of diversion results in less trash to be disposed of at a landfill, creating cost savings to the district.<sup>69</sup>

The Controller also argues that the claimant realized offsetting cost savings by implementing its IWM plan because the claimant reported diversion of the following amounts of solid waste due to implementation of its IWM plan:

405.5 tons in calendar year 2000 [Tab 4, page 1 ], 382.2 tons in calendar year 2001 [Tab 4, page 4), 588.6 tons in calendar year 2002 [Tab 4, page 7], 964.9 tons in calendar year 2003 [Tab 4, page 10), 488.7 tons in calendar year 2004 [Tab 4, page 13), 6,189.5 tons in calendar year 2005 [Tab 4, page 16), 7,481.1 tons in calendar year 2006 [Tab 4, page 19], and 20,205.1 tons in calendar year 2007 [Tab 4, page 22) . . . .<sup>70</sup>

According to the Controller: “The savings is supported when the tonnage diverted is multiplied by the cost to dispose of one ton of solid waste at the landfill (e.g., \$59.94 per ton at the Mid-Valley Landfill in Rialto, California).”<sup>71</sup>

The Controller agrees that the claimant did not remit cost savings from the implementation of its IWM plan into the Integrated Waste Management Account in compliance with the Public Contract Code, but asserts that the claimant is not precluded from the requirement to do so, as indicated in the Parameters and Guidelines and the court ruling. The Controller says the evidence supports that the claimant realized cost savings that should have been remitted to the State and that must be used to fund IWM plan costs.<sup>72</sup>

In response to the claimant’s argument that the Controller’s formula is a standard of general application that is an underground regulation, the Controller asserts that it used a “court approved methodology” to determine the “required offset.” The Controller also states that the claimant did not amend any of its reimbursement claims after the Parameters and Guidelines were amended in September 2008. According to the Controller: “We believe that this “court-identified” approach provides a reasonable methodology to identify the required offset.”<sup>73</sup>

The Controller also states that it “allocated” the offsetting savings every year of the audit period except calendar year 2002 to avoid penalizing the claimant for diverting more than the minimum rate of diversion required.<sup>74</sup> According to the Controller:

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<sup>69</sup> Exhibit B, Controller’s Comments on the IRC, page 18.

<sup>70</sup> Exhibit B, Controller’s Comments on the IRC, page 18.

<sup>71</sup> Exhibit B, Controller’s Comments on the IRC, page 18.

<sup>72</sup> Exhibit B, Controller’s Comments on the IRC, pages 18-19.

<sup>73</sup> Exhibit B, Controller’s Comments on the IRC, page 19.

<sup>74</sup> Exhibit B, Controller’s Comments on the IRC, page 20.

As there is no State mandate to exceed solid waste diversion greater than 25% for calendar years 2002 and 2003 or greater than 50% for calendar year 2004 and beyond, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceeded the levels set by statute.<sup>75</sup>

The Controller notes that after the passage of Statutes 2008, chapter 343, CIWMB no longer required districts to report their tonnage or percentage diverted, but they are still required to divert 50 percent of their solid waste.<sup>76</sup>

Defending its use of the claimant's 2007 reported diversion rate to calculate offsetting savings for subsequent years, the Controller calls the 2007 report a "fair representation" of the 2008 through 2010 diversion rate because the Controller found that the "district's annual per-capita disposal rate for both the employee and student populations to be well below the target rate," so the district is meeting its requirement to divert 50% of its solid waste.<sup>77</sup> The Controller also cites statements in the claimant's 2008 and 2009 annual reports that indicate the claimant's waste diversion programs were firmly in place and operating. According to the Controller, "it is entirely possible that the offsetting savings calculations we determined for FY 2008-09 and FY 2010-11 (which are based on the 2007 tonnage amounts) may even be understated."<sup>78</sup>

The Controller also responded to the claimant's argument against the assumption that all tonnage diverted would have been disposed in a landfill, even though some waste may have been composted or may not apply to the mandate (e.g. paint). The Controller cites a statement in the claimant's 2010 report that the claimant does not compost on site or haul compostable material because it is of "relatively light volume."<sup>79</sup> The Controller states:

[A]s a result of this mandated program, the district is claiming nearly \$200,000 in salaries and benefits for its grounds caretakers to "divert solid waste from landfill disposal or transformation facilities- composting" [Tab 13]. We are uncertain why the district is claiming such large costs for activities it states it does not perform. Regardless, it seems reasonable that such offsetting savings incurred as a result of composting, no matter how minimal, be recognized and appropriately offset against direct composting costs that the district incurred and claimed as part of implementing its IWM plan.<sup>80</sup>

The Controller also states that the district's reference to paint disposal is irrelevant because hazardous waste is not included in the diversion amounts that the claimant reported, and therefore, are not included in the Controller's offsetting savings calculation.<sup>81</sup>

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<sup>75</sup> Exhibit B, Controller's Comments on the IRC, page 20.

<sup>76</sup> Exhibit B, Controller's Comments on the IRC, page 21.

<sup>77</sup> Exhibit B, Controller's Comments on the IRC, page 21.

<sup>78</sup> Exhibit B, Controller's Comments on the IRC, page 21.

<sup>79</sup> Exhibit B, Controller's Comments on the IRC, page 21.

<sup>80</sup> Exhibit B, Controller's Comments on the IRC, page 22.

<sup>81</sup> Exhibit B, Controller's Comments on the IRC, page 22.

Regarding the data for the statewide disposal fee, the Controller states the information was provided by CIWMB, is included in the record, and is based on a private survey of a large percentage of landfills across California. The Controller also cites its internet search for landfill fees that revealed:

[T]he Mid-Valley Landfill, in Rialto, California, currently charges \$59.94 per ton to dispose of solid waste [Tab 6]. Therefore, we believe that the \$36.83 to \$56 "statewide average disposal fee" used to calculate the offsetting savings realized by the district is reasonable. The district did not provide any information, such as its contract with or invoices received from its commercial waste hauler to support either the landfill fees actually incurred by the district or to confirm that the statewide average landfill fee was greater than the actual landfill fees incurred by the district.<sup>82</sup>

In response to the claimant's argument that it did not claim landfill costs, so there are none to offset, the Controller answers that the mandated program does not reimburse claimants for landfill costs incurred to dispose of solid waste. Rather, the program reimburses claimants' costs to divert solid waste from disposal, which according to the Controller, results in "both a reduction of solid waste going to a landfill and the associated cost of having the waste hauled there. The reduction of landfill costs incurred creates offsetting savings that the district is required to identify in its mandated cost claims."<sup>83</sup>

In response to the claimant's argument that "the adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed," the Controller quotes Public Resources Code section 42925 which provides that "cost savings realized as a result of the IWM plan are to "fund plan *implementation and administration costs*."<sup>84</sup> The Controller argues that "the district did not identify, and we did not find, any statute or provision limiting offsetting savings solely to solid waste diversion activities included in the district's IWM claims."<sup>85</sup> The Controller cites the reimbursable activities in the Parameters and Guidelines that refer to "implementation of the IWM plan," concluding that "it is reasonable that offsetting savings realized from implementing the plan be offset against direct costs to implement the plan." The Controller also asserts that the claimant's reference to other IWM audits is not relevant to the current issue.<sup>86</sup>

The Controller also disagrees with claimant's argument that the Controller used the wrong standard of review. The Controller cites Government Code section 17561(d)(2) that authorizes it to audit the claimant's records to verify actual mandate-related costs *and* reduce any claim that is excessive or unreasonable. In this case, the claims were excessive because the claimant's "mandated cost claims exceeded the proper amount based on the reimbursable costs allowable

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<sup>82</sup> Exhibit B, Controller's Comments on the IRC, page 23.

<sup>83</sup> Exhibit B, Controller's Comments on the IRC, page 23.

<sup>84</sup> Public Resources Code section 42925. Emphasis added in Controller's comments.

<sup>85</sup> Exhibit B, Controller's Comments on the IRC, page 24.

<sup>86</sup> Exhibit B, Controller's Comments on the IRC, page 24.

per statutory language and the program's parameters and guidelines."<sup>87</sup> As to the burden of proof, the Controller states that it used data from the claimant's annual reports to CIWMB from implementing its IWM program, and that it confirmed that the statewide average fee for disposal is "'in-line' with the actual disposal fee charged by the Mid-Valley Landfill in Rialto, California (which is only 12 miles away from the district)."<sup>88</sup>

In comments on the Draft Proposed Decision, the Controller agreed with the conclusion that the reductions for all years in the audit period were correct except for calendar years 2002 and 2003. The Controller also agreed to reinstate \$22,884 to the claimant for calendar years 2002 and 2003, "the reduction of which the Commission concluded was incorrect as a matter of law."<sup>89</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 if the Controller determines that the claim 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 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>90</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>91</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

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<sup>87</sup> Exhibit B, Controller's Comments on the IRC, pages 26-27.

<sup>88</sup> Exhibit B, Controller's Comments on the IRC, page 27.

<sup>89</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision.

<sup>90</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>91</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.

the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.<sup>92</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.’ ”<sup>93</sup>

The Commission must review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>94</sup> In addition, sections 1185.1(f)(3), 1185.2(d) and (e) 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>95</sup>

**A. The Controller’s Reduction of Costs Claimed Is Generally Correct as a Matter of Law; However, the Reduction for Calendar Years 2002 and 2003 Based on an Incorrect Diversion Rate Is Incorrect as a Matter of Law, and the Controller’s Failure to Allocate the Rate in 2002 is Arbitrary, Capricious, and Entirely Lacking in Evidentiary Support.**

1. The test claim statutes presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized.

The test claim statute added Public Resources Code section 42925(a), which provides: “Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code.”

The court’s Ruling on Submitted Matter states that community colleges are “likely to experience costs savings in the form of reduced or avoided costs of landfill disposal” as a result of the

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<sup>92</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space Dist.* (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>93</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>94</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>95</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.

mandated activities in Public Resources Code section 42921 because reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.” The court noted that “diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates.” The statutory definition of diversion provides that “activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division.” And the statutory definition of disposal is “the management of solid waste through landfill disposal or transformation at a permitted solid waste facility.”<sup>96</sup> The court explained:

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(l) of Public Resources Code section 42926.<sup>97</sup>

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan

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<sup>96</sup> Public Resources Code sections 40124 and 40192(b). Exhibit B, Controller’s Comments on the IRC, pages 82-83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>97</sup> Exhibit B, Controller’s Comments on the IRC, page 83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>98</sup>

Thus, the court found that offsetting savings are, by statutory definition, likely to occur as a result of implementing the mandated activities. Reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.”<sup>99</sup> As the court held, “landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs. . . .”<sup>100</sup>

The statutes, therefore, presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. As indicated in the court’s ruling, the amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB. The amount of cost savings realized must be identified by the claimant and used to offset the costs incurred to comply with IWM plan implementation and administration activities approved for reimbursement in the Parameters and Guidelines. Accordingly, the court’s ruling requires claimants to report in their reimbursement claims the costs incurred to comply with the reimbursable activities (which includes the activities and costs to divert at least 25 or 50 percent of all solid waste from landfill disposal) and the cost savings from the avoided landfill disposal fees, for a reimbursement claim of the net increased costs.

The Parameters and Guidelines are consistent with the court’s ruling and require in Section IV. that “[t]he claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.”<sup>101</sup> Section VIII. requires that “[r]educed or avoided costs realized from implementation of the community college districts’ Integrated Waste Management plans shall be identified and offset from this claim as cost

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<sup>98</sup> Exhibit B, Controller’s Comments on the IRC, pages 84-85 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>99</sup> Exhibit B, Controller’s Comments on the IRC, page 82 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>100</sup> Exhibit B, Controller’s Comments on the IRC, page 83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

<sup>101</sup> Exhibit A, IRC, page 56 (Parameters and Guidelines).

savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1.”<sup>102</sup> The court’s decision and the amended Parameters and Guidelines are binding.<sup>103</sup>

2. During the audit period, the claimant exceeded the mandated solid waste diversion rate, but has filed no evidence to rebut the presumption that cost savings were realized. Thus, the Controller’s finding that the claimant realized cost savings is correct as a matter of law.

In this case, the claimant asserts that no cost savings were realized, but does not explain why.<sup>104</sup>

The record shows that during the audit period, the claimant complied with the mandate and diverted more solid waste than the state-mandated percentage.<sup>105</sup> The mandate requires community colleges to divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, through source reduction, recycling, and composting activities, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004.<sup>106</sup> The claimant reported to CIWMB that 27.5 percent of its waste was diverted in calendar year 2000,<sup>107</sup> 30.8 percent diversion in 2001,<sup>108</sup> 37.6 percent in 2002,<sup>109</sup> and 56.4 percent in 2003.<sup>110</sup> These diversions exceed the mandated diversion requirement of 25 percent. The claimant’s annual reports to CIWMB for calendar years 2004 through 2007 also report diversion percentages that exceed the mandated diversion requirement of 50 percent, ranging from 53.12 percent to 93.49 percent of the waste generated.<sup>111</sup>

In 2008, CIWMB stopped requiring community college districts to report the amount and percentage of tonnage diverted, and instead required them to report the "per-capita disposal" of waste.<sup>112</sup> As amended, each community college now has a disposal target that is the equivalent to a 50 percent diversion, and is expressed on a per capita basis. So if the district’s per-capita

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<sup>102</sup> Exhibit A, IRC, page 61 (Parameters and Guidelines).

<sup>103</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

<sup>104</sup> Exhibit A, IRC, page 9.

<sup>105</sup> Exhibit B, Controller’s Comments on the IRC, page 89. The Controller found that the claimant did not divert the mandated percentage in calendar year 2002, but as discussed below, that finding is incorrect.

<sup>106</sup> Public Resources Code sections 42921. Exhibit A, IRC, pages 53 and 57 (Parameters and Guidelines, section IV.(B)(5)).

<sup>107</sup> Exhibit B, Controller’s Comments on the IRC, page 34 (2000 Report).

<sup>108</sup> Exhibit B, Controller’s Comments on the IRC, page 37 (2001 Report).

<sup>109</sup> Exhibit B, Controller’s Comments on the IRC, page 40 (2002 Report).

<sup>110</sup> Exhibit B, Controller’s Comments on the IRC, page 43 (2003 Report).

<sup>111</sup> Exhibit B, Controller’s Comments on the IRC, pages 43-57 (2003-2007 Reports) and 89.

<sup>112</sup> The new requirement was a result of Statutes 2008, chapter 343 (SB 1016).

disposal rate is less than the target, it means that the district is meeting the requirement to divert 50 percent of its solid waste.<sup>113</sup>

The claimant, in its report for 2008, 2009, and 2010, reported annual per capita disposal rates for both the employee and student populations to be at or below the target rates, thereby satisfying the requirement to divert 50 percent of its solid waste.<sup>114</sup> The claimant's annual reports also indicate it had waste reduction programs in place. For example, the 2008 report states: "All offices have continued to regularly recycle paper, plastic, aluminum, cardboard, etc. and use on-line forms and electronic processing (e-mail, purchasing, etc.)" and states that the district did not implement new programs or discontinue programs in 2008.<sup>115</sup> The 2009 report states, in response to a question about changes to the college's diversion program: "The most significant change was the implementation of construction debris recycling, as noted above. The College has also hosted several e-waste collections during the year. No recycling effort has been abandoned or reduced throughout the past year."<sup>116</sup> And according to the 2010 report: "No recycling or waste diversion programs have been eliminated during the course of the past year. The college continues to sponsor local e-waste events for the surrounding community and works closely with construction contractors to ensure the greatest possible volume of construction waste material is diverted from landfills."<sup>117</sup>

The record also shows that the claimant's solid waste that was not diverted was disposed of at a landfill by a waste hauler. The 2001 report notes: "Less material is going to the landfill due to recycling."<sup>118</sup> And the 2002 report states: "with the implementation of the recycling program, our waste stream has decreased to the landfills."<sup>119</sup> The 2010 report states that tree and shrubbery from pruning and food waste "are the only waste materials that are not diverted from landfills at this time" and that the "college continues to sponsor local e-waste events for the surrounding community and works closely with construction contractors to ensure the greatest possible volume of construction waste material is diverted from landfills."<sup>120</sup> And the district's claims also indicate landfill use, as costs were claimed for "diverting solid waste from landfill

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<sup>113</sup> Exhibit B, Controller's Comments on the IRC, pages 98-106 ["Understanding SB 1016 Solid Waste Per Capita Disposal Measurement Act", <http://www.calrecycle.ca.gov/lgcentral/goalmeasure/Tools/SimplePresen.pdf>.]

<sup>114</sup> Exhibit B, Controller's Comments on the IRC, pages 59 (2008 Report, showing an employee population target of 60.0, and 5.8 was achieved; and a student population target of 1.7, and 0.18 was achieved); 62 (2009 Report, showing an employee population target of 60.0, and 7.3 was achieved; and a student population target of 1.7, and 0.14 was achieved); 67 (2010 Report, showing an employee population target of 60.0, and 9.7 was achieved; and a student population target of 1.7 and 0.17 was achieved).

<sup>115</sup> Exhibit B, Controller's Comments on the IRC, page 59 (2008 Report).

<sup>116</sup> Exhibit B, Controller's Comments on the IRC, page 63 (2009 Report).

<sup>117</sup> Exhibit B, Controller's Comments on the IRC, page 67-68 (2010 Report).

<sup>118</sup> Exhibit B, Controller's Comments on the IRC, page 38 (2001 Report).

<sup>119</sup> Exhibit B, Controller's Comments on the IRC, page 41 (2002 Report).

<sup>120</sup> Exhibit B, Controller's Comments on the IRC, page 67-68 (2010 Report).

disposal ... - recycling” and for “diverting solid waste from landfill disposal ... - composting.”<sup>121</sup>

The avoided landfill disposal fee was based on the statewide average disposal fee provided by CIWMB for each fiscal year in the audit period, since the claimant did not provide any information to the Controller regarding the landfill fees it was charged.<sup>122</sup>

The claimant’s website acknowledges cost savings from waste diversion programs, as it states: “SBVC's [San Bernardino Valley College's] efforts at recycling save thousands of dollars per year. . . .”<sup>123</sup>

Based on this documentation, the Controller correctly presumed, consistent with the presumption in the test claim statutes and the court’s interpretation of those statutes and with no evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted.

The statutory presumption of cost savings controls unless the claimant files evidence to rebut the presumption and shows that cost savings were not realized.<sup>124</sup> The claimant has the burden of proof on this issue. Under the mandates statutes and regulations, the claimant is required to show that it has incurred increased costs mandated by the state when submitting a reimbursement claim to the Controller’s Office, and the burden to show that any reduction made by the Controller is incorrect.<sup>125</sup> The Parameters and Guidelines, as amended pursuant to the court’s

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<sup>121</sup> Exhibit A, IRC, pages 285 (1999-2000 claim), 289 (2000-2001 claim), 293 (2001-2002 claim), 297 (2002-2003 claim), 301 (2003-2004 claim), 305 (2004-2005 claim), 310 (2005-2006 claim), 315 (2006-2007 claim), 320 (2007-2008 claim, which mentioned composting only, not recycling), 324 (2008-2009 claim), 328 (2010-2011 claim, which mentioned composting only).

<sup>122</sup> Exhibit B, Controller’s Comments on the IRC, pages 22-23, 115-143.

<sup>123</sup> Exhibit B, Controller’s Comments on the IRC, page 72.

<sup>124</sup> Government Code section 17559, which requires that the Commission’s decisions be supported by substantial evidence in the record. See also, *Coffy v. Shiimoto* (2015) 60 Cal.4th 1198, 1209, a case interpreting the rebuttable presumption in Vehicle Code section 23152 that if a person had 0.08 percent or more, by weight, of alcohol in the blood at the time of testing, then it is presumed by law that he or she had 0.08 percent or more, by weight, of alcohol in the blood at the time of driving, unless he or she files evidence to rebut the presumption. The court states that unless and until evidence is introduced that would support a finding that the presumption does not exist, the statutory presumption that the person was driving over the legal limit remains the finding of fact.

<sup>125</sup> Evidence Code section 500, which states: “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” See also, *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 24, where the court recognized that “the general principle of Evidence Code 500 is that a party who seeks a court’s action in his favor bears the burden of persuasion thereon.” This burden of proof is recognized throughout the architecture of the mandates statutes and regulations. Government Code section 17551(a) requires the Commission to hear and decide a claim filed by a local agency or school district that it is entitled to reimbursement under article

writ, also require claimants to show the costs incurred to divert solid waste and to perform the administrative activities, and *to report and identify* the costs saved or avoided by diverting solid waste: “Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans *shall be* identified and offset from this claim as cost savings.”<sup>126</sup> Thus, the claimant has the burden to rebut the statutory presumption and to show, with substantial evidence in the record, that the costs of complying with the mandate exceed any cost savings realized by diverting solid waste.

The Commission finds that since the claimant has not filed any evidence to rebut the statutory presumption of cost savings, the Controller’s finding that cost savings have been realized is correct as a matter of law.

3. For all years of the audit period except calendar years 2002 and 2003, the Controller’s calculation of cost savings is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

The Controller correctly determined that for every year during the audit period (except for calendar year 2002 as discussed below), the claimant diverted more solid waste than the amount mandated by the test claim statute.<sup>127</sup> For years the claimant exceeded the mandate, the Controller calculated offsetting savings by allocating the diversion to reflect the mandate. To allocate the diversion, the Controller divided the mandated solid waste diversion rate (either 25 percent or 50 percent) by the actual rate diverted (as annually reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee

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XIII B, section 6. Section 17551(d) requires the Commission to hear and decide a claim by a local agency or school district that the Controller has incorrectly reduced payments to the local agency or school district. In these claims, the claimant must show that it has incurred increased costs mandated by the state. (Gov. Code, §§ 17514 [defining “costs mandated by the state”], 17560(a) [“A local agency or school district may . . . file an annual reimbursement claim that details the costs actually incurred for that fiscal year.”]; 17561 [providing that the issuance of the Controller’s claiming instructions constitutes a notice of the right of local agencies and school districts to file reimbursement claims based upon the parameters and guidelines, and authorizing the Controller to audit the records of any local agency or school district to “verify the actual amount of the mandated costs.”]; 17558.7(a) [“If the Controller reduces a claim approved by the commission, the claimant may file with the commission an incorrect reduction claim pursuant to regulations adopted by the commission.”]. By statute, only the local agency or school district may bring these claims, and the local entity must present and prove its claim that it is entitled to reimbursement. (See also, Cal. Code Regs., tit. 2, §§ 1185.1, et seq., which requires that the IRC contain a narrative that describes the alleged incorrect reductions, and be signed under penalty of perjury.)

<sup>126</sup> Exhibit A, IRC, page 61 (Amended Parameters and Guidelines). Emphasis added.

<sup>127</sup> Exhibit A, IRC, page 33, fn. 2 (Final Audit Report). Exhibit B, Controller’s Comments on the IRC, page 89.

(based on the statewide average fee) to calculate the offsetting savings realized.<sup>128</sup>

$$\text{Offsetting Savings Realized} = \frac{\text{Maximum Allowable Diversion \%}}{\text{Actual Diversion \%}} \times \text{Tonnage Diverted} \times \text{Avoided Landfill Disposal Fee (per Ton)}$$

The formula allocates or reduces cost savings based on the mandated rate, and is intended to avoid penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>129</sup>

The formula is consistent with the statutory presumption of cost savings, as interpreted by the court for this program and the requirements in the Parameters and Guidelines. The court found that the test claim statutes require that reduced or avoided landfill fees represent savings that must be offset against the cost of diversion. The court stated: “The amount or value of the [offsetting cost] savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report” to CIWMB.<sup>130</sup> The Parameters and Guidelines state: “Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be identified and offset from this claim as cost savings . . . .”<sup>131</sup> Thus, the Controller’s formula correctly presumes, based on the record and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted. And when the claimant exceeded the mandated diversion rates, the Controller’s formula limited the offset to reflect the mandated rate.

The claimant raises several arguments, unsupported by the law or evidence in the record, that the Controller’s calculation of cost savings is incorrect.

The claimant first alleges that cost savings cannot be realized because the chain of events required by Public Contract Code sections 12167 and 12167.1 did not occur: that savings have to be converted to cash, and amounts in excess of \$2,000 per year must be deposited in the state fund and appropriated back by the Legislature to mitigate the costs.<sup>132</sup> It is undisputed that the claimant did not remit to the state any savings realized from the implementation of the IWM

<sup>128</sup> Exhibit A, IRC, page 35 (Final Audit Report); Exhibit B, Controller’s Comments on the IRC, page 20.

<sup>129</sup> Exhibit B, Controller’s Comments on the IRC, pages 20.

<sup>130</sup> Exhibit B, Controller’s Comments on the IRC, page 83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>131</sup> Exhibit A, IRC page 61 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>132</sup> Exhibit A, IRC, page 13.

plan.<sup>133</sup> However, as indicated above, cost savings are presumed by the statutes and the claimant has not filed evidence to rebut that-presumption. Thus, the claimant should have deposited the cost savings into the state’s account as required by the test claim statutes, and the claimant’s failure to comply with the law does not make the Controller’s calculations of cost savings incorrect as a matter of law, or arbitrary or capricious. Since cost savings are presumed by the statutes, the claimant has the burden to show increased costs mandated by the state. As the court stated: “[r]eimbursement is not available under section 6 and section 17514 to the extent that a local government or school district is able to provide the mandated program or increased level of service without actually incurring increased costs.”<sup>134</sup>

The claimant next asserts that the Controller’s formula is an underground regulation.<sup>135</sup> The Commission disagrees. Government Code section 11340.5 provides that no state agency shall enforce or attempt to enforce a rule or criterion which is a regulation, as defined in section 11342.600, unless it has been adopted pursuant to the Administrative Procedures Act. As discussed above, however, the formula is consistent with the statutory presumption of cost savings, as interpreted by the court for this program. Interpretations that arise in the course of case-specific adjudications are not regulations.<sup>136</sup>

The claimant also argues that using landfill fees in the calculation of offsetting savings is not relevant because “[t]he District did not claim landfill costs, so there are none to be offset.”<sup>137</sup> The claimant’s interpretation of the cost savings requirement is not correct. The cost of disposing waste at a landfill is not eligible for reimbursement. Reimbursement is authorized to *divert* solid waste from the landfill through source reduction, recycling, and composting activities.<sup>138</sup> As explained by the court:

In complying with the mandated solid waste diversion requirements of Public Resources Code section 42921, California Community Colleges are likely to experience cost savings in the form of reduced or avoided costs of landfill disposal. The reduced or avoided costs are a direct result and an integral part of the mandated IWM plan ....

Such reduction or avoidance of landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings which must be offset against the costs of the diversion activities to determine the reimbursable costs of

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<sup>133</sup> Exhibit B, Controller’s Comments on the IRC, pages 13, 18.

<sup>134</sup> Exhibit B, Controller’s Comments on the IRC, page 82 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>135</sup> Exhibit A, IRC, page 14.

<sup>136</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>137</sup> Exhibit A, IRC, page 17.

<sup>138</sup> Exhibit A, IRC, page 57 (Parameters and Guidelines).

IWM plan implementation -- i.e., the actual increased costs of diversion -- under section 6 and section 17514.<sup>139</sup>

The court also noted that diversion is defined as “activities which reduce or eliminate the amount of solid waste from solid waste disposal.”<sup>140</sup>

In addition, the claimant argues that the formula assumes facts without evidence in the record. For example, the claimant questions the Controller’s assumption that the diversion rate achieved in 2007 applies to subsequent years.<sup>141</sup> The claimant also questions the assumption that all diverted waste would have been disposed in a landfill, and that the statewide average cost to dispose of waste at a landfill actually applied to the claimant.<sup>142</sup>

The Controller’s assumptions, however, are supported by evidence in the record and the claimant has filed no evidence to rebut them. The Controller applied the diversion rate achieved in 2007 to subsequent years because CIWMB stopped requiring community college districts to report the actual amount and percent of tonnage diverted in 2008. As the Controller notes, the 2007 data is “a fair representation of the 2008 through 2010 diversion information because the district’s recycling processes have already been established and committed to.”<sup>143</sup> As discussed above, the data and the narrative in the claimant’s reports for 2008, 2009, and 2010 reveal that the claimant’s annual per capita disposal rate for both the employee and student populations were below the target rate.<sup>144</sup> Overall, the evidence indicates that the claimant satisfied the requirement to divert 50 percent or more of its solid waste during 2008, 2009, and 2010.<sup>145</sup>

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<sup>139</sup> Exhibit B, Controller’s Comments on the IRC, pages 82-83 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>140</sup> Public Resources Code section 40124. Exhibit B, Controller’s Comments on the IRC, page 82 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>141</sup> Exhibit A, IRC, page 15.

<sup>142</sup> Exhibit A, IRC, pages 15-16.

<sup>143</sup> Exhibit B, Controller’s Comments on the IRC, page 21.

<sup>144</sup> Exhibit B, Controller’s Comments on the IRC, pages 59 (2008 Report, showing an employee population target of 60.0, and 5.8 was achieved; and a student population target of 1.7, and 0.18 was achieved); 62 (2009 Report, showing an employee population target of 60.0, and 7.3 was achieved; and a student population target of 1.7, and 0.14 was achieved); 67 (2010 Report, showing an employee population target of 60.0, and 9.7 was achieved; and a student population target of 1.7 and 0.17 was achieved).

<sup>145</sup> Exhibit B, Controller’s Comments on the IRC, page 59 (2008 report), stating “All offices have continued to regularly recycle paper, plastic, aluminum, cardboard, etc. and use on-line forms and electronic processing (e-mail, purchasing, etc.)” and states that the district did not implement new programs or discontinue programs in 2008.

The Controller obtained the statewide average cost for landfill disposal fees from CIWMB. The fees were based on a private survey of a large percentage of landfills across California.<sup>146</sup> The Controller's audit report indicates that the claimant did not provide documentation to support a different disposal fee.<sup>147</sup> In addition, the Controller states:

The district did not provide any information, such as its contract with or invoices received from its commercial waste hauler to support either the landfill fees actually incurred by the district or to confirm that the statewide average landfill fee was greater than the actual landfill fees incurred by the district.<sup>148</sup>

On these audit issues, the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. The Commission must only ensure that the Controller's decision is not arbitrary, capricious, or entirely lacking in evidentiary support, and adequately considered all relevant factors.<sup>149</sup> There is no evidence that the Controller's assumptions are wrong or arbitrary or capricious with regard to the statewide average landfill fee.

The claimant also points to the Controller's audits of other community college districts, arguing that the Controller's audit results in those cases vary and are arbitrary.<sup>150</sup> The Controller's audits of other community college district reimbursement claims are not relevant to the Controller's audit here. Each audit depends on the documentation and evidence provided by the claimant to show increased costs mandated by the state.

Accordingly, the Controller's calculation of cost savings for all years of the audit period except calendar years 2002 and 2003 is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

4. The reduction of costs claimed for calendar years 2002 and 2003 based on an incorrect mandated diversion rate is incorrect as a matter of law, and the failure to allocate the rate in 2002 is arbitrary, capricious, and entirely lacking in evidentiary support.

In calendar year 2002, the claimant achieved a diversion rate of 37.6 percent.<sup>151</sup> Although the mandated diversion rate for 2002 was 25 percent, the Controller used 50 percent and mistakenly found that the claimant did not exceed the mandated diversion rate. Based on this finding, the Controller did not allocate the diversion to reflect the mandate, but used 100 percent of the reported diversion to calculate offsetting savings. This resulted in an audit reduction of \$21,290

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<sup>146</sup> Exhibit B, Controller's Comments on the IRC, pages 22-23, 115-141.

<sup>147</sup> Exhibit A, IRC, page 36.

<sup>148</sup> Exhibit B, Controller's Comments on the IRC, page 23.

<sup>149</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>150</sup> Exhibit A, IRC, pages 17-18.

<sup>151</sup> Exhibit B, Controller's Comments on the IRC, page 40 (2002 Annual Report). The Controller did not round this figure and calculated it at 37.57 percent. See page 89.

for 2002 (588.6 tons of waste diverted in 2002, multiplied by the avoided statewide average disposal fee of \$36.17).<sup>152</sup>

In calendar year 2003, the claimant achieved a diversion rate of 56.4 percent.<sup>153</sup> The Controller correctly found that the claimant exceeded the mandated diversion rate and therefore allocated the diversion as it had for other years. However, the Controller used a 50 percent mandated rate to calculate the allocated diversion rate although the test claim statutes required only 25 percent diversion in calendar year 2003.<sup>154</sup> The requirement to divert 50 percent of solid waste did not become operative until January 1, 2004.<sup>155</sup>

As indicated in the Parameters and Guidelines, the mandate is to divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities.<sup>156</sup> Thus, in calendar years 2002 and 2003, community college districts were mandated to achieve diversion rates of only 25 percent.

The claimant's 2002 report to CIWMB shows it achieved 37.6 percent diversion, and its 2003 report shows it achieved 56.4 percent diversion,<sup>157</sup> thereby exceeding the mandated diversion rate of 25 percent in both years. The Controller admits that, "[a]s there is no State mandate to exceed solid waste diversion greater than 25% for calendar years 2002 and 2003 or greater than 50% for calendar year 2004 and beyond, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceed the levels set by statute."<sup>158</sup> Therefore, the Controller's finding that the claimant's diversion of solid waste did not achieve the mandated diversion rate in calendar year 2002 is incorrect as a matter of law. Moreover, the Controller's calculation of offsetting savings for 2002, which did not reduce cost savings by allocating the diversion to reflect the mandate as it did for other years when the claimant exceeded the mandate, is arbitrary, capricious, or entirely lacking in evidentiary support.

Additionally, the Controller's calculation of cost savings for calendar year 2003, using a 50 percent diversion rate instead of the mandated 25 percent diversion rate, is also incorrect as a matter of law.<sup>159</sup> As discussed above, the Controller's formula for offsetting cost savings for years in which the claimant exceeded the diversion mandate, which allocates the diversion based

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<sup>152</sup> Exhibit A, IRC, page 33, footnote 2. Exhibit B, Controller's Comments on the IRC, page 89.

<sup>153</sup> Exhibit B, Controller's Comments on the IRC, page 43 (2003 Annual Report). The Controller did not round this figure and calculated it at 56.37 percent. See page 89.

<sup>154</sup> Exhibit B, Controller's Comments on the IRC, page 20.

<sup>155</sup> Public Resources Code sections 42921; Exhibit A, IRC, page 93 (Parameters and Guidelines).

<sup>156</sup> Exhibit A, IRC, page 93 (Parameters and Guidelines). This is based on Public Resources Code sections 42921.

<sup>157</sup> Exhibit B, Controller's Comments on the IRC, pages 40 (2002 Report) 43 (2003 Report), and 89.

<sup>158</sup> Exhibit B, Controller's Comments on the IRC, page 20.

<sup>159</sup> Exhibit B, Controller's Comments on the IRC, page 89.

on the mandated rate, is consistent with the test claim statutes and the court's decision on this program.

Applying the Controller's cost savings formula to calendar years 2002 and 2003 (using the mandated 25 percent rate to calculate the allocated diversion), results in offsetting savings of:

- \$14,167 for 2002 (25 percent divided by 37.57 percent, multiplied by 588.6 tons diverted multiplied by the statewide average landfill disposal fee of \$36.17) rather than \$21,290; and
- \$15,761 for 2003 (25 percent divided by 56.37 percent, multiplied by 964.9 tons diverted multiplied by the statewide average landfill disposal fee of \$36.83) rather than \$31,522.

Therefore, the Commission finds that the difference of \$22,884 has been incorrectly reduced.

Accordingly, the Commission finds that the reduction of costs claimed for calendar years 2002 and 2003 based on an incorrect mandated diversion rate, is incorrect as a matter of law, and the failure to allocate the rate for 2002 is arbitrary, capricious, and entirely lacking in evidentiary support.

## **V. Conclusion**

Based on the foregoing, the Commission concludes that the Controller's reduction of costs claimed for all years in the audit period except calendar years 2002 and 2003 is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

The Commission further concludes that the Controller's reduction of costs claimed for calendar years 2002 and 2003, based on the application of an incorrect mandated diversion rate, is incorrect as a matter of law, and the failure to allocate the rate for 2002 is arbitrary, capricious, and entirely lacking in evidentiary support. The law and the record support offsetting cost savings for these years of \$29,928 rather than \$52,812. Therefore, the difference of \$22,884 has been incorrectly reduced and should be reinstated to claimant.

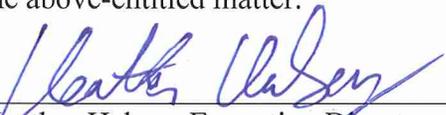
Accordingly, the Commission partially approves this IRC and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission's regulations, that the Controller reinstate \$22,884 to the claimant.



RE: **Decision**

*Integrated Waste Management*, 14-0007-I-11  
Public Resources Code Sections 40148, 40196.3, 42920-42928;  
Public Contract Code Sections 12167 and 12167.1  
Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75)  
State Agency Model Integrated Waste Management Plan (February 2000)  
Fiscal Years: 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005,  
2005-2006, 2006-2007, 2007-2008, 2008-2009, and 2010-2011  
San Bernardino Community College District, Claimant

On May 25, 2018, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

  
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Heather Halsey, Executive Director

Dated: May 30, 2018

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE INCORRECT REDUCTION CLAIM  
ON:

Education Code Sections 44662 and 44664<sup>1</sup>  
Statutes 1983, Chapter 498 and Statutes 1999,  
Chapter 4

Fiscal Years 2005-2006, 2006-2007, 2007-  
2008, and 2008-2009

Filed on June 9, 2015

Carlsbad Unified School District, Claimant

Case No.: 14-9825-I-02

*The Stull Act*

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

*(Adopted July 27, 2018)*

*(Served July 30, 2018)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on July 27, 2018. Sean Mick appeared on behalf of the claimant, and Masha Vorobyova appeared on behalf of the State Controller’s Office (Controller).

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 the Proposed Decision to deny the IRC by a vote of 5-0 as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	Yes
Ken Alex, Director of the Office of Planning and Research	Absent
Richard Chivaro, Representative of the State Controller	Absent
Sarah Olsen, Public Member	Yes
Carmen Ramirez, City Council Member	Yes
Andre Rivera, Representative of the State Treasurer, Vice Chairperson	Yes
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	Yes

<sup>1</sup> Note that this caption differs from the Test Claim and Parameters and Guidelines captions because it only includes those code sections approved for reimbursement by the Commission and not those pled in the Test Claim but denied.

## **Summary of the Findings**

This analysis addresses reductions made by the Controller to reimbursement claims filed by the Carlsbad Unified School District (claimant) for costs incurred during fiscal years 2005-2006 through 2008-2009 (audit period) for the *Stull Act* program. The claimant disputes reductions totaling \$274,101 for the audit period.

The Commission denies this IRC, finding that reductions related to the claimant's time study, and disallowances of completed employee evaluations in all four fiscal years were correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

Specifically, the Controller reduced costs based on denial of 19 of 22 discrete activities identified in the claimant's time study, relating to training, meetings, observation, report writing, conferences between evaluators and teachers, and other activities relating to planning, preparation, and organizing notes, and STAR testing. These activities are beyond the very narrow scope of the approved higher level of service, and the claimant has presented no argument or evidence establishing the relationship to the mandated activities included in the Parameters and Guidelines. The reduction based on the 19 denied activities is therefore correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

In addition, the Controller reduced reimbursement based on disallowed completed evaluations for non-instructional certificated employees, such as administrators, counselors, and librarians, among others; and preschool teachers. Preschool teachers do not perform the requirements of educational programs mandated by state or federal law, and therefore evaluations of preschool teachers are not reimbursable. Similarly, evaluations of non-instructional certificated personnel are reimbursable under Part IV.B. of the Parameters and Guidelines only if such employees' last regularly-scheduled evaluation resulted in an unsatisfactory evaluation; those facts are not supported in the record. The reduction based on disallowed completed evaluations is therefore correct as a matter of law.

## **COMMISSION FINDINGS**

### **I. Chronology**

- 12/28/2006     The claimant filed its 2005-2006 reimbursement claim.<sup>2</sup>
- 01/25/2008     The claimant filed its 2006-2007 reimbursement claim.<sup>3</sup>
- 02/13/2009     The claimant filed its 2007-2008 reimbursement claim.<sup>4</sup>
- 01/29/2010     The claimant filed its 2008-2009 reimbursement claim.<sup>5</sup>

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<sup>2</sup> Exhibit A, IRC, page 338 [Claim Documentation for Fiscal Year 2005-2006].

<sup>3</sup> Exhibit A, IRC, page 270 [Claim Documentation for Fiscal Year 2006-2007].

<sup>4</sup> Exhibit A, IRC, page 184 [Claim Documentation for Fiscal Year 2007-2008].

<sup>5</sup> Exhibit A, IRC, page 85 [Claim Documentation for Fiscal Year 2008-2009].

- 06/24/2010 The Controller issued a letter informing the claimant of the initiation of the audit.<sup>6</sup>
- 05/02/2012 The Controller issued the Draft Audit Report.<sup>7</sup>
- 05/09/2012 The claimant responded to the Draft Audit Report
- 06/15/2012 The Controller issued its Final Audit Report.<sup>8</sup>
- 07/13/2012 The Controller issued “results of review” letters.<sup>9</sup>
- 06/09/2015 The claimant filed the IRC.<sup>10</sup>
- 10/02/2015 The Controller filed late comments on the IRC.<sup>11</sup>
- 05/22/2018 Commission staff issued the Draft Proposed Decision.<sup>12</sup>
- 05/29/2018 The Controller filed comments on the Draft Proposed Decision.<sup>13</sup>

## **II. Background**

The Stull Act was originally enacted in 1971 to establish a uniform system of evaluation and assessment of the performance of “certificated personnel” within each school district. (Former Ed. Code, §§ 13485-13490.) As originally enacted, the Stull Act required the governing board of each school district to develop and adopt specific guidelines to evaluate and assess certificated personnel, and to avail itself of the advice of certificated instructional personnel before developing and adopting the guidelines.<sup>14</sup> The evaluation and assessment of the certificated personnel was required to be reduced to writing and a copy transmitted to the employee no later than sixty days before the end of the school year.<sup>15</sup> The employee then had the right to initiate a written response to the evaluation, which became a permanent part of the employee’s personnel file.<sup>16</sup> The school district was also required to hold a meeting with the employee to discuss the evaluation.<sup>17</sup>

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<sup>6</sup> Exhibit B, Controller’s Late Comments on the IRC, page 62 [Audit Entrance Conference Letter].

<sup>7</sup> Exhibit A, IRC, page 62 [Final Audit Report, p. 3].

<sup>8</sup> Exhibit A, IRC, page 57 [Final Audit Report Cover Letter].

<sup>9</sup> Exhibit A, IRC, page 4.

<sup>10</sup> Exhibit A, IRC, page 1.

<sup>11</sup> Exhibit B, Controller’s Late Comments on the IRC.

<sup>12</sup> Exhibit C, Draft Proposed Decision.

<sup>13</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

<sup>14</sup> Former Education Code sections 13486-13487.

<sup>15</sup> Former Education Code section 13488.

<sup>16</sup> Former Education Code section 13488.

<sup>17</sup> Former Education Code section 13488.

Prior law also required that the evaluation and assessment be continuous.<sup>18</sup> For probationary employees, the evaluation had to occur once each school year. For permanent employees, the evaluation was required every other year. Former section 13489 also required that the evaluation include recommendations, if necessary, for areas of improvement in the performance of the employee. If the employee was not performing his or her duties in a satisfactory manner according to the standards, the “employing authority” was required to notify the employee in writing, describe the unsatisfactory performance, and confer with the employee making specific recommendations as to areas of improvement and endeavor to assist in the improvement. Reimbursement for these prior requirements was denied by the Commission.<sup>19</sup>

The test claim statutes amended the Stull Act in 1983 and 1999 to expand the scope of evaluation and assessment of certificated personnel. The test claim statutes added additional criteria that must be included in those evaluations: the employee’s instructional techniques and strategies, and adherence to curricular objectives; and the performance of instructional employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11 (i.e., the STAR test subjects) as it reasonably relates to the progress of pupils towards the state adopted academic content standards as measured by state adopted assessment tests.<sup>20</sup> And, in the case the employee receives an unsatisfactory result, the test claim statutes require an additional evaluation “in the years in which the permanent certificated employee would not have otherwise been evaluated.”<sup>21</sup>

Since prior law already required evaluation and assessment of certificated personnel, the Commission partially approved the Test Claim on May 27, 2004, for those activities that represent the *limited* new program or higher level of service mandated by the state by the test claim statutes. The Test Claim Decision also found that the mandate was limited to certificated personnel performing the requirements of educational programs mandated by state or federal law; in other words, if the personnel being evaluated are performing the duties of voluntary school programs, the evaluation of those personnel would not be mandated by the state.<sup>22</sup>

The Parameters and Guidelines were adopted September 27, 2005. As relevant to this IRC, the Parameters and Guidelines identify the following reimbursable activities and limitations:

A. Certificated Instructional Employees

1. Evaluate and assess the performance of certificated instructional employees that perform the requirements of educational programs mandated by state or federal law as it reasonably relates to the instructional techniques and strategies used by the employee and the employee's adherence to curricular objectives (Ed. Code, § 44662, subd. (b), as amended by Stats. 1983, ch. 498.).

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<sup>18</sup> Former Education Code section 13489.

<sup>19</sup> Exhibit E, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 2; 17-18.

<sup>20</sup> Exhibit E, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 29-33.

<sup>21</sup> Exhibit E, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 33-34.

<sup>22</sup> See Exhibit E, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 5-12.

Reimbursement for this activity is limited to:

- a. reviewing the employee's instructional techniques and strategies and adherence to curricular objectives, and
- b. including in the written evaluation of the certificated instructional employees the assessment of these factors during the following evaluation periods:
  - o once each year for probationary certificated employees;
  - o every other year for permanent certificated employees; and
  - o beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C. § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.

*Note: For purposes of claiming reimbursement, eligible claimants must identify the state or federal law mandating the educational program being performed by the certificated instructional employees.*

2. Evaluate and assess the performance of certificated instructional employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11 as it reasonably relates to the progress of pupils towards the state adopted academic content standards as measured by state adopted assessment tests (Ed. Code, § 44662, subd. (b), as amended by Stats. 1999, ch. 4.).

Reimbursement for this activity is limited to:

- a. reviewing the results of the Standardized Testing and Reporting test as it reasonably relates to the performance of those certificated employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, and
- b. including in the written evaluation of those certificated employees the assessment of the employee's performance based on the Standardized Testing and Reporting results for the pupils they teach during the evaluation periods specified in Education Code section 44664, and described below:
  - o once each year for probationary certificated employees;
  - o every other year for permanent certificated employees; and
  - o beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C. § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.

## B. Certificated (Instructional and Non-Instructional) Employees

1. Evaluate and assess permanent certificated, instructional and non-instructional, employees that perform the requirements of educational programs mandated by state or federal law and receive an *unsatisfactory evaluation* in the years in which the permanent certificated employee would not have otherwise been evaluated pursuant to Education Code section 44664 (i.e., every other year). The additional evaluations shall last until the employee achieves a positive evaluation, or is separated from the school district (Ed. Code, § 44664, as amended by Stats. 1983, ch. 498).

This additional evaluation and assessment of the permanent certificated employee requires the school district to perform the following activities:

- a. evaluating and assessing the certificated employee performance as it reasonably relates to the following criteria: (1) the progress of pupils toward the standards established by the school district of expected pupil achievement at each grade level in each area of study, and, if applicable, the state adopted content standards as measured by state adopted criterion referenced assessments; (2) the instructional techniques and strategies used by the employee; (3) the employee's adherence to curricular objectives; (4) the establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities; and, if applicable, (5) the fulfillment of other job responsibilities established by the school district for certificated non-instructional personnel (Ed. Code, § 44662, subs. (b) and (c));
- b. reducing the evaluation and assessment to writing (Ed. Code, § 44663, subd. (a)). The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. If the employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the school district shall notify the employee in writing of that fact and describe the unsatisfactory performance (Ed. Code, § 44664, subd. (b));
- c. transmitting a copy of the written evaluation to the certificated employee (Ed. Code, § 44663, subd. (a));
- d. attaching any written reaction or response to the evaluation by the certificated employee to the employee's personnel file (Ed. Code, § 44663, subd. (a)); and
- e. conducting a meeting with the certificated employee to discuss the evaluation (Ed. Code, § 44553, subd. (a)).

*Note: For purposes of claiming reimbursement, eligible claimants must identify the state or federal law mandating the educational program being performed by the certificated, instructional and non-instructional, employees.*<sup>23</sup>

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<sup>23</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 3-5].

Additionally, the Parameters and Guidelines require that actual costs claimed “must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities.”<sup>24</sup>

### **Controller’s Audit and Summary of the Issues**

The Controller’s Final Audit Report states that “[i]nitially, all costs claimed [for employee salaries and benefits] by the district were unallowable because they were based on average time increments supported with time records that were not completed contemporaneously.”<sup>25</sup> In other words, the claimant did not provide adequate source documentation, and utilized average times to calculate the reimbursement requested. The Controller initially disallowed the entire claim. The claimant’s representatives then conducted a time study in fiscal year 2010-2011, as a substitute for records of actual time spent on evaluations, to determine the costs for the audit period (fiscal years 2005-2006 through 2008-2009).<sup>26</sup> The Controller accepted and applied that time study to the audit period, but as explained below determined that the scope of the time study included unallowable activities and costs.

There is no indication in the record that claimant disputes the Controller’s initial rejection of the claimant’s source documentation; the dispute in this IRC is focused on the development and application of the claimant’s time study.<sup>27</sup>

The claimant’s time study documented the time to perform 22 “activities of the teacher evaluation process,” and determined that it takes evaluators approximately 10 hours and 38 minutes, on average, to complete each required evaluation.<sup>28</sup> Of those 22 “activities” included in the time study, the Controller disallowed 19, as follows:

1. Preparing before training or planning meetings/conferences;
2. Training or planning meetings/conferences;
3. Preparing/organizing notes from training or planning meetings/conferences;
4. Preparing before meeting with teachers;
5. Conducting actual conference with teachers;
6. Preparing or organizing notes from meetings with teachers;
7. Preparing before “Pre-Observation” conferences with teachers;

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<sup>24</sup> Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3].

<sup>25</sup> Exhibit A, IRC, page 65 [Controller’s Final Audit Report, p. 6].

<sup>26</sup> Exhibit A, IRC, page 65 [Controller’s Final Audit Report, p. 6].

<sup>27</sup> Exhibit A, IRC, page 11 [“In response to the Controller’s exclusion at the beginning of the audit of all of the original claim documentation, the District with the agreement of the auditor prepared a time study based on the FY 2010-2011 certificated staff evaluation cycle.”].

<sup>28</sup> Exhibit A, IRC, page 65 [Controller’s Final Audit Report, p. 6]. See also, Exhibit A, IRC, page 11 [“The time study identified 22 discrete activities established as a result of staff interviews.”].

8. Conducting “Pre-Observation” conferences with teachers;
9. Preparing/organizing notes form “Pre-Observation” conferences with teachers;
10. Preparing before classroom observations of teachers;
11. Preparing/organizing notes from classroom observations, finalizing Collect Data forms;
12. Reporting observations, preparing the Standards for Excellence in Teaching observation checklists;
13. Preparing before “Post-Observation” conferences with teachers;
14. Conducting “Post-Observation” conferences with teachers;
15. Preparing notes from “Post-Observation” conferences and preparing Reflecting Conference worksheets;
16. Preparing before Final Evaluation conferences with teachers;
17. Conducting Final Evaluation conferences with teachers;
18. Preparing/organizing notes from Final Evaluation conferences with teachers; and
19. Discussing the STAR results with teachers and assessing how to improve instructional abilities.<sup>29</sup>

The Controller determined that activities related to planning, preparation, and organizing notes are not reimbursable because they are not required activities under the Parameters and Guidelines; that the claimant duplicated costs by including training in the time study, which was identified as a separate reimbursable activity in the Parameters and Guidelines on a one-time basis for each employee performing the mandate; and that conferences between teachers and evaluators are not reimbursable because they were required under prior law.<sup>30</sup>

Accordingly, the Controller allowed three elements, or “activities” of the time study:

- Conducting “informal” classroom observations;
- Conducting “formal” classroom observations; and
- Writing Final Evaluation Reports and/or preparing Teacher Evaluation Report.<sup>31</sup>

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<sup>29</sup> Exhibit A, IRC, pages 65-66 [Controller’s Final Audit Report, pp. 6-7].

<sup>30</sup> Exhibit A, IRC, page 66 [Controller’s Final Audit Report, p. 7].

<sup>31</sup> Exhibit A, IRC, page 67 [Controller’s Final Audit Report, p. 8].

Based on these three activities, the Controller found that it takes approximately 5 hours and 8 minutes to complete each required teacher evaluation under the mandated program.<sup>32</sup>

In addition to limiting the elements of the time study, the Controller disallowed costs for 46 of 660 completed evaluations, which the Controller determined were claimed in excess of the scope of the mandate. The evaluations that the Controller found to be non-reimbursable were for:

- Principals, vice principals, directors, coordinators, counselors, psychologists, librarians, and library media specialists who are not certificated *instructional* employees;
- Preschool teachers who do not perform the requirements of the program that is mandated by state or federal law;
- Duplicate teacher evaluations claimed multiple times in one school year;
- Permanent biannual teacher evaluations claimed every year rather than every other year; and
- Permanent five-year teacher evaluations claimed multiple times in a five-year period rather than once every five years.<sup>33</sup>

The claimant responded to these findings in the Draft Audit Report, concurring with the findings on duplicate evaluations and evaluations conducted in years that they were not mandated, but asserting that the remaining reductions for administrative or library personnel, who were also certificated employees, and for preschool teachers, were not supported in the audit report or by any law or rule cited by the Controller.<sup>34</sup> In addition, the claimant conceded that training activities and costs were duplicated in the time study, and agreed that because the Parameters and Guidelines permitted training only once for each employee, the Controller's adjustment is reasonable.<sup>35</sup>

Accordingly, based on the claimant's response to the audit report and its IRC filing, the following issues are in dispute:

- Reductions based on the 19 disallowed activities in the claimant's time study; and
- Disallowed completed evaluations based on the type of certificated employee (i.e., Principals, vice principals, directors, coordinators, counselors, psychologists, librarians, and library media specialists, which are not certificated *instructional* employees; and preschool teachers, which the Controller found were not

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<sup>32</sup> Exhibit A, IRC, page 67 [Controller's Final Audit Report, p. 8].

<sup>33</sup> Exhibit A, IRC, page 67 [Controller's Final Audit Report, p. 8].

<sup>34</sup> Exhibit A, IRC, pages 70-71 [Controller's Final Audit Report, pp. 11-12].

<sup>35</sup> Exhibit A, IRC, page 70 [Controller's Final Audit Report, p. 11].

performing the requirements of state- or federally-mandated educational programs).<sup>36</sup>

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

#### **A. Carlsbad Unified School District**

##### **1. Time Study**

The claimant groups the 19 disallowed activities from the time study into four categories: evaluation conferences; preparation activities; training activities; and STAR testing results.<sup>37</sup> The claimant acknowledges that the audit report allows reimbursement for training costs elsewhere in the findings, and therefore the claimant “does not dispute removal of the training time from the time study.”<sup>38</sup> With respect to evaluation conferences, the claimant cites the Controller’s finding that evaluation conferences are not new to the test claim statute, and argues that “[t]he Controller has confused the subject matter of the old and new mandates with the method of implementation.”<sup>39</sup> The claimant notes that the Commission’s Test Claim Decision found that the test claim statute added two new factors or criteria for evaluation of certificated instructional employees: “the instructional techniques and strategies used by the employee, and the employee’s adherence to curricular objectives.”<sup>40</sup> The claimant argues that “the fact that districts used evaluation conferences to implement the previous mandated activities does not exclude reimbursement to use the same method to implement the new activities.”<sup>41</sup>

With respect to “preparation activities,” the claimant argues that preparation time was stated as a separate element in the time study only to promote accuracy: “preparation time could have been logically merged with the activity relevant to the preparation.”<sup>42</sup> The claimant notes that the Parameters and Guidelines “enumerates the subject matter of the evaluation process and not the entire process to implement the mandate.”<sup>43</sup> The claimant further notes, “[e]ven the Controller characterizes the parameters and guidelines as an ‘outline.’”<sup>44</sup> The claimant therefore concludes that preparation relating to evaluation conferences “is a rational, relevant, reasonable and

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<sup>36</sup> The total disputed reduction over four fiscal years is \$258,812 in salaries and benefits, and \$15,289 in related indirect costs. (Exhibit A, IRC, page 65 [Controller’s Final Audit Report, p. 6].)

<sup>37</sup> Exhibit A, IRC, pages 13-16.

<sup>38</sup> Exhibit A, IRC, page 16.

<sup>39</sup> Exhibit A, IRC, page 13.

<sup>40</sup> Exhibit A, IRC, page 14.

<sup>41</sup> Exhibit A, IRC, page 14.

<sup>42</sup> Exhibit A, IRC, page 15.

<sup>43</sup> Exhibit A, IRC, page 15.

<sup>44</sup> Exhibit A, IRC, page 15.

necessary part of implementing the mandated activities in the usual course of business and the Controller has stated no basis to exclude it from the scope of the evaluation process.”<sup>45</sup>

And with respect to STAR testing results, the claimant argues that the audit disallows time to review STAR test results “as it reasonably relates to the performance of those certificated employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11...” despite such review being found reimbursable in the Commission’s Test Claim Decision.<sup>46</sup>

Accordingly, the claimant alleges that the Controller incorrectly denied costs for activities properly included within the time study, and, incorrectly reduced the average time resulting from the study.

## 2. Excluded Evaluations

The claimant’s time study assigned a value (in staff time) to each evaluation, for purposes of tracking costs and claiming reimbursement. The Controller, however, disallowed costs for 46 of 660 completed evaluations claimed, based on findings that those evaluations were beyond the scope of the mandate. Evaluations claimed beyond the scope of the mandate include those that were conducted at a time they were not required, including duplicate evaluations within a single school year and evaluations conducted more than once every five years for permanent five-year-tenured teachers, or more than every other year for permanent non-tenured teachers.<sup>47</sup> The remaining disallowances were for certificated employees who were not required to be evaluated under the mandate (specifically, administrative and other non-instructional personnel, and preschool instructors).<sup>48</sup> While the claimant concurs with the Controller’s findings relating to evaluations conducted in a year they were not required, the claimant also notes in its IRC that the Controller has not identified the number of evaluations excluded based on each of these grounds.<sup>49</sup> With respect to excluded employees, such as “principals, vice principals, directors, coordinators, counselors, psychologists, librarians, and library media specialists,”<sup>50</sup> the claimant argues that the Test Claim Decision and Parameters and Guidelines do not limit reimbursement to employees providing classroom instruction. Rather, the claimant argues that the Test Claim Decision includes all certificated personnel “involved in the education process...”<sup>51</sup>

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<sup>45</sup> Exhibit A, IRC, page 15.

<sup>46</sup> Exhibit A, IRC, page 16 [citing the Test Claim Decision, *The Stull Act*, 98-TC-25].

<sup>47</sup> Exhibit A, IRC, page 67 [Controller’s Final Audit Report, p. 8].

<sup>48</sup> Exhibit A, IRC, page 67 [Controller’s Final Audit Report, p. 8].

<sup>49</sup> Exhibit A, IRC, pages 19-20.

<sup>50</sup> Exhibit A, IRC, page 67 [Controller’s Final Audit Report, p. 8].

<sup>51</sup> Exhibit A, IRC, page 17 [citing the Test Claim Decision, *The Stull Act*, 98-TC-25, pages 18-20 (“Certificated employees are those employees directly involved in the educational process and include both instructional and non-instructional employees such as teachers, administrators, supervisors, and principals.”)].

With respect to the exclusion of completed evaluations for preschool teachers, the claimant argues that the Commission identified a number of voluntary educational programs for which reimbursement for this mandate was not required, and preschool instruction was not among them.<sup>52</sup> Accordingly, the claimant asserts that “[t]here is no stated basis to exclude certificated preschool instructors.”<sup>53</sup>

The claimant did not file comments on the Draft Proposed Decision.

### **B. State Controller’s Office**

The Controller explains that “[i]nitially, all costs claimed by the district were unallowable because they were based on average time increments supported with time records that were not completed contemporaneously.”<sup>54</sup> The claimant conducted a time study in fiscal year 2010-2011, “as a substitute for records of actual time spent on teacher evaluations.”<sup>55</sup> The Controller accepted and applied that time study to the audit period, but determined that the scope of the time study included unallowable activities and costs:

The time study documented the time it took district evaluators to perform 22 separate activities of the teacher evaluation process. The time study results reported time for training, planning, preparation, meetings, observation, report writing and other activities within the evaluation process. We determined that 19 activities reported in the time study were unallowable.<sup>56</sup>

The claimant disputed those 19 disallowed activities, and grouped them into four categories: evaluation conferences; preparation activities; training activities; and STAR testing results.<sup>57</sup> Responding to the claimant’s categories, the Controller asserts that “evaluation conferences” as described by the claimant are not reimbursable for two reasons: first, section IV.B.1. of the Parameters and Guidelines only provides reimbursement for evaluation conferences every other year, unless a previous evaluation results in an unsatisfactory evaluation. The Controller states that no unsatisfactory evaluations were reported.<sup>58</sup> And second, the Controller maintains that section IV.A.1. and IV.A.2. do not provide reimbursement for evaluation conferences, and the Commission’s Statement of Decision expressly found that conferences were not reimbursable “because they were required before the enactment of the test claim legislation.”<sup>59</sup> The Controller

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<sup>52</sup> Exhibit A, IRC, pages 18-19 [citing Parameters and Guidelines, p. 3; Test Claim Decision, p. 11, Fn 42].

<sup>53</sup> Exhibit A, IRC, page 19.

<sup>54</sup> Exhibit B, Controller’s Late Comments on the IRC, page 10.

<sup>55</sup> Exhibit B, Controller’s Late Comments on the IRC, page 10.

<sup>56</sup> Exhibit B, Controller’s Late Comments on the IRC, page 10.

<sup>57</sup> Exhibit A, IRC, pages 13-16.

<sup>58</sup> Exhibit B, Controller’s Late Comments on the IRC, page 14.

<sup>59</sup> Exhibit B, Controller’s Late Comments on the IRC, page 14.

notes that the test claim statutes added “two new evaluation factors,” but the evaluation itself was required under prior law.<sup>60</sup>

With respect to “preparation activities,” the Controller argues that reimbursement is limited to those activities outlined in the Parameters and Guidelines, which do not list any preparation activities as reimbursable.<sup>61</sup> To the extent the claimant asserts that preparation activities are “reasonable and necessary,” the Controller suggests that “[t]he district may file an amendment with the Commission on State Mandates to amend the existing parameters and guidelines.”<sup>62</sup>

And with respect to “STAR testing results,” the Controller asserts that the claimant “did not claim any activity that is reimbursable.”<sup>63</sup> The Controller notes that “[r]eimbursement for the activity IV.A.2 is limited to ‘review of the results of the STAR test...and to include in the written evaluation...the assessment of the employee’s performance based on STAR results...’”<sup>64</sup> The claimant instead claimed reimbursement for “discussing the STAR results with teachers and how to improve instructional abilities.”<sup>65</sup> The Controller asserts that “these two activities are not interchangeable,” and “[w]e believe conference activities are not reimbursable, as they are not listed as allowable activities in the respective section of the program’s parameters and guidelines.”<sup>66</sup>

Finally, with respect to the number of completed evaluations claimed, and the number disallowed, the Controller notes that the claimant disagrees with the disallowed evaluations for “non-instructional certificated personnel,” including administrators, counselors, librarians, and others; and disallowed evaluations for preschool teachers.<sup>67</sup> The Controller maintains that the claimant is reading the Commission’s Test Claim Decision out of context, and therefore misinterpreting the Parameters and Guidelines with respect to employees for whom evaluations are reimbursable.<sup>68</sup> Addressing preschool teachers specifically, the Controller argues that the claimant failed to identify any specific state or federal law making preschool instruction mandatory, and therefore evaluations of preschool teachers are beyond the scope of this mandate.<sup>69</sup>

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<sup>60</sup> Exhibit B, Controller’s Late Comments on the IRC, page 14.

<sup>61</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>62</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>63</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>64</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>65</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>66</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>67</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 18-19.

<sup>68</sup> Exhibit B, Controller’s Late Comments on the IRC, page 18.

<sup>69</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

The Controller's Comments on the Draft Proposed Decision state that the Controller agrees with the findings and recommendations in the Draft Proposed Decision.<sup>70</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.

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>71</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>72</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>73</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

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<sup>70</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision.

<sup>71</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>72</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>73</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space Dist.* (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.

connection between those factors, the choice made, and the purposes of the enabling statute.” [Citation.]’ ”<sup>74</sup>

The Commission must review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>75</sup> In addition, section 1185.1(f)(3) and 1185.2(d) and (e) 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>76</sup>

**A. The Claimant Timely Filed this IRC Within Three Years From the Date It First Received From the Controller Written Notice of the Adjustment as Required by Former Section 1185.1 of the Commission’s Regulations.**

Government Code section 17561 authorizes the Controller to audit the reimbursement claims and records of local government to verify the actual amount of the mandated costs, and to reduce any claim that the Controller determines is excessive or unreasonable. If the Controller reduces a claim on a state-mandated program, the Controller is required to notify the claimant in writing, specifying the claim components adjusted, the amounts adjusted, interest charges on claims adjusted to reduce the overall reimbursement to the claimant, and the reason for the adjustment.<sup>77</sup> The claimant may then file an IRC with the Commission “pursuant to regulations adopted by the Commission” contending that the Controller’s reduction was incorrect and to request that the Controller reinstate the amounts reduced to the claimant.<sup>78</sup>

To be complete, an IRC filing must be timely filed “no later than three years following the date of the Office of State Controller’s final audit report, letter, remittance advice, or other written notice of adjustment to a reimbursement claim.”<sup>79</sup>

Here, the Final Audit Report is dated June 15, 2012.<sup>80</sup> The IRC was filed with the Commission on June 9, 2015.<sup>81</sup> Less than three years having elapsed between the issuance of the final audit

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<sup>74</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th, 534, 547-548.

<sup>75</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>76</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>77</sup> Government Code section 17558.5(c).

<sup>78</sup> Government Code sections 17551(d), 17558.7; California Code of Regulations, title 2, sections 1185.1, 1185.9.

<sup>79</sup> Former California Code of Regulations, title 2, sections 1185.1(c), 1185.2(a) (Register 2014, No. 21).

<sup>80</sup> Exhibit A, IRC, pages 4; 57.

<sup>81</sup> Exhibit A, IRC, page 1.

report and the filing of the IRC, this IRC was filed within the period prescribed in former Code of Regulations, title 2, section 1185.1.

Based on the foregoing, the Commission finds the IRC was timely filed.

**B. The Controller’s Reductions Based on the Denial of Activities Included in the Claimant’s Time Study that the Controller Found Were Beyond the Scope of the Mandate Are Correct as Matter of Law, and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

The Parameters and Guidelines for this program, adopted September 27, 2005, require that reimbursement be based on *actual costs* supported by contemporaneous source documents created at or near the same time the actual cost was incurred, as follows:

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.<sup>82</sup>

The claimant’s original reimbursement claim documentation is comprised of forms and schedules containing administrators’ assertions of estimated staff time spent on the mandate, which were then compiled to produce average times to perform the mandated activities, and translated into costs.<sup>83</sup> The Controller rejected the claimant’s initial claimed costs for fiscal years 2005-2006 through 2008-2009 “because they were based on average time increments supported with time records that were not completed contemporaneously.”<sup>84</sup> This amounts to a finding that the claimant did not comply with the contemporaneous source document rule, and did not claim actual costs, as required by the Parameters and Guidelines.<sup>85</sup> There is no assertion or evidence in the record rebutting that finding. Pursuant to Government Code section 17564, reimbursement claims filed with the Controller shall be filed in the manner prescribed in the Parameters and Guidelines, and the Parameters and Guidelines, as a quasi-judicial decision of the Commission, are final and binding.<sup>86</sup> The claimant failed to comply with the Parameters and

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<sup>82</sup> Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3].

<sup>83</sup> Exhibit A, IRC, pages 85-366. See, e.g., Exhibit A, IRC, pages 101; 104-122; 124-125; 141.

<sup>84</sup> Exhibit A, IRC, page 65 [Final Audit Report, p. 6].

<sup>85</sup> See Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3]; *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 802-803 [Discussing non-enforceability of the Controller’s Contemporaneous Source Document Rule when imposed only by Controller’s Claiming Instructions, prior to valid incorporation within Parameters and Guidelines, a regulatory document].

<sup>86</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

Guidelines, and therefore the Controller could have reduced the entire claim to zero. Any such reduction would have been correct as a matter of law.

Instead, the Controller permitted the claimant to conduct a time study based on fiscal year 2010-2011 activities, “as a substitute for records of actual time spent on teacher evaluations.”<sup>87</sup> The results of that time study were then applied to the earlier audit period, and the issue before the Commission in this IRC is whether the Controller’s adjustments to and application of the time study is arbitrary, capricious, or entirely lacking in evidentiary support.

The claimant’s time study identified 22 discrete activities involved in the teacher evaluation process, and identified the time spent on each item, in order to determine average times to perform the reimbursable activities.<sup>88</sup> Those items included time for training, planning, preparation, meetings, observation, report writing, and other activities, for a total (average) of 10 hours, 38 minutes per evaluation.<sup>89</sup>

The Controller disallowed 19 of the 22 discrete activities of the time study, based on the following findings:

- (1) The activities related to planning, preparation, and organizing notes are not reimbursable under the mandate.
- (2) Training-related activities were included in the time study, but were also claimed as a direct cost item in each fiscal year. “We determined allowable time spend on training from the district’s original claims.”
- (3) Conferences between the evaluators and teachers are not reimbursable because they were required before the enactment of the test claim legislation.<sup>90</sup>

And, according to the claimant’s narrative, the Controller also denied one activity related to evaluation and assessment of teachers with respect to their pupils’ STAR testing results, and progress toward state standards.<sup>91</sup>

The Controller found that each completed evaluation takes an average of 5 hours and 8 minutes, based on the three allowed activities from the claimant’s time study.<sup>92</sup>

The claimant disputes the disallowance of activities related to evaluation conferences, preparation and planning activities, and reviewing STAR test results.<sup>93</sup> Specifically, the claimant argues that evaluation conferences are “a method of implementing this mandate, and

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<sup>87</sup> Exhibit A, IRC, page 65 [Final Audit Report, p. 6].

<sup>88</sup> See Exhibit A, IRC, page 11.

<sup>89</sup> Exhibit A, IRC, page 65 [Final Audit Report, p. 6].

<sup>90</sup> Exhibit A, IRC, page 66 [Final Audit Report, p. 7].

<sup>91</sup> Exhibit A, IRC, page 16.

<sup>92</sup> Exhibit A, IRC, page 67 [Final Audit Report, p. 8].

<sup>93</sup> Exhibit A, IRC, pages 13-16.

not just a subject matter activity.”<sup>94</sup> The claimant further asserts that preparation activities were not explicitly considered or denied by the Test Claim Decision, and “[p]reparation is a rational, relevant, reasonable and necessary part of implementing the mandated activities in the usual course of business and the Controller has stated no basis to exclude it from the scope of the evaluation process.”<sup>95</sup> In addition, the claimant argues that the Test Claim Decision approved “the review of the results of the STAR test as it reasonably relates to the performance of those certificated employees [that teach STAR test subjects], and to include in the written evaluation of those certificated employees the assessment of the employee’s performance based on the STAR results for the pupils they teach.”<sup>96</sup>

The Commission finds that the Controller’s denial of the 19 activities included in the claimant’s time study is correct as a matter of law, and not arbitrary, capricious, or without evidentiary support.

The Parameters and Guidelines limit reimbursement for evaluation and assessment of certificated employees as follows:

- Evaluate and assess the performance of certificated instructional employees *that perform the requirements of educational programs mandated by state or federal law* as it reasonably relates to the instructional techniques and strategies used by the employee; and the employee’s adherence to curricular objectives.

*Reimbursement for this activity is limited to:*

- *review* of the employee’s instructional techniques and strategies and adherence to curricular objectives, and
  - *include in the written evaluation* of the certificated instructional employees the assessment of these factors during the specified evaluation periods.
- Evaluate and assess the performance of certificated instructional employees that teach [STAR test subjects, reading, writing, mathematics, etc.] in grades 2 to 11 as it reasonably relates to the progress of pupils toward [STAR test statewide standards].

*Reimbursement for this activity is limited to:*

- *review* of the results of the STAR test as it reasonably relates to the performance of those certificated employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, and
- *include in the written evaluation* of those certificated employees the assessment of the employee’s performance based on the STAR results for the pupils they teach during the specified evaluation periods.

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<sup>94</sup> Exhibit A, IRC, page 13.

<sup>95</sup> Exhibit A, IRC, pages 13-15.

<sup>96</sup> Exhibit A, IRC, page 16.

- Evaluate and assess permanent *certificated, instructional and non-instructional employees that perform the requirements of educational programs mandated by state or federal law and receive an unsatisfactory evaluation* in the years in which the permanent certificated employee would not have otherwise been evaluated. The additional evaluations shall last until the employee achieves a positive evaluation, or is separated from the school district. The following activities are reimbursable:
  - evaluate and assess the certificated employee performance as it reasonably relates to the following criteria: (1) the progress of pupils toward the standards established by the school district of expected pupil achievement at each grade level in each area of study, and, if applicable, the state adopted content standards as measured by state adopted criterion referenced assessments; (2) the instructional techniques and strategies used by the employee; (3) the employee’s adherence to curricular objectives; (4) the establishment and maintenance of a suitable learning environment, within the scope of the employee’s responsibilities; and, if applicable, (5) the fulfillment of other job responsibilities established by the school district for certificated non-instructional personnel;
  - the evaluation and assessment shall be reduced to writing. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. If the employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the school district shall notify the employee in writing of that fact and describe the unsatisfactory performance;
  - transmit a copy of the written evaluation to the certificated employee;
  - attach any written reaction or response to the evaluation by the certificated employee to the employee’s personnel file; and
  - conduct a meeting with the certificated employee to discuss the evaluation.<sup>97</sup>

This is a very narrow higher level of service, and reimbursement is not required for the full evaluation and assessment of those certificated employees who have received satisfactory evaluations. For those employees, reimbursement is limited to the review and the inclusion of the new criteria mandated by the test claim statutes in the written evaluation. Further, the Parameters and Guidelines require the claimant to identify the state or federal law that mandates the educational program being performed by the employee being evaluated.<sup>98</sup>

Nowhere in the time study documentation, the response to the Draft Audit Report, or the IRC narrative itself, does the claimant attempt to isolate the narrow higher level of service approved by the Commission in the Test Claim Decision, or to tie the 19 disallowed time study items to the approved activities. As explained in the Test Claim Decision, prior law already required

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<sup>97</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 4-6].

<sup>98</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 4-6].

evaluation of certificated employees.<sup>99</sup> The test claim statutes merely added additional criteria to be considered within those evaluations, and required a follow-up evaluation when a certificated employee receives an unsatisfactory evaluation and annual evaluations thereafter until the employee receives a satisfactory evaluation or, is separated from the school district.<sup>100</sup> The time study activities proposed by the claimant make are not restricted to the time and costs of evaluations pertaining to only the new evaluation and assessment criteria,<sup>101</sup> nor are they limited to only those evaluations required for employees whose last regularly-scheduled evaluation resulted in an unsatisfactory rating.<sup>102</sup> The Parameters and Guidelines require documentation to establish the relationship between the activities and costs claimed and the reimbursable activities stated in the Parameters and Guidelines.<sup>103</sup> The claimant’s time study activities (which generally include evaluation conferences, preparation and planning activities) are described too generally to establish that connection.<sup>104</sup>

Furthermore, the activity proposed for claimant’s time study related to STAR testing goes beyond the scope of the reimbursable activity. The claimant argues that the Commission approved “the review of the results of the STAR test as it reasonably relates to the performance of those certificated employees [teaching STAR test subjects] and to include in the written evaluation of those certificated employees the assessment of the employee’s performance based on the STAR results for the pupils they teach...”<sup>105</sup> That description is substantially similar to and consistent with the Parameters and Guidelines, which indeed provide reimbursement to evaluate and assess the performance of teachers of STAR test subjects<sup>106</sup> “as it reasonably relates to the progress of pupils towards the state adopted academic content standards...” The Parameters and Guidelines also clarify that reimbursement for this activity is limited to “reviewing the results” of the STAR test and “including in the written evaluation...the assessment of the employee’s performance based on the [STAR test] results for the pupils they teach.”<sup>107</sup> However, the activity stated in the claimant’s proposed time study pertaining to STAR testing is “*Discussing* the STAR results with teachers and assessing how to improve instructional abilities.”<sup>108</sup> The activity as described in the claimant’s time study implies interaction between

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<sup>99</sup> Exhibit E, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 18-25.

<sup>100</sup> Exhibit A, IRC, pages 31-32 [Parameters and Guidelines, pp. 4-5].

<sup>101</sup> Exhibit A, IRC, pages 31-32 [Parameters and Guidelines, pp. 4-5, Parts IV.A.1. & 2.].

<sup>102</sup> Exhibit A, IRC, page 32 [Parameters and Guidelines, p. 5, Part IV.B.1.].

<sup>103</sup> Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3]. Actual costs claimed “must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities.”

<sup>104</sup> Exhibit A, IRC, pages 31-32 [Parameters and Guidelines, pp. 4-5].

<sup>105</sup> Exhibit A, IRC, page 16 [citing Test Claim Decision, *The Stull Act*, 98-TC-25, p. 31].

<sup>106</sup> Grades 2 through 11, teaching Reading, Writing, Mathematics, History/Social Science, and Science.

<sup>107</sup> Exhibit A, IRC, page 31 [Parameters and Guidelines, p. 4].

<sup>108</sup> Exhibit A, IRC, page 13.

the teacher and the evaluator that is not required by the plain language of the approved activity as stated in the Parameters and Guidelines. Both reviewing the results of the STAR test, and including an assessment in the written evaluation can be done unilaterally by the evaluator, and do not require a discussion.

And, to the extent certain elements of the claimant's time study related to evaluation conferences, preparation, and planning activities seem "rational, relevant, reasonable and necessary part[s] of implementing the mandated activities,"<sup>109</sup> they are not identified as reimbursable activities in the Parameters and Guidelines. The claimant had an opportunity to include those activities within the Parameters and Guidelines as "reasonably necessary activities" pursuant to Government Code section 17557(a) and Code of Regulations, title 2, section 1183.7(d). Section 1183.7 describes the "Content of Parameters and Guidelines," and subdivision (d) defines "reasonably necessary activities" as those activities "necessary to comply with the statutes, regulations and other executive orders found to impose a state-mandated program." The section further states that "[w]hether an activity is reasonably necessary is a mixed question of law and fact," the assertion of which must be supported by documentary evidence submitted in accordance with section 1187.5.<sup>110</sup> In other words, if the claimant seeks reimbursement for the various elements of its time study as "reasonably necessary" elements of the reimbursable mandate, those activities have to be approved by the Commission based on substantial evidence in the record and included within the Parameters and Guidelines, either when the Parameters and Guidelines were first adopted, or as an amendment request.<sup>111</sup> To the extent the activities claimed exceed the scope of the mandate as stated in the Parameters and Guidelines, they are not eligible for reimbursement. The Parameters and Guidelines, as adopted, are binding on the parties.<sup>112</sup> The argument that such items are "reasonably necessary" cannot now be employed as an end-run around the Parameters and Guidelines.

Finally, it is the claimant's burden to establish actual costs, using "source documents that show the validity of such costs, when they were incurred, and *their relationship to the reimbursable activities.*"<sup>113</sup> The claimant argues that the Controller's reduction of costs is incorrect or arbitrary or capricious, and frames these issues in terms of the Controller's failure to state a reason for the reduction.<sup>114</sup> The claimant, however, ignores its duty to establish the relationship to the reimbursable activities. The Controller's concession permitting the use of a time study does not alter the scope of the mandate, which is a question of law, or otherwise relieve the claimant of the burden to show that its claimed costs are eligible for reimbursement pursuant to the Test Claim Decision and Parameters and Guidelines. Moreover, there is no evidence in the

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<sup>109</sup> Exhibit A, IRC, page 15.

<sup>110</sup> California Code of Regulations, title 2, section 1183.7.

<sup>111</sup> See California Code of Regulations, title 2, section 1183.17.

<sup>112</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

<sup>113</sup> Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3].

<sup>114</sup> See, e.g., Exhibit A, IRC, page 15 [Discussing "Preparation Activities," the claimant states that the Controller "has stated no basis to exclude it from the scope of the evaluation process."].

record that the Controller's reduction of costs based on the denial of these 19 activities is arbitrary, capricious, or entirely lacking in evidentiary support.

Accordingly, the Commission finds that the Controller's reduction of costs based on the Controller's denial of 19 of the activities included in claimant's time study is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

**C. The Controller's Disallowance of Completed Evaluations that Are Beyond the Scope of the Mandate Is Correct as a Matter of Law.**

As noted above, the Parameters and Guidelines for *The Stull Act* program require reimbursement for the following:

- Evaluate and assess the performance of certificated instructional employees that perform the requirements of educational programs mandated by state or federal law as it reasonably relates to
  - the instructional techniques and strategies used by the employee; and
  - the employee's adherence to curricular objectives;
- Evaluate and assess the performance of certificated instructional employees that teach [STAR test subjects, reading, writing, mathematics, etc.] in grades 2 to 11 as it reasonably relates to the progress of pupils toward [STAR test statewide standards]; and
- Evaluate and assess permanent certificated, instructional, and non-instructional employees that perform the requirements of educational programs mandated by state or federal law and receive an unsatisfactory evaluation in the years in which the permanent certificated employee would not have otherwise been evaluated. The additional evaluations shall last until the employee achieves a positive evaluation, or is separated from the school district.<sup>115</sup>

The Parameters and Guidelines further require the claimant to identify the state or federal law mandating the educational program being performed by the employee being evaluated and assessed.<sup>116</sup>

The Controller disallowed reimbursement for evaluations completed for employees that are not within the scope of the mandate. Specifically, as disputed here, the Controller disallowed reimbursement for evaluations of the following employees:

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<sup>115</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 4-6].

<sup>116</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 4-6]. Note that this caveat is not stated under section IV.A.2. of the Parameters and Guidelines, with respect to certificated instructional employees that teach STAR test subjects in grades 2 to 11 (presumably because simply claiming costs under this very specific activity makes clear which state and federal laws are implicated).

- Principals, vice principals, directors, coordinators, counselors, psychologists, librarians, and library media specialists who are not certificated instructional employees; and
- Preschool teachers [because they] do not perform the requirements of the program that is mandated by state or federal law.<sup>117</sup>

The claimant argues that all certificated employees are “instructional personnel even if they are not ‘classroom teachers’” and that preschool teachers are not excluded by the Parameters and Guidelines.<sup>118</sup> Addressing preschool instructors specifically, claimant argues that “[t]he audit report excludes preschool teachers in general based on the Controller’s opinion that preschool teachers do not perform the requirements of an educational program mandated by state or federal law.”<sup>119</sup> The claimant further argues that the Commission identified voluntary programs for which reimbursement is not required in a footnote in the Test Claim Decision, “and preschool is not included in that enumeration.”<sup>120</sup> Accordingly, claimant asserts that “[t]here is no stated basis to exclude certificated preschool instructors.”<sup>121</sup>

With respect to other personnel, such as administrators, librarians, and others for whom evaluations and assessments were excluded from reimbursement, the claimant states that the audit report misstates the standard for judging which employees’ evaluations are reimbursable and which are not:

The intent of this component is to evaluate the elements of classroom instruction. Principals, vice principals, directors, coordinators, counselors, psychologists, librarians, and library media specialists do not provide classroom instruction and are considered “non-instructional” certificated personnel.<sup>122</sup>

The claimant concedes that “the portion of the mandate relating to the evaluation of compliance with the testing assessment standards (the STAR component) is limited to classroom teachers because the parameters and guidelines specifically state ‘employees that teach’ specified curriculum.”<sup>123</sup> However, the claimant maintains that all certificated employees are instructional personnel and that “[i]t has not been established as a matter of law that involvement in the educational process requires a ‘classroom.’”<sup>124</sup>

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<sup>117</sup> Exhibit A, IRC, pages 73-74 [Final Audit Report, pp. 14-15].

<sup>118</sup> Exhibit A, IRC, pages 18-19 and 71.

<sup>119</sup> Exhibit A, IRC, page 18.

<sup>120</sup> Exhibit A, IRC, page 19.

<sup>121</sup> Exhibit A, IRC, page 19.

<sup>122</sup> Exhibit A, IRC, page 17 [quoting Controller’s Final Audit Report, p. 15 (Exhibit A, IRC, p. 74)].

<sup>123</sup> Exhibit A, IRC, page 71 [Controller’s Final Audit Report, p. 12].

<sup>124</sup> Exhibit A, IRC, page 18 and 71.

The claimant is wrong on both counts. The Test Claim Decision analyzed at length the distinction between instructional and non-instructional personnel, in an attempt to isolate the higher level of service imposed by the test claim statutes. The Commission found that prior law “required school districts to develop evaluation and assessment guidelines and to evaluate both instructional and non-instructional certificated employees based on the guidelines on a continuing basis.”<sup>125</sup> The Commission also found case law to support the conclusion that the Stull Act, prior to the test claim statutes, applied to both instructional and non-instructional certificated personnel.<sup>126</sup> In analyzing the test claim statutes the Commission found, and the Department of Finance and the test claimant agreed, that the new categories of “instructional techniques and strategies,” and “the employee’s adherence to curricular objectives,” represented new criteria for the evaluation and assessment of certificated *instructional* personnel equating the term “instructional” with “teachers.”<sup>127</sup>

Accordingly, Part IV.A.1. of the Parameters and Guidelines limits reimbursement for the higher level of service imposed by the test claim statutes to “certificated *instructional* employees,” and to the *two new components* of the evaluation, both of which relate to the provision of *instruction*: “instructional techniques and strategies used by the employee and the employee’s adherence to curricular objectives.”<sup>128</sup> In addition, as noted, Part IV.A.1. *requires the claimant* to identify the state or federal law mandating the educational program being performed by the certificated instructional personnel.<sup>129</sup> Therefore, this section provides reimbursement for evaluation and assessment of *instructional* employees only, and only those performing the requirements of educational programs mandated by state or federal law. Although administrators, librarians, counselors, and psychologists are positions requiring certification, they generally do not provide instruction to students.<sup>130</sup> The claimant argues that these employees are *not excluded* by the

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<sup>125</sup> Exhibit E, Test Claim Decision, *The Stull Act*, 98-TC-25, page 22.

<sup>126</sup> Exhibit E, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 22-23.

<sup>127</sup> Exhibit E, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 28-30; 21 [The plain language of these statutes does not distinguish between instructional employees (teachers) and non-instructional employees (principals, administrators), or specifically exclude certificated non-instructional employees.].

<sup>128</sup> Exhibit A, IRC, page 31 [Parameters and Guidelines, p. 4].

<sup>129</sup> Exhibit A, IRC, page 31 [Parameters and Guidelines, p. 4].

<sup>130</sup> Education Code section 44065, which governs teaching and services credential requirements. See also, California Code of Regulations, title 5, section 80049.1, which authorizes a school psychologist with a services credential to “provide services that enhance academic performance; design strategies and programs to address problems of adjustment; consult with other educators and parents on issues of social development, behavioral and academic difficulties; conduct psycho-educational assessments for purposes of identifying special needs; provide psychological counseling for individuals, groups and families; and coordinate intervention strategies for management of individual and school-wide crises.”

California Code of Regulations, title 5, section 80049.1 also authorizes a school counselor with a services credential to “develop, plan, implement and evaluate a school counseling and guidance

Parameters and Guidelines, but neither do they necessarily fall within the higher level of service that the Commission determined to be reimbursable, absent some evidence that they are indeed performing the requirements of educational programs mandated by state or federal law; a requirement that the Parameters and Guidelines expressly requires the claimant to establish and for which the claimant has submitted no evidence. Thus, the Controller correctly concludes that “instructional” employees excludes administrators, librarians, counselors, and psychologists, and others, absent additional evidence.<sup>131</sup>

With regard to preschool instruction, the claimant mistakenly relies on a footnote in the Test Claim Decision, which listed examples of voluntary educational programs funded by the Budget Act, to suggest that preschool instruction, which was not among the programs listed, must therefore be mandatory.<sup>132</sup> The list in the Test Claim Decision was not intended to represent an exhaustive cataloging of voluntary (or non-mandatory) educational programs, as the claimant suggests.<sup>133</sup> Rather, the Parameters and Guidelines expressly require the claimant to specifically identify the educational programs mandated by state or federal law being performed by the certificated instructional employee in order to get reimbursed for the evaluation, which the claimant has not done. In addition, Education Code section 48200 et seq., provides for compulsory education for pupils aged 6 to 18, but does not as a matter of law apply to preschool-

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program that includes academic, career, personal and social development; advocate for the higher academic achievement and social development of all students; provide school-wide prevention and intervention strategies and counseling services; provide consultation, training and staff development to teachers and parents regarding students' needs; and supervise a district-approved advisory program as described in Education Code Section 49600.”

California Code of Regulations, title 5, section 80053, authorizes the librarian with a services credential to “instruct students in accessing, evaluating, using and integrating information and resources in the library program; to plan and coordinate school library programs with the instructional programs of a school district through collaboration with teachers; to select materials for school and district libraries; to develop programs for and deliver staff development for school library services; to coordinate or supervise library programs at the school, district or county level; to plan and conduct a course of instruction for those pupils who assist in the operation of school libraries; to supervise classified personnel assigned school library duties; and to develop procedures for and management of the school and district libraries.”

California Code of Regulations, title 5, section 80054.5, authorizes the school administrator with a services credential to develop, coordinate, and assess instructional programs; supervise and evaluate certificated and classified personnel; discipline students; manage fiscal services; develop, coordinate, and supervise student support services.

And, Code of Regulations, title 5, section 16043 states that persons employed by a school district as librarians may supplement classroom instruction, or conduct “a planned course of instruction for those pupils who assist in the operation of school libraries.”

<sup>131</sup> Exhibit A, IRC, pages 73-74 [Final Audit Report, pp. 14-15].

<sup>132</sup> Exhibit A, IRC, pages 18-19.

<sup>133</sup> Exhibit E, Test Claim Decision, *The Stull Act*, 98-TC-25, page 12, Fn 42.

aged children. The claimant argues that federal special education law requires preschool instruction for pupils when part of a pupil's Individualized Education Plan.<sup>134</sup> However, the claimant has not provided any evidence that preschool teachers evaluated and claimed provided instruction in educational programs mandated by federal law, as required by the Parameters and Guidelines.

In addition, Part IV.A.2. requires reimbursement only for evaluations of "certificated instructional employees that teach..." STAR test subjects in grades 2 to 11.<sup>135</sup> This provision also excludes non-instructional administrative and support personnel, and excludes preschool teachers, based on nothing more than its plain language.

Part IV.B.1. does provide for reimbursement for evaluation and assessment of certificated instructional *and* non-instructional employees, but only those whose last regularly-scheduled evaluation resulted in an unsatisfactory evaluation (i.e., off-year evaluations for permanent certificated employees, and more often than once every five years for permanent "tenured" certificated employees). Part IV.B.1. also includes the same caveat as above, that the claimant must identify the state or federal law mandating the educational program being performed. There has been no specific argument or evidence in the record to support a finding that any of the non-instructional personnel whose evaluations were disallowed were evaluated on the basis of having a previously unsatisfactory evaluation.

The claimant, with all of its arguments, attempts to shift the burden to the Controller to support its reductions, but it is the claimant's burden to make out its claim.<sup>136</sup> In addition, sections 1185.1(f)(3), 1185.2(d) and (e) of the Commission's regulations require that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Parameters and Guidelines specifically and expressly require the *claimant* to identify the state or federal law mandating the educational program being performed by the employee(s) evaluated, except in the case of STAR subject instructors in grades 2 to 11 (for whom the mandatory nature of the educational program is presumed).<sup>137</sup> The claimant has not complied with the Parameters and Guidelines.

Based on the foregoing, the Commission finds that the Controller's disallowance of 46 completed evaluations that were beyond the scope of the mandate is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

## V. Conclusion

Based on the foregoing, the Commission finds that the IRC was timely filed and denies this IRC. The Commission finds that the Controller's reduction of costs based the denial of 19 activities included in the claimant's time study and the disallowance of 46 completed evaluations that were beyond the scope of the mandate, are correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

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<sup>134</sup> Exhibit A, IRC, pages 71-74 [Controller's Final Audit Report, pp. 12-15].

<sup>135</sup> Exhibit A, IRC, pages 31-32 [Parameters and Guidelines, pp. 4-5].

<sup>136</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>137</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 4-6].



RE: **Decision**

*The Stull Act*, 14-9825-I-02

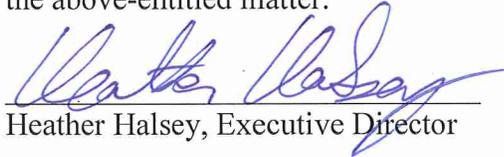
Education Code Sections 44660-44665;

Statutes 1983, Chapter 498; Statutes 1999, Chapter 4

Fiscal Years: 2005-2006, 2006-2007, 2007-2008, and 2008-2009

Carlsbad Unified School District, Claimant

On July 27, 2018, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

  
Heather Halsey, Executive Director

Dated: July 30, 2018

BEFORE THE  
 COMMISSION ON STATE MANDATES  
 STATE OF CALIFORNIA

**IN RE INCORRECT REDUCTION CLAIM  
 ON:**

Public Resources Code Sections 40148, 40196.3, 42920-42928; Public Contract Code Sections 12167 and 12167.1; Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75); State Agency Model Integrated Waste Management Plan (February 2000)

Fiscal Years 2003-2004, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, and 2010-2011

San Mateo County Community College District, Claimant

Case No.: 15-0007-I-12

*Integrated Waste Management*

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

*(Adopted July 27, 2018)*

*(Served July 27, 2018)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on July 27, 2018. The claimant, San Mateo County Community College District, did not attend the hearing. Lisa Kurokawa appeared for the State Controller’s Office (Controller).

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 the Proposed Decision to partially approve the IRC by a vote of 5-0 as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	Yes
Ken Alex, Director of the Office of Planning and Research	Absent
Richard Chivaro, Representative of the State Controller,	Absent
Sarah Olsen, Public Member	Yes
Carmen Ramirez, City Council Member	Yes
Andre Rivera, Representative of the State Treasurer, Vice Chairperson	Yes
Jacqueline Wong-Hernandez,, Representative of the Director of the Department of Finance, Chairperson	Yes

## **Summary of the Findings**

This IRC addresses reductions made by the State Controller's Office (Controller) to reimbursement claims of the San Mateo County Community College District (claimant) for fiscal years 2003-2004 and 2005-2006 through 2010-2011 (the audit period), under the *Integrated Waste Management* program, 00-TC-07. The Controller made the audit reductions because the claimant did not identify and deduct from its reimbursement claims any offsetting savings from its solid waste diversion that results in reduced or avoided landfill disposal fees.

The test claim statutes require community college districts to adopt and implement, in consultation with California Integrated Waste Management Board (CIWMB, which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste<sup>1</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of solid waste by January 1, 2002, and at least 50 percent by January 1, 2004.<sup>2</sup> The test claim statutes also provide that "Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency's integrated waste management plan to fund plan implementation and administration costs . . ."<sup>3</sup>

The statutes, therefore, presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. The amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB.<sup>4</sup>

The Commission finds that the audit reductions are partially incorrect.

During the audit period, the claimant diverted solid waste, as required by the test claim statutes, at all three colleges in the district: Cañada College, Skyline College, and College of San Mateo. The Controller correctly presumed, consistent with the test claim statutes and the court's interpretation of those statutes, and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill disposal fee per ton of waste required to be diverted.

Based on the evidence in the record, the Commission finds that the Controller's calculation of offsetting cost savings for all years in the audit period except the first half of fiscal year 2003-2004 is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support. For those years the claimant exceeded the mandated diversion rate, the Controller calculated offsetting savings by allocating the diversion to reflect the mandate by dividing the percentage of solid waste required to be diverted by the test claim statute (either 25 percent or 50 percent) by the actual percentage of solid waste diverted (as annually reported by the claimant to

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<sup>1</sup> Public Resources Code section 42920(b).

<sup>2</sup> Public Resources Code section 40124.

<sup>3</sup> Public Resources Code section 42925(a).

<sup>4</sup> Exhibit B, Controller's Comments on the IRC, pages 142-143 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

the California Integrated Waste Management Board (CIWMB). The allocated tonnage of solid waste diverted was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized.<sup>5</sup> The formula allocates cost savings based on the mandated rate of diversion, and is intended to avoid penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>6</sup> The claimant has not filed any evidence to rebut the statutory presumption of cost savings or to show that the statewide average disposal fee is incorrect or arbitrary. Thus, the Controller's reduction of costs claimed for these fiscal years is correct.

However, the Controller's reduction of costs claimed for the first half of fiscal year 2003-2004 is incorrect as a matter of law. For Cañada and Skyline Colleges, the Controller allocated the diversion rate for the first half of fiscal year 2003-2004, as it did for the other fiscal years, because the claimant exceeded the mandate. However, the Controller used a 50 percent rate to calculate the allocated diversion for calendar year 2003, although the test claim statutes required only 25 percent diversion until January 1, 2004,<sup>7</sup> so the Controller's calculation of cost savings at Cañada and Skyline Colleges for the first half of fiscal year 2003-2004 is incorrect as a matter of law.

For the College of San Mateo, the Controller found that the claimant did not meet the minimum "50 percent" diversion rate during the first half of fiscal year 2003-2004, although the mandated diversion rate during calendar year 2003 was 25 percent diversion (and the College achieved 44 percent).<sup>8</sup> The requirement to divert 50 percent did not become effective until January 1, 2004,<sup>9</sup> so the Controller's finding was incorrect as a matter of law. In addition, the Controller did not allocate the diversion rate for the College of San Mateo, as it had for the other fiscal years when the claimant exceeded the mandate. Instead, the Controller used 100 percent of the claimant's diversion to calculate the offsetting savings for the College of San Mateo for the first half of fiscal year 2003-2004,<sup>10</sup> so the Controller's savings calculation for this period is arbitrary, capricious, or entirely lacking in evidentiary support.

Applying the Controller's cost savings formula (using the mandated 25 percent diversion rate to calculate the allocated diversion) to the first half of fiscal year 2003-2004, results in offsetting savings of:

- \$1,705 for Cañada College (25 percent divided by 51.13 percent multiplied by 94.7 tons diverted multiplied by the statewide average landfill fee of \$36.83) rather than \$3,411;

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<sup>5</sup> Exhibit A, IRC, pages 38; Exhibit B, Controller's Comments on the IRC, page 20.

<sup>6</sup> Exhibit B, Controller's Comments on the IRC, page 20.

<sup>7</sup> Public Resources Code sections 42921(b); Exhibit A, IRC, page 74 (Parameters and Guidelines).

<sup>8</sup> Exhibit B, Controller's Comments on the IRC, page 153.

<sup>9</sup> Public Resources Code sections 42921(b); Exhibit A, IRC, page 74 (Parameters and Guidelines).

<sup>10</sup> Exhibit B, Controller's Comments on the IRC, page 153.

- \$1,805 for Skyline College (25 percent divided by 74.41 percent multiplied by 145.85 tons diverted multiplied by the statewide average landfill fee of \$36,83) rather than \$3,610; and
- \$6,124 for the College of San Mateo (25 percent divided by 44.13 percent multiplied by 293.5 tons diverted multiplied by the statewide average landfill fee of \$36.83) rather than \$10,810.

Thus, the reduction of \$8,197 (the difference between the Controller’s reduction of \$17,831 and \$9,634, which is the amount that should have been reduced) is incorrect as a matter of law and should be reinstated to the claimant.

Therefore, the Commission partially approves this IRC, and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission’s regulations, that the Controller reinstate \$8,197 to the claimant.

## COMMISSION FINDINGS

### I. Chronology

- 10/06/2005 The claimant filed its fiscal year 2003-2004 reimbursement claim.<sup>11</sup>
- 12/10/2007 The claimant filed its 2005-2006 reimbursement claim.<sup>12</sup>
- 02/17/2009 The claimant filed its 2006-2007 and 2007-2008 reimbursement claims.<sup>13</sup>
- 02/12/2010 The claimant filed its 2008-2009 reimbursement claim.<sup>14</sup>
- 01/26/2012 The claimant signed its 2010-2011 reimbursement claim.<sup>15</sup>
- 02/06/2012 The claimant filed its 2009-2010 reimbursement claim.<sup>16</sup>
- 09/28/2015 The Controller notified the claimant of the audit.<sup>17</sup>
- 10/20/2015 The Controller issued the Final Audit Report.<sup>18</sup>

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<sup>11</sup> Exhibit A, IRC, page 285 (2003-2004 Claim). Exhibit B, Controller’s Comments on the IRC, page 19.

<sup>12</sup> Exhibit A, IRC, page 292 (2005-2006 Claim). Exhibit B, Controller’s Comments on the IRC, page 19.

<sup>13</sup> Exhibit A, IRC, page 299 (2006-2007 Claim). Exhibit B, Controller’s Comments on the IRC, page 19. Exhibit A, IRC, page 303 (2007-2008 Claim).

<sup>14</sup> Exhibit A, IRC, page 307 (2008-2009 Claim).

<sup>15</sup> Exhibit A, IRC, page 317 (2010-2011 Claim). This claim was only for July 1, 2010 to October 7, 2010, and does not show the date the Controller received it.

<sup>16</sup> Exhibit A, IRC, page 312 (2009-2010 Claim).

<sup>17</sup> Exhibit B, Controller’s Comments on the IRC, pages 155-156.

<sup>18</sup> Exhibit A, IRC, page 25 (Final Audit Report).

- 03/15/2016 The claimant filed this IRC.<sup>19</sup>
- 06/06/2016 The Controller filed comments on the IRC.<sup>20</sup>
- 04/09/2018 Commission staff issued the Draft Proposed Decision.<sup>21</sup>
- 04/23/2018 The Controller filed comments on the Draft Proposed Decision.<sup>22</sup>

## II. Background

### A. The *Integrated Waste Management Program*

The test claim statutes require community college districts<sup>23</sup> to adopt and implement, in consultation with CIWMB (which is now the California Department of Resources Recycling and Recovery, or CalRecycle), integrated waste management (IWM) plans to reduce solid waste, reuse materials whenever possible, recycle recyclable materials, and procure products with recycled content in all agency offices and facilities.<sup>24</sup> To implement their plans, districts must divert from landfill disposal at least 25 percent of generated solid waste by January 1, 2002, and at least 50 percent by January 1, 2004. To divert means to “reduce or eliminate the amount of solid waste from solid waste disposal...”<sup>25</sup>

CIWMB developed and adopted a model IWM plan on February 15, 2000, and the test claim statutes provide that if a district does not adopt an IWM plan, the CIWMB model plan governs the community college.<sup>26</sup> Each district is also required to report annually to CIWMB on its progress in reducing solid waste; and the reports’ minimum contents are specified in statute.<sup>27</sup> The test claim statutes also require a community college, when entering into or renewing a lease, to ensure that adequate areas are provided for and adequate personnel are available to oversee collection, storage, and loading of recyclable materials in compliance with CIWMB’s requirements.<sup>28</sup> Additionally, the test claim statutes added Public Resources Code section 42925(a), which addressed cost savings from IWM plan implementation:

Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and

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<sup>19</sup> Exhibit A, IRC, page 1.

<sup>20</sup> Exhibit B, Controller’s Comments on the IRC, page 1.

<sup>21</sup> Exhibit C, Draft Proposed Decision.

<sup>22</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

<sup>23</sup> The test claim statutes apply to “state agencies” and define them to include “the California Community Colleges” (Pub. Res. Code, § 40196.3).

<sup>24</sup> Public Resources Code section 42920(b).

<sup>25</sup> Public Resources Code section 40124.

<sup>26</sup> Public Resources Code section 42920(b)(3).

<sup>27</sup> Public Resources Code section 42926.

<sup>28</sup> Public Resources Code section 42924(b).

administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code.

The Public Contract Code sections referenced in section 42925(a) require that revenue received as a result of the community college's IWM plan be deposited in CIWMB's Integrated Waste Management Account. After July 1, 1994, CIWMB is authorized to spend the revenue upon appropriation by the Legislature to offset recycling program costs. Annual revenue under \$2,000 is to be continuously appropriated for expenditure by the community colleges, whereas annual revenue over \$2,000 is available for expenditures upon appropriation by the Legislature.<sup>29</sup>

On March 24, 2004, the Commission adopted the *Integrated Waste Management Statement of Decision* and determined that the test claim statutes impose a reimbursable state-mandated program on community college districts. The Commission also found that cost savings under Public Resources Code section 42925(a) did not preclude a reimbursable mandate under Government Code section 17556(e) because there was no evidence that offsetting savings would result in no net costs to a community college implementing an IWM plan, nor was there evidence that revenues received from plan implementation would be "in an amount sufficient to fund" the cost of the state-mandated program. The Commission found that any revenues received would be identified as offsetting revenue in the Parameters and Guidelines.

The Parameters and Guidelines were adopted on March 30, 2005, and authorize reimbursement for the increased costs to perform the following activities:

A. One-Time Activities (*Reimbursable starting January 1, 2000*)

1. Develop the necessary district policies and procedures for the implementation of the integrated waste management plan.
2. Train district staff on the requirements and implementation of the integrated waste management plan (one-time per employee). Training is limited to the staff working directly on the plan.

B. Ongoing Activities (*Reimbursable starting January 1, 2000*)

1. Complete and submit to the [Integrated Waste Management] Board the following as part of the State Agency Model Integrated Waste Management Plan (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.):

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<sup>29</sup> Public Contract Code sections 12167 and 12167.1 are part of the State Assistance for Recycling Markets Act, which was originally enacted in 1989 to foster the procurement and use of recycled paper products and other recycled resources in daily state operations (See Pub. Contract Code, §§ 12153, 12160; Stats. 1989, ch. 1094). The Act, including sections 12167 and 12167.1, applies to California community colleges only to the limited extent that these sections are referenced in Public Resources Code section 42925. Community colleges are not defined as state agencies or otherwise subject to the Act's provisions for the procurement and use of recycled products in daily state operations. See Exhibit B, Controller's Comments on the IRC, pages 144-145 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355)).

- a. state agency or large state facility information form;
- b. state agency list of facilities;
- c. state agency waste reduction and recycling program worksheets that describe program activities, promotional programs, and procurement activities, and other questionnaires; and
- d. state agency integrated waste management plan questions.

NOTE: Although reporting on promotional programs and procurement activities in the model plan is reimbursable, implementing promotional programs and procurement activities is not.

2. Respond to any Board reporting requirements during the approval process. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
  3. Consult with the Board to revise the model plan, if necessary. (Pub. Resources Code, § 42920, subd. (b)(3) & State Agency Model Integrated Waste Management Plan, February 2000.)
  4. Designate one solid waste reduction and recycling coordinator for each college in the district to perform new duties imposed by chapter 18.5 (Pub. Resources Code, §§ 42920 – 42928). The coordinator shall implement the integrated waste management plan. The coordinator shall act as a liaison to other state agencies (as defined by section 40196.3) and coordinators. (Pub. Resources Code, § 42920, subd. (c).)
  5. Divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities. Maintain the required level of reduction, as approved by the Board. (Pub. Resources Code, §§ 42921 & 42922, subd. (i).)
- C. Alternative Compliance (*Reimbursable from January 1, 2000 – December 31, 2005*)
1. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2002 deadline to divert 25 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42923 subds. (a) & (c).)
    - a. Notify the Board in writing, detailing the reasons for its inability to comply.
    - b. Request of the Board an alternative to the January 1, 2002 deadline.
    - c. Provide evidence to the Board that the college is making a good faith effort to implement the source reduction, recycling, and composting programs identified in its integrated waste management plan.

- d. Provide information that describes the relevant circumstances that contributed to the request for extension, such as lack of markets for recycled materials, local efforts to implement source reduction, recycling and composting programs, facilities built or planned, waste disposal patterns, and the type of waste disposed of by the community college.
  - e. Submit a plan of correction that demonstrates that the college will meet the requirements of Section 42921 [the 25 and 50 percent diversion requirements] before the time extension expires, including the source reduction, recycling, or composting steps the community college will implement, a date prior to the expiration of the time extension when the requirements of Section 42921 will be met, the existing programs that it will modify, any new programs that will be implemented to meet those requirements, and the means by which these programs will be funded.
2. Seek either an alternative requirement or time extension if a community college is unable to comply with the January 1, 2004 deadline to divert 50 percent of its solid waste, by doing the following: (Pub. Resources Code, §§ 42927 & 42922, subs. (a) & (b).)
- a. Notify the Board in writing, detailing the reasons for its inability to comply.
  - b. Request of the Board an alternative to the 50-percent requirement.
  - c. Participate in a public hearing on its alternative requirement.
  - d. Provide the Board with information as to:
    - (i) the community college's good faith efforts to implement the source reduction, recycling, and composting measures described in its integrated waste management plan, and demonstration of its progress toward meeting the alternative requirement as described in its annual reports to the Board;
    - (ii) the community college's inability to meet the 50 percent diversion requirement despite implementing the measures in its plan;
    - (iii) how the alternative source reduction, recycling, and composting requirement represents the greatest diversion amount that the community college may reasonably and feasibly achieve; and,
    - (iv) the circumstances that support the request for an alternative requirement, such as waste disposal patterns and the types of waste disposed by the community college.<sup>30</sup>

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<sup>30</sup> These alternative compliance and time extension provisions in part C were sunset on January 1, 2006, but were included in the adopted Parameters and Guidelines.

D. Accounting System (*Reimbursable starting January 1, 2000*)

Developing, implementing, and maintaining an accounting system to enter and track the college's source reduction, recycling and composting activities, the cost of those activities, the proceeds from the sale of any recycled materials, and such other accounting systems which will allow it to make its annual reports to the state and determine waste reduction. Note: only the pro-rata portion of the costs incurred to implement the reimbursable activities can be claimed.

E. Annual Report (*Reimbursable starting January 1, 2000*)

Annually prepare and submit, by April 1, 2002, and by April 1 each subsequent year, a report to the Board summarizing its progress in reducing solid waste. The information in the report must encompass the previous calendar year and shall contain, at a minimum, the following as outlined in section 42926, subdivision (b): (Pub. Resources Code, §§ 42926, subd. (a) & 42922, subd. (i).)

1. calculations of annual disposal reduction;
2. information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors;
3. a summary of progress made in implementing the integrated waste management plan;
4. the extent to which the community college intends to use programs or facilities established by the local agency for handling, diversion, and disposal of solid waste (If the college does not intend to use those established programs or facilities, it must identify sufficient disposal capacity for solid waste that is not source reduced, recycled or composted.);
5. for a community college that has been granted a time extension by the Board, it shall include a summary of progress made in meeting the integrated waste management plan implementation schedule pursuant to section 42921, subdivision (b), and complying with the college's plan of correction, before the expiration of the time extension;
6. for a community college that has been granted an alternative source reduction, recycling, and composting requirement by the Board pursuant to section 42922, it shall include a summary of progress made towards meeting the alternative requirement as well as an explanation of current circumstances that support the continuation of the alternative requirement.

F. Annual Recycled Material Reports (*Reimbursable starting July 1, 1999*)

Annually report to the Board on quantities of recyclable materials collected for recycling. (Pub. Contract Code, § 12167.1.) (See Section VII. regarding

offsetting revenues from recyclable materials.)<sup>31</sup>

The Parameters and Guidelines further require that each claimed reimbursable cost be supported by contemporaneous source documentation.<sup>32</sup>

And as originally adopted, the Parameters and Guidelines required community college districts to identify and deduct from their reimbursement claims all of the offsetting revenues received from the sale of recyclable materials, limited by the provisions of Public Resources Code section 42925 and Public Contract Code section 12167.1. The original Parameters and Guidelines did not require community colleges to identify and deduct from their claims any offsetting cost savings resulting from the solid waste diversion activities required by the test claim statutes.<sup>33</sup>

### **B. Superior Court Decision on Cost Savings and Offsets Under the Program**

After the Parameters and Guidelines were adopted, the Department of Finance (Finance) and CIWMB filed a petition for writ of mandate requesting the court to direct the Commission to set aside the Test Claim Statement of Decision and Parameters and Guidelines and to issue a new Decision and Parameters and Guidelines that give full consideration to the cost savings and offsetting revenues community college districts will achieve by complying with the test claim statutes, including all cost savings realized from avoided landfill disposal fees and revenues received from the collection and sale of recyclable materials. The petitioners further argued that Public Contract Code sections 12167 and 12167.1 do not require community college districts to deposit revenues received from the collection and sale of recyclable materials into the Integrated Waste Management Account, as determined by the Commission, but instead allow community college districts to retain all revenues received. The petitioners argued that such revenues must be identified as offsetting revenues and applied to the costs of the program, without the community college district obtaining the approval of the Legislature or CIWMB.

On May 29, 2008, the Sacramento County Superior Court granted the petition for writ of mandate, finding that the Commission's treatment of cost savings and revenues in the Parameters and Guidelines was erroneous and required that the Parameters and Guidelines be amended. The court said:

There is no indication in the administrative record or in the legal authorities provided to the court that, as respondent [Commission] argues, a California Community College might not receive the full reimbursement of its actual increased costs required by section 6 if its claims for reimbursement of IWM plan costs were offset by realized cost savings and all revenues received from the plan activities.<sup>34</sup>

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<sup>31</sup> Exhibit A, IRC, page 45-48 (Parameters and Guidelines, adopted March 30, 2005).

<sup>32</sup> Exhibit A, IRC, page 45 (Parameters and Guidelines, adopted March 30, 2005).

<sup>33</sup> Exhibit A, IRC, pages 42-51 (Parameters and Guidelines, adopted March 30, 2005).

<sup>34</sup> Exhibit B, Controller's Comments on the IRC, page 142, footnote 1 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter, Footnote 1).

Instead, the court recognized that community colleges are “likely to experience costs savings in the form of reduced or avoided costs of landfill disposal” as a result of the mandated activities in Public Resources Code section 42921 because reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.”<sup>35</sup> The court noted that “diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates” and cited the statutory definition of diversion: “activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division [i.e., division 30, including § 42920 et seq.]” as well as the statutory definition of disposal: “the management of solid waste through landfill disposal or transformation at a permitted solid waste facility.”<sup>36</sup> The court explained:

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926.<sup>37</sup>

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the

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<sup>35</sup> Exhibit B, Controller’s Comments on the IRC, page 142 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

<sup>36</sup> Exhibit B, Controller’s Comments on the IRC, pages 142-143 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>37</sup> Exhibit B, Controller’s Comments on the IRC, page 143 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>38</sup>

The court issued a writ of mandate directing the Commission to amend the Parameters and Guidelines to require community college districts claiming reimbursable costs of an IWM plan to:

1. Identify and offset from their claims, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1, cost savings realized as a result of implementing their plans; and
2. Identify and offset from their claims all of the revenue generated as a result of implementing their plans, without regard to the limitations or conditions described in sections 12167 and 12167.1 of the Public Contract Code.<sup>39</sup>

### **C. Parameters and Guidelines Amendment Pursuant to the Writ**

In compliance with the writ, the Commission amended the Parameters and Guidelines on September 26, 2008 to add section VIII. Offsetting Cost Savings, which states:

Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1. Pursuant to these statutes, community college districts are required to deposit cost savings resulting from their Integrated Waste Management plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the California Integrated Waste Management Board for the purpose of offsetting Integrated Waste Management plan costs. Subject to the approval of the California Integrated Waste Management Board, cost savings by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting Integrated Waste Management program costs. Cost savings exceeding two thousand dollars (\$2,000) annually may be available for

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<sup>38</sup> Exhibit B, Controller's Comments on the IRC, pages 144-145 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>39</sup> Exhibit B, Controller's Comments on the IRC, page 30 (Judgment Granting Petition for Writ of Administrative Mandamus).

expenditure by the community college only when appropriated by the Legislature. To the extent so approved or appropriated and applied to the college, these amounts shall be identified and offset from the costs claimed for implementing the Integrated Waste Management Plan.<sup>40</sup>

Section VII. of the Parameters and Guidelines, on Offsetting Revenues, was amended as follows (amendments in ~~strikeout~~ and underline):

Reimbursement for this mandate from any source, including but not limited to, services fees collected, federal funds, and other state funds allocated to any service provided under this program, shall be identified and ~~deducted~~ offset from this claim. Offsetting revenue shall include all revenues generated from implementing the Integrated Waste Management Plan. ~~the revenues cited in Public Resources Code section 42925 and Public Contract Code sections 12167 and 12167.1.~~

~~Subject to the approval of the California Integrated Waste Management Board, revenues derived from the sale of recyclable materials by a community college that do not exceed two thousand dollars (\$2,000) annually are continuously appropriated for expenditure by the community college for the purpose of offsetting recycling program costs. Revenues exceeding two thousand dollars (\$2,000) annually may be available for expenditure by the community college only when appropriated by the Legislature. To the extent so approved or appropriated and applied to the college, these amounts are a reduction to the recycling costs mandated by the state to implement Statutes 1999, chapter 764.~~

In addition, revenue from a building-operating fee imposed pursuant to Education Code section 76375, subdivision (a) if received by a claimant and the revenue is applied to this program, shall be deducted from the costs claimed.<sup>41</sup>

All other requirements in the Parameters and Guidelines remained the same.

CIWMB requested additional amendments to the Parameters and Guidelines at this September 2008 hearing, including a request to alter the offsetting savings provision to require community college districts to provide offsetting savings information *whether or not* the offsetting savings generated in a fiscal year exceeded the \$2,000 continuous appropriation required by Public Contract Code sections 12167 and 12167.1. The Commission denied the request because the proposed language went beyond the scope of the court's judgment and writ.<sup>42</sup>

CIWMB also requested adding a requirement for community college districts to analyze specified categories of potential cost savings when filing their reimbursement claims. The Commission found that the court determined that the amount or value of cost savings is already available from the annual reports the community college districts provide to CIWMB pursuant to

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<sup>40</sup> Exhibit A, IRC page 63 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>41</sup> Exhibit A, IRC, pages 50, 62-63 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

<sup>42</sup> Exhibit E, Commission on State Mandates, Excerpt from the Minutes for the September 26, 2008 Meeting.

Public Resources Code section 42926(b). This report is required to include the district's "calculations of annual disposal reduction" and "information on the changes in waste generated or disposed of due to increases or decreases in employees, economics, or other factors." Thus, the Commission denied CIWMB's request and adopted the staff analysis finding that the request was beyond the scope of the court's writ and judgment. The Commission also noted that the request was the subject of separate pending request filed by CIWMB to amend the Parameters and Guidelines and would therefore be further analyzed for that matter.

**D. Subsequent Request by CIWMB to Amend the Parameters and Guidelines to Require Detailed Reports on Cost Savings and Revenues**

CIWMB filed a request to amend the Parameters and Guidelines to require community college districts to submit with their reimbursement claims a separate worksheet and report analyzing the costs incurred and avoided and any fees received relating to staffing, overhead, materials, storage, transportation, equipment, the sale of commodities, avoided disposal fees, and any other revenue received relating to the mandated program as specified by CIWMB. At its January 30, 2009 meeting, the Commission denied the request for the following reasons: there is no requirement in statute or regulation that community college districts perform the analysis specified by CIWMB; the Commission has no authority to impose additional requirements on community college districts regarding this program; the offsetting cost savings paragraph in the Parameters and Guidelines already identifies the offsetting savings consistent with the language of Public Resources Code section 42925(a), Public Contract Code sections 12167 and 12167.1, and the court's judgment and writ; and information on cost savings is already available in the community colleges' annual reports submitted to CIWMB, as required by Public Resources Code section 42926(b)(1).<sup>43</sup>

**E. The *Integrated Waste Management* Program Made Optional**

This program was made optional by Statutes 2010, chapter 724 (AB 1610), section 34, effective October 19, 2010 and has remained so since that time.<sup>44</sup>

**F. The Controller's Audit**

The Controller audited the reimbursement claims for fiscal years 2003-2004 and 2005-2006 through 2010-2011 (the audit period). Fiscal year 2004-2005 was not audited because the Controller stated that the statute of limitations to initiate the review had expired for that year.<sup>45</sup>

Of the \$843,392 claimed during the audit period, the Controller found that \$608,751 is allowable (\$618,751 less a \$10,000 penalty for filing a late claim) and \$234,641 is unallowable because the claimant did not report offsetting savings from implementation of its IWM plan.<sup>46</sup> The

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<sup>43</sup> Exhibit E, Commission on State Mandates, Item 9, Final Staff Analysis of Proposed Amendments to the Parameters and Guidelines for *Integrated Waste Management*, 05-PGA-16, January 30, 2009, pages 2-3.

<sup>44</sup> See Government Code section 17581.5.

<sup>45</sup> Exhibit A, IRC, page 25 (Final Audit Report).

<sup>46</sup> Exhibit A, IRC, page 25 (Final Audit Report). Exhibit B, Controller's Comments on the IRC, page 27.

Controller found that the claimant realized total offsetting savings of \$661,373 from implementation of its IWM plan, but because offsetting savings for fiscal years 2003-2004 and 2005-2006 through 2007-2008 resulted in a negative balance due the claimant, and because of the 2009-2010 late filing penalty, the Controller adjusted the claims by a net of \$234,641.<sup>47</sup>

The Controller’s audit finding is based on the court’s ruling, which states, “the amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California community colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926,”<sup>48</sup> the resulting amendment to the Parameters and Guidelines, and the claimant’s annual reports to CIWMB.

The claimant operates three colleges in the district: Cañada College, Skyline College, and the College of San Mateo. The Controller determined that the claimant diverted more solid waste than the amount mandated by the test claim statute each year of the audit period (except at the College of San Mateo in the first half of fiscal year 2003-2004).<sup>49</sup> Thus, the Controller found that the claimant realized cost savings in each year of the audit period.

For the years the claimant exceeded the diversion mandate, the Controller calculated offsetting cost savings by allocating the diversion to reflect the mandate. To allocate the diversion, the Controller divided the percentage of solid waste required to be diverted (either 25 or 50 percent) by the actual percentage of solid waste diverted (as reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized in those years.<sup>50</sup>

$$\begin{array}{rcccl}
 & & \text{Allocated Diversion \%} & & \\
 & & \left\{ \begin{array}{c} \text{Maximum} \\ \text{Allowable} \end{array} \right. & & \\
 \text{Offsetting} & & \text{Diversion \%} & \times & \text{Tonnage} & \times & \text{Avoided} \\
 \text{Savings} & = & \frac{\text{Diversion \%}}{\text{Actual}} & \times & \text{Diverted} & \times & \text{Landfill} \\
 \text{Realized} & & \text{Diversion \%} & & & & \text{Disposal Fee} \\
 & & & & & & \text{(per Ton)}
 \end{array}$$

The Controller provided an example of how the formula works. For calendar year 2007 at Cañada College, the claimant reported diversion of 272.6 tons of solid waste and disposal of 190.8 tons generated. Diverting 272.6 tons out of the 463.4 tons of waste generated results in a

<sup>47</sup> Exhibit A, IRC, pages 16-17 and 37 (Final Audit Report). Exhibit B, Controller’s Comments on the IRC, page 27.

<sup>48</sup> Exhibit B, Controller’s Comments on the IRC, page 143 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>49</sup> Exhibit B, Controller’s Comments on the IRC, pages 151-153. As explained below, this finding on the College of San Mateo for the first half of fiscal year 2003-2004 is incorrect.

<sup>50</sup> Exhibit A, IRC, page 38 (Final Audit Report).

diversion rate of 58.83 percent (exceeding the 50 percent required).<sup>51</sup> To avoid penalizing the claimant for diverting more solid waste than the amount mandated,<sup>52</sup> the Controller allocated the diversion by dividing the diversion rate mandated by the test claim statute (50 percent) by the actual diversion rate (58.83 percent), which equals 84.99 percent. The 84.99 percent allocated diversion is then multiplied by the 272.6 tons diverted that year, which equals 231.7 tons of diverted solid waste, instead of the 272.6 tons actually diverted. The allocated 231.7 tons of diverted waste is then multiplied by the statewide average disposal fee per ton, which in calendar year 2007 was \$46, resulting in “offsetting cost savings” for calendar year 2007 of \$10,657 at Cañada College.<sup>53</sup>

In 2008, CIWMB stopped requiring community college districts to report the actual tonnage diverted, instead requiring a report based on "per-capita disposal." Consequently, the Controller used the claimant’s reported 2007 diversion rate to calculate the offsetting savings for fiscal years 2007-2008 through 2010-2011.<sup>54</sup>

The Controller pointed out in the audit report that the claimant did not provide documentation supporting a different diversion rate or disposal fees to calculate offsetting cost savings.<sup>55</sup>

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

#### **A. San Mateo County Community College District**

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<sup>51</sup> Exhibit B, Controller’s Comments on the IRC, pages 20, 151 (Controller’s calculation of offsetting savings).

<sup>52</sup> Exhibit B, Controller’s Comments on the IRC, page 20.

<sup>53</sup> Exhibit B, Controller’s Comments on the IRC, pages 20, 151 (Controller’s calculations of offsetting savings). Page 20 of the Controller’s Late Comments on the IRC describe the calculation differently than the formula identified in the audit report, but the result is the same. The Controller states that cost savings can be calculated by multiplying the total tonnage generated (solid waste diverted + disposed) by the mandated diversion percentage (25 or 50 percent), times the avoided landfill disposal fee:

For example, in calendar year 2007, Cañada College reported to CalRecycle that it diverted 272.6 tons of solid waste and disposed of 190.8 tons, which results in an overall diversion percentage of 58.8% [Tab 5, page 13]. Because the district was required to divert 50% for that year to meet the mandated requirements and comply with the Public Resources Code, it needed to divert only 231.7 tons (463.4 total tonnage generated x 50%) in order to satisfy the 50% requirement. Therefore, we adjusted our calculation to compute offsetting savings based on 231.7 tons of diverted solid waste rather than a total of 272.6 tons diverted.

Using this formula results in cost savings at Cañada College for calendar year 2007 of \$10,658 (463.4 tons generated x 50 percent = 231.7 tons x \$46 = \$10,658).

<sup>54</sup> Exhibit A, IRC, page 38 (Final Audit Report). Exhibit B, Controller’s Comments on the IRC, pages 20-21.

<sup>55</sup> Exhibit A, IRC, pages 38-39 (Final Audit Report).

The claimant maintains that the audit reductions are incorrect and requests the reinstatement of the full amount reduced.

The claimant alleges that it did not realize any cost savings as a result of the mandate and quotes the Superior Court decision (discussed above) that cost savings will “most likely” occur as a result of reduced or avoided costs of landfill disposal, arguing:

The court presupposes a previous legal requirement for districts to incur landfill disposal fees to divert solid waste. Thus, potentially relieved of the need to incur new or additional landfill fees for increased waste diversion, a cost savings would occur. There is no finding of fact or law in the court decision or from the Commission Statement of Decision for the test claim for this assumed duty to use landfills.<sup>56</sup>

The claimant further argues that the offsetting savings provision in the Parameters and Guidelines does not assume that the cost savings occurred, but instead requires that the cost savings be *realized*, which according to the claimant, necessitates the following chain of events:

[T]he cost savings must exist (avoided landfill costs); be converted to cash; amounts in excess of \$2,000 per year deposited in the state fund; and, these deposits by the districts appropriated by the Legislature to districts for purposes of mitigating the cost of implementing the plan. None of those prerequisite events occurred so no cost savings were "realized" by the District. Regardless, the adjustment cannot be applied to the District since no state appropriation of the cost savings was made to the District.<sup>57</sup>

The claimant also argues that the Parameters and Guidelines are silent as to how to calculate the avoided costs, but that the court provided two alternative methods, either disposal reduction or diversion reported by districts. The Controller used the diversion percentage, which assumes, without findings of fact, that all diversion tonnage is landfill disposal tonnage reduction. The claimant contends that the Controller’s calculation of cost savings is wrong because: (1) the formula is a standard of general application that was not adopted pursuant to the Administrative Procedure Act and is therefore an unenforceable underground regulation; (2) the Controller’s formula assumes facts not in evidence, such as applying the diversion percentage reported by the claimant, and assumes that all tonnage diverted would have been disposed in a landfill, although some waste may have been composted or may not apply to the mandate (e.g. paint), and that tonnage diverted in 2007 applies to subsequent years of the audit period; and (3) the landfill disposal fee, a statewide average calculated by CIWMB, does not include the data used to generate the average fee amounts, so the average is unknown and unsupported by the audit findings.<sup>58</sup>

The claimant further alleges that application of the cost savings formula is incorrect, stating:

The District did not claim landfill costs, so there are none to be offset. The adjustment method does not match or limit the landfill costs avoided to landfill

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<sup>56</sup> Exhibit A, IRC, pages 9-11.

<sup>57</sup> Exhibit A, IRC, pages 12-13. Emphasis in original.

<sup>58</sup> Exhibit A, IRC, pages 13-16.

costs, if any, actually claimed. Instead, the total adjustment amount for avoided landfill costs is applied to the total annual claim amounts and thus reduces unrelated salary and benefit costs...<sup>59</sup>

Moreover, the Controller's calculation method prevents the claimant from receiving full reimbursement for its actual increased program costs. The claimant contends, using audit results for 29 other claimants under the *Integrated Waste Management* program, that the application of the Controller's formula has arbitrary results because the percentages of allowed costs for those claimants ranges from zero to 83.4 percent.<sup>60</sup>

Finally, the claimant argues: (1) the Controller used the wrong standard of review in that the claimed costs were not found to be excessive or unreasonable, as required by Government Code section 17561(d)(2); and (2) the Controller has the burden of proof as to the propriety of its audit findings "because it bears the burden of going forward and because it is the party with the power to create, maintain, and provide evidence regarding its auditing methods and procedures, as well as the specific facts relied upon for its audit findings."<sup>61</sup>

The claimant did not file comments on the Draft Proposed Decision.

#### **B. State Controller's Office**

The Controller maintains that the audit findings are correct and that the claimant understated offsetting cost savings of \$661,373 from implementation of its IWM plan, but because the offsetting savings adjustment for fiscal years 2003-2004 and 2005-2006 through 2007-2008 resulted in a negative balance due the district, and because of a 2009-2010 late filing penalty, the Controller adjusted the district's claims by a net \$234,641.<sup>62</sup>

Regarding the claimant's statement that there is only a presumption to incur landfill disposal fees to dispose of solid waste, the Controller notes:

[T]he district does not provide an alternative for how non-diverted solid waste would be disposed of, if not at a landfill. In addition, the district does not state that it disposed of its solid waste at any location other than a landfill or used any other methodology to dispose of its waste other than to contract with a commercial waste hauler. Therefore, comments relating to legal requirements regarding alternatives for the disposal of solid waste are irrelevant.<sup>63</sup>

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<sup>59</sup> Exhibit A, IRC, page 17.

<sup>60</sup> Exhibit A, IRC, pages 17-18.

<sup>61</sup> Exhibit A, IRC, pages 20-21.

<sup>62</sup> Exhibit B, Controller's Comments on the IRC, page 15.

<sup>63</sup> Exhibit B, Controller's Comments on the IRC, page 16.

The Controller cites some of the claimant's annual reports to indicate that it disposed of solid waste and contracted with a waste hauler during the audit period.<sup>64</sup> The Controller also found that the claimant's website referred to diversion from a landfill.<sup>65</sup> As the Controller points out:

Unless the district had an arrangement with its waste hauler that it did not disclose to us or CalRecycle, the district did not dispose of its solid waste at a landfill for no cost. San Mateo County Community College District is located in San Mateo, California. An internet search for landfill fees revealed that the Blue Line Transfer Station in South San Francisco, California (11 miles from the district office), currently charges \$90 per ton to dispose of solid waste [Tab 6, page 1]. Therefore, the higher rate of diversion results in less trash that is disposed of at a landfill, which creates cost savings for the district.<sup>66</sup>

The Controller also referred to a statement in Skyline College's 2014 report in which the claimant acknowledged cost savings from its diversion activities, stating: "the composting pilot program will determine how much waste from the dining hall and adjacent restrooms can be diverted from local landfills and *identify potential cost savings for the college.*"<sup>67</sup>

As to the claimant not remitting cost savings from the implementation of its IWM plan into the Integrated Waste Management Account in compliance with the Public Contract Code, the Controller asserts that the claimant is not precluded from the requirement to do so, as indicated in the Parameters and Guidelines and the court ruling. The Controller says the claimant's statements support that the claimant realized cost savings from implementing its IWM plan.<sup>68</sup>

The Controller also disagrees with the claimant's argument that the formula is a standard of general application that is an underground regulation. The Controller used a "court approved methodology" to determine the "required offset" and notes that the claimant did not amend any of its reimbursement claims after the Parameters and Guidelines were amended in September 2008. According to the Controller: "We believe that this "court- identified" approach provides a reasonable methodology to identify the applicable offsets."<sup>69</sup> The claimant did not provide an alternative methodology to calculate the required offset.<sup>70</sup>

The Controller also states that it "allocated" the offsetting savings to avoid penalizing the claimant for diverting more than the minimum rate of diversion required during the audit period.<sup>71</sup> According to the Controller:

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<sup>64</sup> Exhibit B, Controller's Comments on the IRC, page 16.

<sup>65</sup> Exhibit B, Controller's Comments on the IRC, page 16.

<sup>66</sup> Exhibit B, Controller's Comments on the IRC, page 17.

<sup>67</sup> Exhibit B, Controller's Comments on the IRC, page 17. Emphasis in Controller's quotation.

<sup>68</sup> Exhibit B, Controller's Comments on the IRC, page 18.

<sup>69</sup> Exhibit B, Controller's Comments on the IRC, page 19.

<sup>70</sup> Exhibit B, Controller's Comments on the IRC, page 19.

<sup>71</sup> Exhibit B, Controller's Comments on the IRC, page 20.

As there is no State mandate to exceed solid waste diversion greater than 25% for calendar years 2000 through 2003 or greater than 50% for calendar year 2004 and beyond, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceeded the levels set by statute.<sup>72</sup>

The Controller defended its application of the claimant's 2007 diversion rates to subsequent years of the audit period because "beginning in calendar year 2008, CalRecycle stopped requiring districts to report the actual amount of tonnage diverted."<sup>73</sup> The Controller states that the claimant is still required to divert 50 percent of its waste, and that its annual reports from 2008 onward indicate that claimant reached its target rates and was therefore diverting 50 percent of its waste. The Controller called 2007 a "fair representation of the 2008 through 2010 diversion information because the district's has already established and committed to its recycling processes."<sup>74</sup>

The Controller also responded to the claimant's argument against the assumption that all tonnage diverted would have been disposed in a landfill, even though some waste may have been composted or may not apply to the mandate. The Controller states,

[T]he district is claiming nearly \$100,000 in salaries and benefits for its groundskeepers for "Diverting solid waste from landfill disposal or transformation facilities - composting" [Tab 13]. Therefore, it is reasonable that the correlated landfill fees that the district did not incur for the composted materials translate into savings realized by the district.<sup>75</sup>

The Controller also states that the claimant's reference to paint disposal is irrelevant because hazardous waste is not included in the diversion amounts that the claimant reported, and therefore, are not included in the Controller's offsetting savings calculation.<sup>76</sup>

Regarding the data for the statewide disposal fee, the Controller states the information was provided by CIWMB, is included in the record, and is based on a private survey of a large percentage of landfills across California. The Controller cites its internet search for landfill fees that revealed:

[T]he Blue Line Transfer Station in South San Francisco, California, currently charges \$90 per ton to dispose of solid waste [Tab 6]. Therefore, we believe that the \$36 to \$56 statewide average disposal fee used to calculate the offsetting savings realized by the district is reasonable. The district did not provide any information, such as its contract with or invoices received from its commercial waste hauler, to support either the landfill fees actually incurred by the district or

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<sup>72</sup> Exhibit B, Controller's Comments on the IRC, page 20.

<sup>73</sup> Exhibit B, Controller's Comments on the IRC, page 20.

<sup>74</sup> Exhibit B, Controller's Comments on the IRC, page 21.

<sup>75</sup> Exhibit B, Controller's Comments on the IRC, page 21.

<sup>76</sup> Exhibit B, Controller's Comments on the IRC, page 21.

to confirm that the statewide average landfill fee was greater than the actual landfill fees incurred by the district.<sup>77</sup>

In response to the claimant's argument that it did not claim landfill costs, so there are none to offset, the Controller answers that the mandated program does not reimburse claimants for landfill costs incurred to dispose of solid waste, so none would be claimable. Rather, the program reimburses claimants' costs to divert solid waste from disposal, which according to the Controller, results in both a reduction of solid waste going to a landfill and the associated costs of having the waste hauled there, which creates offsetting savings that the claimant is required to identify in its mandated cost claims.<sup>78</sup>

In response to the claimant's argument that "the adjustment method does not match or limit the landfill costs avoided to landfill costs, if any, actually claimed," the Controller quotes Public Resources Code section 42925, which provides that "cost savings realized as a result of the IWM plan are to "fund plan *implementation and administration costs*."<sup>79</sup> The Controller argues that offsetting savings applies to the whole program and is not limited to solid waste diversion activities. The Controller also cites the reimbursable activities in the Parameters and Guidelines that refer to "implementation of the IWM plan," concluding that it is reasonable that offsetting savings from implementing the plan be offset against direct costs to implement the plan.<sup>80</sup>

As to the claimant's reference to other community college district audits under the IWM program, the Controller states that the "adjustments made at other community college districts are not relevant to the current issue at hand."<sup>81</sup>

The Controller disagrees with claimant's argument that the Controller used the wrong standard of review. The Controller cites the statute that authorizes it to audit the claimant's records to verify actual mandate-related costs *and* reduce any claim that is excessive or unreasonable. In this case, the claims were excessive because the "claims exceeded the proper amount based on the reimbursable costs allowable per statutory language and the program's parameters and guidelines."<sup>82</sup> As to the burden of proof, the Controller states that it used data from the claimant's annual reports to CIWMB from implementing its IWM program.<sup>83</sup>

The Controller filed comments on the Draft Proposed Decision on April 23, 2018, agreeing with the conclusion that supports its reductions of costs claimed for all years in the audit period except the first half of fiscal year 2003-2004. The Controller also agreed to reinstate \$8,197 for the first

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<sup>77</sup> Exhibit B, Controller's Comments on the IRC, page 22.

<sup>78</sup> Exhibit B, Controller's Comments on the IRC, page 22.

<sup>79</sup> Public Resources Code section 42925. Emphasis added.

<sup>80</sup> Exhibit B, Controller's Comments on the IRC, page 23.

<sup>81</sup> Exhibit B, Controller's Comments on the IRC, page 24.

<sup>82</sup> Exhibit B, Controller's Comments on the IRC, page 26.

<sup>83</sup> Exhibit B, Controller's Comments on the IRC, page 26.

half of fiscal year 2003-2004 “as the Commission concluded this reduction was incorrect as a matter of law.”<sup>84</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 if the Controller determines that the claim 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 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>85</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>86</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>87</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

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<sup>84</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision, page 1.

<sup>85</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>86</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>87</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space Dist.* (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.

connection between those factors, the choice made, and the purposes of the enabling statute.” [Citation.]’ ”<sup>88</sup>

The Commission must review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant. <sup>89</sup> In addition, sections 1185.1(f)(3) and 1185.2(d) and (e) 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>90</sup>

**A. The Controller’s Reduction of Costs Claimed Is Generally Correct as a Matter of Law; However, the Reduction for the First Half of Fiscal Year 2003-2004, Based on the Incorrect Diversion Rate, Is Incorrect as a Matter of Law and Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

1. The test claim statutes presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized.

The test claim statute added Public Resources Code section 42925(a), which provides: “Any cost savings realized as a result of the state agency integrated waste management plan shall, to the extent feasible, be redirected to the agency’s integrated waste management plan to fund plan implementation and administration costs, in accordance with Sections 12167 and 12167.1 of the Public Contract Code.”

The court’s Ruling on Submitted Matter states that community colleges are “likely to experience costs savings in the form of reduced or avoided costs of landfill disposal” as a result of the mandated activities in Public Resources Code section 42921 because reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill disposal costs are reduced or avoided.” The court noted that “diversion is defined in terms of landfill disposal for purposes of the IWM plan mandates.” The statutory definition of diversion provides that “activities which reduce or eliminate the amount of solid waste from solid waste disposal for purposes of this division.” And the statutory definition of disposal is “the management of solid waste through landfill disposal or transformation at a permitted solid waste facility.”<sup>91</sup> The court explained:

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<sup>88</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>89</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>90</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>91</sup> Public Resources Code sections 40124 and 40192(b). Exhibit B, Controller’s Comments on the IRC, pages 142-143 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

[R]eduction or avoidance of landfill fees resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs of the IWM plan implementation . . . The amount or value of the savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report to petitioner Integrated Waste Management Board pursuant to subdivision (b)(1) of Public Resources Code section 42926.<sup>92</sup>

The court harmonized section 42925(a) with Public Contract Code sections 12167 and 12167.1:

By requiring the redirection of cost savings from state agency IWM plans to fund plan implementation and administration costs “in accordance with Sections 12167 and 12167.1 of the Public Contract Code,” section 42925 assures that cost savings realized from state agencies’ IWM plans are handled in a manner consistent with the handling of revenues received from state agencies’ recycling plans under the State Assistance for Recycling Markets Act. Thus, in accordance with section 12167, state agencies, along with California Community Colleges which are defined as state agencies for purposes of IWM plan requirements in Public Resources Code section 42920 et seq. [citations omitted], must deposit cost savings resulting from IWM plans in the Integrated Waste Management Account in the Integrated Waste Management Fund; the funds deposited in the Integrated Waste Management Account, upon appropriation by the Legislature, may be expended by the Integrated Waste Management Board for the purpose of offsetting IWM plan costs. In accordance with section 12167.1 and notwithstanding section 12167, cost savings from the IWM plans of the agencies and colleges that do not exceed \$2000 annually are continuously appropriated for expenditure by the agencies and colleges for the purpose of offsetting IWM plan implementation and administration costs; cost savings resulting from IWM plans in excess of \$2000 annually are available for such expenditure by the agencies and colleges when appropriated by the Legislature.<sup>93</sup>

Thus, the court found that offsetting savings are, by statutory definition, likely to occur as a result of implementing the mandated activities. Reduced or avoided costs “are a direct result and an integral part of the IWM plan mandated under Public Resources Code section 42920 et seq.: as solid waste diversion occurs, landfill disposal of the solid waste and associated landfill

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<sup>92</sup> Exhibit B, Controller’s Late Comments on the IRC, page 143 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

<sup>93</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 144-145 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

disposal costs are reduced or avoided.”<sup>94</sup> As the court held, “landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings *which must be offset* against the costs of the diversion activities to determine the reimbursable costs. . . .”<sup>95</sup>

The statutes, therefore, presume that by complying with the mandate to divert solid waste through the IWM program, landfill fees are reduced or avoided and cost savings are realized. As indicated in the court’s ruling, the amount or value of the cost savings may be determined from the calculations of annual solid waste disposal reduction or diversion, which community colleges are required to annually report to CIWMB. The amount of cost savings realized must be identified by the claimant and used to offset the costs incurred to comply with IWM plan implementation and administration activities approved for reimbursement in the Parameters and Guidelines. Accordingly, the court’s ruling requires claimants to report in their reimbursement claims the costs incurred to comply with the reimbursable activities (which includes the activities and costs to divert at least 25 or 50 percent of all solid waste from landfill disposal) and the cost savings from the avoided landfill disposal fees, for a reimbursement claim of the net increased costs.

The Parameters and Guidelines are consistent with the court’s ruling and require in Section IV. that “[t]he claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.”<sup>96</sup> Section VIII. requires that “[r]educed or avoided costs realized from implementation of the community college districts’ Integrated Waste Management plans shall be identified and offset from this claim as cost savings, consistent with the directions for revenue in Public Contract Code sections 12167 and 12167.1.”<sup>97</sup> The court’s decision and the amended Parameters and Guidelines are binding.<sup>98</sup>

2. During the audit period, the claimant exceeded the mandated solid waste diversion rate, but has filed no evidence to rebut the presumption that cost savings were realized. Thus, the Controller’s finding that the claimant realized cost savings is correct as a matter of law.

In this case, the claimant asserts that no cost savings were realized, but does not explain why.<sup>99</sup>

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<sup>94</sup> Exhibit B, Controller’s Late Comments on the IRC, page 142 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>95</sup> Exhibit B, Controller’s Late Comments on the IRC, page 143 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter). Emphasis added.

<sup>96</sup> Exhibit A, IRC, page 58 (Parameters and Guidelines).

<sup>97</sup> Exhibit A, IRC, page 63 (Parameters and Guidelines).

<sup>98</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

<sup>99</sup> Exhibit A, IRC, page 9.

The mandate requires community colleges to divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, through source reduction, recycling, and composting activities, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004.<sup>100</sup> The record shows that in calendar years 2003, 2004, 2005, 2006, and 2007, the claimant exceeded the mandated diversion rate at all three campuses. The claimant's annual reports to CIWMB for the audit period report diversion rates that range from 51 percent to 99 percent of the waste generated at Cañada College,<sup>101</sup> 65.8 to 81 percent diversion at Skyline College,<sup>102</sup> and 44 to 75.4 percent diversion at the College of San Mateo.<sup>103</sup>

In 2008, CIWMB stopped requiring community college districts to report the amount and percentage of tonnage diverted, and instead required them to report the "per-capita disposal" of waste.<sup>104</sup> As amended, each community college now has a disposal target that is the equivalent to a 50 percent diversion, and is expressed on a per capita basis. If the district's per-capita disposal rate is less than the target, it means that the district is meeting the requirement to divert 50 percent of its solid waste.<sup>105</sup>

The claimant, in its report for 2008, 2009, and 2010, reported annual per capita disposal rates for both the employee and student populations to be at or below the target rates in most circumstances, thereby satisfying the requirement to divert 50 percent of its solid waste.<sup>106</sup> In

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<sup>100</sup> Public Resources Code sections 42921. Exhibit A, IRC, pages 55 and 59 (Parameters and Guidelines, section IV.(B)(5)).

<sup>101</sup> Exhibit B, Controller's Comments on the IRC, pages 37-62 and 151.

<sup>102</sup> Exhibit B, Controller's Comments on the IRC, pages 63-95 and 152.

<sup>103</sup> Exhibit B, Controller's Comments on the IRC, pages 96-123 and 153.

<sup>104</sup> The new requirement was a result of Statutes 2008, chapter 343 (SB 1016).

<sup>105</sup> Exhibit B, Controller's Comments on the IRC, pages 162-170 ["Understanding SB 1016 Solid Waste Per Capita Disposal Measurement Act", <http://www.calrecycle.ca.gov/lgcentral/goalmeasure/Tools/SimplePresen.pdf>.]

<sup>106</sup> Exhibit B, Controller's Comments on the IRC, pages 83 (Skyline College 2008 Report, showing an employee target of 11.8 and 1.9 achieved, and a population target of 0.3 and .05 achieved); 87 (Skyline College 2009 Report, showing an employee target of 11.8 and 1.4 achieved, and a student target of 0.3 and .03 achieved); 92 (Skyline College 2010 Report, showing an employee target of 11.8 and 1.4 achieved, and a student target of 0.3 and .02 achieved), pages 112 (College of San Mateo 2008 Report, showing an employee target of 5.3 and 2.3 achieved, and a student target of 0.1 and 0.07 achieved); 116 (College of San Mateo 2009 Report, showing an employee target of 5.3 and 5.7 achieved, and a student target of 0.1 and 0.14 achieved); 121 (College of San Mateo 2010 Report, showing an employee target of 5.3 and 3.4 achieved, and a student target of 0.1 and 0.22 achieved), pages 53 (Cañada College 2008 Report, showing an employee target of 7.2, and 13.9 was achieved; and a student target of 0.2, and 0.43 was achieved); 56 (Cañada College 2009 Report, showing an employee target of 7.2 and 12.9 was achieved; and a student target of 0.2 and .27 was achieved); 60 (Cañada College 2010

addition, the claimant's annual reports indicate ongoing diversion and waste reduction programs after 2007. For example, in 2008 Cañada College reported: "No programs implemented or discontinued this year."<sup>107</sup> Also, the Cañada College 2009 report compared the amount of its waste to the previous year, stating: "Disposal is less."<sup>108</sup> The Skyline College 2008 report states: "All waste diversion programs previously in place at Skyline College were continued and, in many cases, improved upon slightly in 2008..."<sup>109</sup> The Skyline College 2009 report states: "After monitoring two calendar years (2008 & 2009) of [the One Stream recycling program's] effects, indications are that it has helped increase our recycling efforts by making it easier for end users to dispose of recyclable items. Skyline College procured and deployed over 50 new waste/recycle station containers for five major campus buildings."<sup>110</sup> In 2010, Skyline again reported that its One Stream recycling program "helped increase our recycling efforts"<sup>111</sup> and stated: "The Annual Per Capita Disposal value for this reporting year (2010) is lower than the previous year (2009)."<sup>112</sup> The College of San Mateo's 2008 report states: "The campus recycling program has not changed" and "[n]o changes were made to programs this year."<sup>113</sup> In its 2009 report, the College of San Mateo left blank the question regarding changes to its programs,<sup>114</sup> but did say "Recycling increased due to construction program and the disposal of metal and construction spoils."<sup>115</sup> The College of San Mateo again left blank the question regarding changes to its IWM programs in its 2010 report.<sup>116</sup>

The record also shows that the solid waste that was not diverted by the claimant was disposed of at a landfill by a waste hauler. The claimant's annual reports filed with CIWMB during the audit period identify the total tonnage of waste disposed<sup>117</sup> and the use of a waste hauler. For example, in the Cañada College reports for 2003-2007 state: "The local waste company transported and disposed of all of the college non-recyclable materials."<sup>118</sup> The annual reports

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Report, showing an employee target of 7.2 and 7.8 was achieved, and a student target of 0.2 and 0.17 was achieved).

<sup>107</sup> Exhibit B, Controller's Comments on the IRC, page 53 (Cañada College 2008 Report).

<sup>108</sup> Exhibit B, Controller's Comments on the IRC, page 58 (Cañada College 2009 Report).

<sup>109</sup> Exhibit B, Controller's Comments on the IRC, page 83 (Skyline College 2008 Report).

<sup>110</sup> Exhibit B, Controller's Comments on the IRC, page 87 (Skyline College 2009 Report).

<sup>111</sup> Exhibit B, Controller's Comments on the IRC, page 92 (Skyline College 2010 Report).

<sup>112</sup> Exhibit B, Controller's Comments on the IRC, page 93 (Skyline College 2010 Report).

<sup>113</sup> Exhibit B, Controller's Comments on the IRC, page 112 (College of San Mateo 2008 Report).

<sup>114</sup> Exhibit B, Controller's Comments on the IRC, page 117 (College of San Mateo 2009 Report).

<sup>115</sup> Exhibit B, Controller's Comments on the IRC, page 118 (College of San Mateo 2009 Report).

<sup>116</sup> Exhibit B, Controller's Comments on the IRC, page 121 (College of San Mateo 2010 Report).

<sup>117</sup> Exhibit B, Controller's Comments on the IRC, pages 16, 37-123.

<sup>118</sup> Exhibit B, Controller's Comments on the IRC, pages 38, 41, 44, 47, and 50.

by Skyline College<sup>119</sup> and the College of San Mateo<sup>120</sup> also indicate the use of a waste hauler. In addition, the claimant expressly refers to the landfill in its reports. For example, Cañada College reports for 2003-2007 state: “Weight tags were supplied for each trip to the land fill.”<sup>121</sup> Cañada College’s 2005 report states: “The majority of soil is being recycled and not disposed into land fill.”<sup>122</sup> Skyline College’s 2009 report states: “Close to 50,000 tons of earth and yard debris was excavated and taken to a landfill on campus versus off-hauled to a disposal site.”<sup>123</sup> And the College of San Mateo’s 2008 report states: “Special Waste Materials includes: concrete/asphalt demolition debris have been used to fill in a below grade parking lot instead of going off site to landfill.”<sup>124</sup> Additionally, statements from the claimant’s website indicate the claimant’s use of (and diversion from) a landfill, such as: “For years, most of this waste [generated by the claimant] was trucked to landfills and buried.”<sup>125</sup> The website also includes a chart of the diversion at each campus and states: “The chart below shows the percentage of our waste that is no longer sent to landfills, benchmarked against our mandated goals.”<sup>126</sup>

The avoided landfill disposal fee was based on the statewide average disposal fee provided by CIWMB for each fiscal year in the audit period, since the claimant did not provide any information to the Controller regarding the landfill fees it was charged.<sup>127</sup>

Based on this documentation, the Controller correctly presumed, consistent with the presumption in the test claim statutes and the court’s interpretation of those statutes and with no evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted.

The statutory presumption of cost savings controls unless the claimant files evidence to rebut the presumption and shows that cost savings were not realized.<sup>128</sup> The claimant has the burden of

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<sup>119</sup> Exhibit B, Controller’s Comments on the IRC, pages 64, 68, 72, 76, 80, 84, 88, and 93.

<sup>120</sup> Exhibit B, Controller’s Comments on the IRC, pages 97, 100, 103, 106 and 109.

<sup>121</sup> Exhibit B, Controller’s Comments on the IRC, pages 38, 41, 44, 47, and 50.

<sup>122</sup> Exhibit B, Controller’s Comments on the IRC, page 44.

<sup>123</sup> Exhibit B, Controller’s Comments on the IRC, page 87.

<sup>124</sup> Exhibit B, Controller’s Comments on the IRC, page 112.

<sup>125</sup> Exhibit B, Controller’s Comments on the IRC, page 34.

<sup>126</sup> Exhibit B, Controller’s Comments on the IRC, page 34.

<sup>127</sup> Exhibit B, Controller’s Comments on the IRC, pages 17, 22, 179-206.

<sup>128</sup> Government Code section 17559, which requires that the Commission’s decisions be supported by substantial evidence in the record. See also, *Coffy v. Shiimoto* (2015) 60 Cal.4th 1198, 1209, a case interpreting the rebuttable presumption in Vehicle Code section 23152 that if a person had 0.08 percent or more, by weight, of alcohol in the blood at the time of testing, then it is presumed by law that he or she had 0.08 percent or more, by weight, of alcohol in the blood at the time of driving, unless he or she files evidence to rebut the presumption. The court states that unless and until evidence is introduced that would support a finding that the presumption

proof on this issue. Under the mandates statutes and regulations, the claimant is required to show that it has incurred increased costs mandated by the state when submitting a reimbursement claim to the Controller's Office, and the burden to show that any reduction made by the Controller is incorrect.<sup>129</sup> The Parameters and Guidelines, as amended pursuant to the court's writ, also require claimants to show the costs incurred to divert solid waste and to perform the administrative activities, and *to report and identify* the costs saved or avoided by diverting solid waste: "Reduced or avoided costs realized from implementation of the community college districts' Integrated Waste Management plans *shall be* identified and offset from this claim as cost savings."<sup>130</sup> Thus, the claimant has the burden to rebut the statutory presumption and to show, with substantial evidence in the record, that the costs of complying with the mandate exceed any cost savings realized by diverting solid waste.

The Commission finds that since the claimant has not filed any evidence to rebut the statutory presumption of cost savings, the Controller's finding that cost savings have been realized is correct as a matter of law.

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does not exist, the statutory presumption that the person was driving over the legal limit remains the finding of fact.

<sup>129</sup> Evidence Code section 500, which states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." See also, *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 24, where the court recognized that "the general principle of Evidence Code 500 is that a party who seeks a court's action in his favor bears the burden of persuasion thereon." This burden of proof is recognized throughout the architecture of the mandates statutes and regulations. Government Code section 17551(a) requires the Commission to hear and decide a claim filed by a local agency or school district that it is entitled to reimbursement under article XIII B, section 6. Section 17551(d) requires the Commission to hear and decide a claim by a local agency or school district that the Controller has incorrectly reduced payments to the local agency or school district. In these claims, the claimant must show that it has incurred increased costs mandated by the state. (Gov. Code, §§ 17514 [defining "costs mandated by the state"], 17560(a) ["A local agency or school district may . . . file an annual reimbursement claim that details the costs actually incurred for that fiscal year."]; 17561 [providing that the issuance of the Controller's claiming instructions constitutes a notice of the right of local agencies and school districts to file reimbursement claims based upon the parameters and guidelines, and authorizing the Controller to audit the records of any local agency or school district to "verify the actual amount of the mandated costs."]; 17558.7(a) ["If the Controller reduces a claim approved by the commission, the claimant may file with the commission an incorrect reduction claim pursuant to regulations adopted by the commission."]). By statute, only the local agency or school district may bring these claims, and the local entity must present and prove its claim that it is entitled to reimbursement. (See also, Cal. Code Regs., tit. 2, §§ 1185.1, et seq., which requires that the IRC contain a narrative that describes the alleged incorrect reductions, and be signed under penalty of perjury.)

<sup>130</sup> Exhibit A, IRC, page 63 (Amended Parameters and Guidelines). Emphasis added.

3. For all years of the audit period except the first half of fiscal year 2003-2004, the Controller’s calculation of cost savings is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

The Controller correctly determined that during the audit period, the claimant diverted solid waste, as mandated by the test claim statute. The Controller also found that the claimant exceeded the minimum required diversion rate every year of the audit period except for the first half of fiscal year 2003-2004 at the College of San Mateo.<sup>131</sup> For years the claimant exceeded the mandate, the Controller calculated offsetting savings by allocating the diversion to reflect the mandate. The allocated diversion was calculated by dividing the percentage of solid waste required to be diverted by the test claim statute (either 25 percent or 50 percent) by the actual percentage of solid waste diverted (as annually reported by the claimant to CIWMB). The allocated diversion was then multiplied by the avoided landfill disposal fee (based on the statewide average fee) to calculate the offsetting savings realized.<sup>132</sup>

$$\begin{array}{rcc}
 & \text{Allocated Diversion \%} & \\
 & \text{Maximum Allowable} & \\
 \text{Offsetting Savings Realized} & = \frac{\text{Diversion \%}}{\text{Actual Diversion \%}} \times \text{Tonnage Diverted} \times \text{Avoided Landfill Disposal Fee (per Ton)} & \\
 \end{array}$$

The formula allocates or reduces cost savings based on the mandated rate, and is intended to avoid penalizing the claimant for diverting more solid waste than the amount mandated by law.<sup>133</sup>

This formula is consistent with the statutory presumption of cost savings, as interpreted by the court for this program, and the requirements in the Parameters and Guidelines. The court found that the test claim statutes require that reduced or avoided landfill fees represent savings that must be offset against the cost of diversion. The court stated: “The amount or value of the [offsetting cost] savings may be determined from the calculations of annual solid waste disposal reduction or diversion which California Community Colleges must annually report” to CIWMB.<sup>134</sup> The Parameters and Guidelines state: “Reduced or avoided costs realized from implementation of the community college districts’ Integrated Waste Management plans shall be identified and offset from this claim as cost savings . . . .”<sup>135</sup> Thus, the Controller’s formula

<sup>131</sup> Exhibit B, Controller’s Comments on the IRC, pages 151-153. As discussed below, the Controller’s finding that the College of San Mateo did not meet the minimum required diversion in the first half of 2003-2004 is in error.

<sup>132</sup> Exhibit A, IRC, pages 38; Exhibit B, Controller’s Comments on the IRC, page 20.

<sup>133</sup> Exhibit B, Controller’s Comments on the IRC, page 20.

<sup>134</sup> Exhibit B, Controller’s Comments on the IRC, page 143 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>135</sup> Exhibit A, IRC page 63 (Amended Parameters and Guidelines, adopted Sept. 26, 2008).

correctly presumes, based on the record and without any evidence to the contrary, that the claimant realized cost savings during the audit period equal to the avoided landfill fee per ton of waste required to be diverted. And when the claimant exceeded the mandated diversion rates, the Controller's formula limits the offset to reflect the mandated rate.

The claimant raises several arguments that the Controller's calculation of cost savings is incorrect. None of these arguments are supported by the law or evidence in the record.

The claimant first alleges that cost savings cannot be realized because the chain of events required by Public Contract Code sections 12167 and 12167.1 did not occur: that savings have to be converted to cash, and amounts in excess of \$2,000 per year must be deposited in the state fund and appropriated back by the Legislature to mitigate the costs.<sup>136</sup> It is undisputed that the claimant did not remit to the state any savings realized from the implementation of the IWM plan.<sup>137</sup> However, as indicated above, cost savings are presumed by the statutes and the claimant has not filed evidence to rebut that presumption. Thus, the claimant should have deposited the cost savings into the state's account as required by the test claim statutes, and the claimant's failure to comply with the law does not make the Controller's calculations of cost savings incorrect as a matter of law, or arbitrary or capricious. Since cost savings are presumed by the statutes, the claimant has the burden to show increased costs mandated by the state. As the court stated: "[r]eimbursement is not available under section 6 and section 17514 to the extent that a local government or school district is able to provide the mandated program or increased level of service without actually incurring increased costs."<sup>138</sup>

The claimant next asserts that the Controller's formula is an underground regulation.<sup>139</sup> The Commission disagrees. Government Code section 11340.5 provides that no state agency shall enforce or attempt to enforce a rule or criterion which is a regulation, as defined in section 11342.600, unless it has been adopted pursuant to the Administrative Procedures Act. As discussed above, however, the formula is consistent with the statutory presumption of cost savings, as interpreted by the court for this program. Interpretations that arise in the course of case-specific adjudications are not regulations.<sup>140</sup>

The claimant also argues that using landfill fees in the calculation of offsetting savings is not relevant because "[t]he District did not claim landfill costs, so there are none to be offset."<sup>141</sup> The claimant's interpretation of the cost savings requirement is not correct. The cost of disposing waste at a landfill is not eligible for reimbursement. Reimbursement is authorized to

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<sup>136</sup> Exhibit A, IRC, pages 12-13.

<sup>137</sup> Exhibit B, Controller's Comments on the IRC, page 11.

<sup>138</sup> Exhibit B, Controller's Comments on the IRC, page 142 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter).

<sup>139</sup> Exhibit A, IRC, pages 13-14.

<sup>140</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>141</sup> Exhibit A, IRC, page 17.

*divert* solid waste from the landfill through source reduction, recycling, and composting activities.<sup>142</sup> As explained by the court:

In complying with the mandated solid waste diversion requirements of Public Resources Code section 42921, California Community Colleges are likely to experience cost savings in the form of reduced or avoided costs of landfill disposal. The reduced or avoided costs are a direct result and an integral part of the mandated IWM plan ....

Such reduction or avoidance of landfill fees and costs resulting from solid waste diversion activities under § 42920 et seq. represent savings which must be offset against the costs of the diversion activities to determine the reimbursable costs of IWM plan implementation -- i.e., the actual increased costs of diversion -- under section 6 and section 17514.<sup>143</sup>

The court also noted that diversion is defined as “activities which reduce or eliminate the amount of solid waste from solid waste disposal.”<sup>144</sup>

In addition, the claimant argues that the formula assumes facts without evidence in the record. For example, the claimant questions the Controller’s assumption that the claimant’s 2007 diversion rate applies to subsequent years in the audit period, that all diverted waste would have been disposed in a landfill, and that the statewide average cost to dispose of waste at a landfill actually applies to the claimant.<sup>145</sup>

The Controller’s assumptions, however, are supported by evidence in the record and the claimant has filed no evidence to rebut them.

The Controller applied the diversion rate achieved in 2007 to subsequent years because CIWMB stopped requiring community college districts to report the actual amount and percent of tonnage diverted in 2008. As the Controller notes, the 2007 rate is “a fair representation of the 2008 through 2010 diversion information because the district’s [sic] has already established and committed to its recycling processes.”<sup>146</sup> As discussed above, the data and the narrative in the claimant’s reports for 2008, 2009, and 2010 reveal that the claimant’s annual per capita disposal rate for both the employee and student populations were near or below the target rate in most years. For example, Skyline College exceeded its target diversion rates in 2008, 2009, and

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<sup>142</sup> Exhibit A, IRC, page 54 (Parameters and Guidelines).

<sup>143</sup> Exhibit B, Controller’s Comments on the IRC, pages 142-143 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter)).

<sup>144</sup> Public Resources Code section 40124. Exhibit B, Controller’s Comments on the IRC, page 142 (*State of California, Department of Finance, California Integrated Waste Management Board v. Commission on State Mandates, et al.* (Sacramento County Superior Court, Case No. 07CS00355, Ruling on Submitted Matter)).

<sup>145</sup> Exhibit A, IRC, pages 14-16.

<sup>146</sup> Exhibit B, Controller’s Comments on the IRC, page 21.

2010.<sup>147</sup> The College of San Mateo exceeded its target diversion rates in 2008 and 2010, but not in 2009.<sup>148</sup> Cañada College did not exceed its target rates in 2008 or 2009, or its employee target for 2010, but did exceed its student target in 2010.<sup>149</sup> Even though the claimant did not exceed its diversion goals in 2008-2010 at Cañada College, or in 2009 at College of San Mateo, the Controller still allocated and reduced cost savings for those years based on the mandated rate, as it did for the earlier years when the claimant exceeded the mandate.<sup>150</sup> Thus, the Controller's application of the 2007 diversion rates to subsequent years did not penalize the claimant. Moreover, the record indicates the claimant diverted waste during 2008, 2009, and 2010, and the claimant has provided no evidence to show that it did not realize cost savings from its diversion.

The Controller obtained the statewide average cost for landfill disposal fees from CIWMB. The fees were based on a private survey of a large percentage of landfills across California.<sup>151</sup> The Controller's audit report indicates that the claimant did not provide documentation to support a different disposal fee.<sup>152</sup> In addition, the Controller states:

[A]n internet search for landfill fees revealed that the Blue Line Transfer Station in South San Francisco, California, currently charges \$90 per ton to dispose of solid waste [Tab 6]. Therefore, we believe that the \$36 to \$56 statewide average disposal fee used to calculate the offsetting savings realized by the district is reasonable. The district did not provide any information, such as its contract with or invoices received from its commercial waste hauler, to support either the landfill fees actually incurred by the district or to confirm that the statewide

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<sup>147</sup> Exhibit B, Controller's Comments on the IRC, pages 83 (Skyline College 2008 Report, showing an employee target of 11.8 and 1.9 achieved, and a population target of 0.3 and .05 achieved); 87 (Skyline College 2009 Report, showing an employee target of 11.8 and 1.4 achieved, and a student target of 0.3 and .03 achieved); 92 (Skyline College 2010 Report, showing an employee target of 11.8 and 1.4 achieved, and a student target of 0.3 and .02 achieved).

<sup>148</sup> Exhibit B, Controller's Comments on the IRC, pages 112 (College of San Mateo 2008 Report, showing an employee target of 5.3 and 2.3 achieved, and a student target of 0.1 and 0.07 achieved); 116 (College of San Mateo 2009 Report, showing an employee target of 5.3 and 5.7 achieved, and a student target of 0.1 and 0.14 achieved); 121 (College of San Mateo 2010 Report, showing an employee target of 5.3 and 3.4 achieved, and a student target of 0.1 and 0.22 achieved).

<sup>149</sup> Exhibit B, Controller's Comments on the IRC, pages 53 (Cañada College 2008 Report, showing an employee target of 7.2, and 13.9 was achieved; and a student target of 0.2, and 0.43 was achieved); 56 (Cañada College 2009 Report, showing an employee target of 7.2 and 12.9 was achieved; and a student target of 0.2 and .27 was achieved); 60 (Cañada College 2010 Report, showing an employee target of 7.2 and 7.8 was achieved, and a student target of 0.2 and 0.17 was achieved).

<sup>150</sup> Exhibit B, Controller's Comments on the IRC, pages 151-153.

<sup>151</sup> Exhibit B, Controller's Comments on the IRC, pages 22, 179-206.

<sup>152</sup> Exhibit A, IRC, page 39.

average landfill fee was greater than the actual landfill fees incurred by the district.<sup>153</sup>

On these audit issues, the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. The Commission must only ensure that the Controller's decision is not arbitrary, capricious, or entirely lacking in evidentiary support, and adequately considered all relevant factors.<sup>154</sup> There is no evidence that the Controller's assumptions are wrong or arbitrary or capricious with regard to the statewide average landfill fee.

The claimant also points to the Controller's audits of other community college districts, arguing that the Controller's audit results in those cases vary and are arbitrary.<sup>155</sup> The Controller's audits of other community college district reimbursement claims are not relevant to the Controller's audit here. Each audit depends on the documentation and evidence provided by the claimant to show increased costs mandated by the state.

Accordingly, the Controller's calculation of cost savings for all years of the audit period except the first half of fiscal year 2003-2004 is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

4. The Controller's calculation of cost savings for the first half of fiscal year 2003-2004, based on an incorrect mandated diversion rate, is incorrect as a matter of law, and for the College of San Mateo, is arbitrary, capricious, or entirely lacking in evidentiary support.

In the first half of fiscal year 2003-2004, the claimant achieved an actual diversion rate of 51.1 percent at Cañada College,<sup>156</sup> 74.4 percent at Skyline College,<sup>157</sup> and 44.1 percent at the College of San Mateo.<sup>158</sup> The Controller allocated the diversion rate at Cañada and Skyline Colleges, as it did for all the other years in the audit period, because they exceeded the diversion mandate. However, the Controller used a 50 percent rate to calculate the allocated diversion, although the test claim statutes required only 25 percent until January 1, 2004,<sup>159</sup> so the calculation of cost savings at Cañada and Skyline Colleges for the first half of fiscal year 2003-2004 is incorrect as a matter of law.

For the College of San Mateo, the Controller found that the claimant did not meet the minimum "50 percent" diversion rate in the first half of 2003-2004, although the minimum rate in 2003

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<sup>153</sup> Exhibit B, Controller's Comments on the IRC, pages 17-18.

<sup>154</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>155</sup> Exhibit A, IRC, pages 17-18.

<sup>156</sup> Exhibit B, Controller's Comments on the IRC, page 37 (Cañada College 2003 Report).

<sup>157</sup> Exhibit B, Controller's Comments on the IRC, page 63 (Skyline College 2003 Report).

<sup>158</sup> Exhibit B, Controller's Comments on the IRC, page 96 (College of San Mateo 2003 Report).

<sup>159</sup> Public Resources Code sections 42921(b); Exhibit A, IRC, page 74 (Parameters and Guidelines).

was 25 percent diversion (and the College achieved 44.1 percent).<sup>160</sup> Because the requirement to divert 50 percent did not become effective until January 1, 2004,<sup>161</sup> the Controller's finding was incorrect as a matter of law. In addition, the Controller did not allocate the diversion rate for the College of San Mateo, as it had for the other fiscal years when the claimant exceeded the mandate. Instead, the Controller used 100 percent of the claimant's diversion to calculate the offsetting savings for the College of San Mateo for the first half of fiscal year 2003-2004,<sup>162</sup> so the Controller's savings calculation for this period is arbitrary, capricious, or entirely lacking in evidentiary support.

As indicated in the Parameters and Guidelines, the mandate is to divert at least 25 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2002, and at least 50 percent of all solid waste from landfill disposal or transformation facilities by January 1, 2004, through source reduction, recycling, and composting activities.<sup>163</sup> Thus, from July 1, 2003, through December 31, 2003, community college districts were mandated to achieve diversion rates of only 25 percent. The Controller admits that, "As there is no State mandate to exceed solid waste diversion greater than 25% for calendar years 2000 through 2003 or greater than 50% for calendar year 2004 and beyond, there is no basis for calculating offsetting savings realized for actual diversion percentages that exceed the levels set by statute."<sup>164</sup>

Applying the Controller's cost savings formula (using the mandated 25 percent rate to calculate the allocated diversion) to the first half of fiscal year 2003-2004, results in offsetting savings of:

- \$1,705 for Cañada College (25 percent divided by 51.13 percent multiplied by 94.7 tons diverted multiplied by the statewide average landfill fee of \$36.83) rather than \$3,411;
- \$1,805 for Skyline College (25 percent divided by 74.41 percent multiplied by 145.85 tons diverted multiplied by the statewide average landfill fee of \$36.83) rather than \$3,610; and
- \$6,124 for the College of San Mateo (25 percent divided by 44.13 percent multiplied by 293.5 tons diverted multiplied by the statewide average landfill fee of \$36.83) rather than \$10,810.

Accordingly, the Commission finds that for fiscal year 2003-2004, the reduction of \$8,197 (the difference between \$9,634, the amount that should have been reduced and \$17,831, the Controller's reduction) is incorrect as a matter of law, and in the case of the College of San Mateo, arbitrary, capricious, or entirely lacking in evidentiary support.

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<sup>160</sup> Exhibit B, Controller's Comments on the IRC, page 153.

<sup>161</sup> Public Resources Code sections 42921(b); Exhibit A, IRC, page 74 (Parameters and Guidelines).

<sup>162</sup> Exhibit B, Controller's Comments on the IRC, page 153.

<sup>163</sup> Exhibit A, IRC, page 59 (Parameters and Guidelines). This is based on Public Resources Code sections 42921.

<sup>164</sup> Exhibit B, Controller's Late Comments on the IRC, page 20.

## **V. Conclusion**

Based on the foregoing, the Commission concludes that the Controller's reduction of costs claimed for all years in the audit period except the first half of fiscal year 2003-2004 is correct as a matter of law and is not arbitrary, capricious, or entirely lacking in evidentiary support.

The Commission further concludes that the Controller's reduction of costs claimed for the first half of fiscal year 2003-2004, based on an incorrect mandated diversion rate, is incorrect as a matter of law, and in the case of the College of San Mateo, is arbitrary, capricious, or entirely lacking in evidentiary support. The law and the record support offsetting cost savings for this period of \$9,634 rather than \$17,831. Therefore, the reduction of \$8,197 (\$17,831 - \$9,634) is incorrect as a matter of law and should be reinstated to claimant.

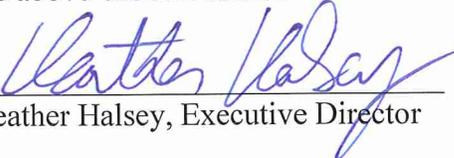
Accordingly, the Commission partially approves this IRC and requests, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission's regulations, that the Controller reinstate \$8,197 to the claimant.



RE: **Decision**

*Integrated Waste Management*, 15-0007-I-12  
Public Resources Code Sections 40148, 40196.3, 42920-42928;  
Public Contract Code Sections 12167 and 12167.1  
Statutes 1992, Chapter 1116 (AB 3521); Statutes 1999, Chapter 764 (AB 75)  
State Agency Model Integrated Waste Management Plan (February 2000)  
Fiscal Years: 2003-2004, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010,  
and 2010-2011  
San Mateo County Community College District, Claimant

On July 27, 2018, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

  
\_\_\_\_\_  
Heather Halsey, Executive Director

Dated: July 27, 2018

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE INCORRECT REDUCTION CLAIM  
ON:

Education Code Section 76300;

Statutes 1984, 2d Ex. Sess., Chapter 1;  
Statutes 1984, Chapters 274, and 1401;  
Statutes 1985, Chapters 920 and 1454;  
Statutes 1986, Chapters 46 and 394;  
Statutes 1987, Chapter 1118; Statutes  
1989, Chapter 136; Statutes 1991,  
Chapter 114; Statutes 1992, Chapter  
703; Statutes 1993, Chapters 8, 66, 67  
and 1124; Statutes 1994, Chapters 153  
and 422; Statutes 1995, Chapter 308;  
Statutes 1996, Chapter 63;  
Statutes 1999, Chapter 72;

California Code of Regulations, Title 5,  
Sections 58501-58503, 58611-58613,  
58620, and 58630

Fiscal Years 1998-1999, 1999-2000, 2000-  
2001, 2001-2002, 2002-2003, 2003-2004,  
2004-2005, 2005-2006, 2006-2007, 2007-  
2008, 2008-2009, 2009-2010, and 2010-2011

Filed on June 27, 2016

North Orange County Community College  
District, Claimant

Case No.: 15-9913-I-02

*Enrollment Fee Collection and Waivers*

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

*(Adopted November 30, 2018)*

*(Served December 7, 2018)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on November 30, 2018. The claimant, North Orange County Community College District, did not attend the hearing. Jim Venneman appeared for the State Controller's Office (Controller).

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 the Proposed Decision to deny the IRC by a vote of 4-0 as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	Yes
Ken Alex, Director of the Office of Planning and Research	Yes
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	Yes
Sarah Olsen, Public Member	Absent
Carmen Ramirez, City Council Member	Absent
Yvette Stowers, Representative of the State Controller	Yes
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	Absent

### **Summary of the Findings**

This IRC challenges the Controller’s reduction of costs claimed by North Orange County Community College District (claimant) for the *Enrollment Fee Collection and Waivers* program for fiscal years 1998-1999 through 2010-2011 (audit period). Of the \$15,955,585 claimed during the audit period, the Controller found that the entire amount is unallowable. The claimant challenges the reductions of costs claimed for salaries and benefits for the ongoing enrollment fee collection activities specified in the Parameters and Guidelines (audit findings 1 and 6/enrollment fee collection activities 1 through 4) and enrollment fee waiver activities (audit findings 3 and 6/enrollment fee waiver activities 7 through 12), and offsetting revenues (audit finding 5).

The Commission finds that the IRC is timely filed, and that Controller’s reductions are correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

As a preliminary issue, the plain language of Government Code section 17551(d) limits the Commission’s jurisdiction on an IRC to whether payments have been “incorrectly *reduced*”. In this case, the Controller *increased* the number of students who applied for a fee waiver and were subject to activity 10.<sup>1</sup> This resulted in an increase in allowable costs. Therefore, the Commission finds that it has no jurisdiction over the increased adjustment to the number of students for activity 10.

The Parameters and Guidelines require that reimbursement claims be based on actual costs incurred that are traceable and supported by contemporaneous source documents, also known as the “contemporaneous source document rule”. However, the claimant estimated the staff time to perform the mandated activities for all fiscal years in question and submitted time surveys certified by claimant’s employees to support the average times reported.

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<sup>1</sup> Activity 10 is “In the case of an incomplete application or incomplete documentation, notify the student of the additional required information and how to obtain that information. Hold student application and documentation in suspense file until all information is received.” Exhibit A, IRC, page 129 (Parameters and Guidelines).

The contemporaneous source document rule cannot apply to the reimbursement claims for costs incurred before the Parameters and Guidelines were adopted in January 2006 without violating due process principles because the claimants were not on notice of the requirements.<sup>2</sup> However, since the claimant had actual notice of the claiming requirements after the Parameters and Guidelines were issued, the Controller could have reduced the costs claimed for salaries and benefits to zero in fiscal years 2006-2007 through 2010-2011, which would have been correct as a matter of law.<sup>3</sup>

Instead, the Controller exercised its audit authority to determine if the estimated average times claimed were reasonable by discussing the program with claimant's staff and conducting a time study during an open enrollment period, during which the Controller contemporaneously logged the times spent to perform the enrollment fee collection and waiver activities. The Controller found that the average times estimated by the claimant to perform the mandated activities were overstated. The claimant has provided no evidence that the Controller's reduction of the estimated times are wrong, or arbitrary, or capricious.

The Controller also reduced the number of students reported by the claimant for each ongoing reimbursable activity based on data from the Chancellor's Office Management Information System (MIS) on enrollment fee waivers and Board of Governors (BOG) grant recipients. The MIS data is reported annually by community college districts to the Chancellor's Office and includes a student headcount, and eliminates any duplicate students by term based on students' Social Security numbers. The Chancellor has an official duty to maintain the MIS data, which is presumed to have been regularly performed and to be correct, absent evidence to the contrary.<sup>4</sup> The claimant has provided no evidence that the reduction to the number of students in the calculation for salaries and benefits is wrong, or arbitrary or capricious.

Finally, the claimant calculated productive hourly rates by including staff in its calculations who did not perform the mandate, and weighed all employee classifications at the same level as if all staff performed the reimbursable activities to the same extent. The Parameters and Guidelines require the claimant to identify the employees performing the mandate, their job classifications, and the hours devoted to each reimbursable activity performed. Thus, the Parameters and Guidelines require the claimant to specifically identify and weigh staff involvement in the mandate when claiming costs for salaries and benefits. The Controller recalculated the productive hourly rates based on the supporting documentation for the productive hourly rates used in the claimant's reimbursement claims. The Controller determined the level of staff involvement (student, classified or supervisory) after discussions with the claimant's staff, and by observing the staff performing the reimbursable activities. The Controller's reduction to

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<sup>2</sup> *Department of Health Services v. Fontes* (1985) 169 Cal.App.3d 301, 304-305; *Tapia v. Superior Court* (1991) 53 Cal.3d 282; 287-292; *Murphy v. City of Alameda* (1993) 11 Cal.App.4th 906, 911-912.

<sup>3</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

<sup>4</sup> Evidence Code section 664 establishes a presumption that official duty has been regularly performed.

productive hourly rates are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

The Commission also finds that the Controller's adjustments to offsetting revenues is correct as a matter of law. The Controller found that offsetting revenues identified by the claimant for the enrollment fee collection and waiver activities were understated because the claimant did not accurately report the amounts received from the Chancellor's Office. The plain language of the Parameters and Guidelines and Education Code section 76300(m) require that funds allocated from the Board of Governors for the fee collection and fee waiver programs be identified as offsetting revenues against the costs incurred. Moreover, in 2008, the Legislature amended Education Code section 76300(m) to clarify the Legislature's intent that the offsetting revenues identified above shall "directly offset mandated costs claimed by community college districts pursuant to Commission on State Mandates consolidated Test Claims 99-TC-13 (Enrollment Fee Collection) and 00-TC-15 (Enrollment Fee Waivers)."<sup>5</sup> The claimant does not provide any evidence to indicate that the amounts identified by the Chancellor's Office are wrong.

Accordingly, the Commission denies this IRC.

## COMMISSION FINDINGS

### I. Chronology

07/27/2006	Claimant signed the reimbursement claims for fiscal years 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004 and 2004-2005. <sup>6</sup>
01/10/2007	Claimant signed the reimbursement claim for fiscal year 2005-2006. <sup>7</sup>
01/24/2008	Claimant signed the reimbursement claim for fiscal year 2006-2007. <sup>8</sup>
01/06/2009	Claimant signed the reimbursement claim for fiscal year 2007-2008. <sup>9</sup>
02/09/2010	Claimant signed the reimbursement claim for fiscal year 2008-2009. <sup>10</sup>
02/09/2011	Claimant signed the reimbursement claim for fiscal year 2009-2010. <sup>11</sup>
03/12/2012	Claimant signed the reimbursement claim for fiscal year 2010-2011. <sup>12</sup>

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<sup>5</sup> Statutes 2008, chapter 757, section 31 (AB 757).

<sup>6</sup> Exhibit A, pages 282, 321, 373, 425, 479, 539, 597 (dated reimbursement claims).

<sup>7</sup> Exhibit A, IRC, page 848.

<sup>8</sup> Exhibit A, IRC, page 897.

<sup>9</sup> Exhibit A, IRC, page 1076.

<sup>10</sup> Exhibit A, IRC, page 1277.

<sup>11</sup> Exhibit A, IRC, page 1476.

<sup>12</sup> Exhibit A, IRC, page 1635.

09/01/2011 The Controller stated that the audit commenced on this date.<sup>13</sup>  
08/06/2013 The date of the Final Audit Report cover letter.<sup>14</sup>  
06/27/2016 The claimant filed the IRC.<sup>15</sup>  
10/06/2016 The Controller filed late comments on the IRC.<sup>16</sup>  
09/21/2018 Commission staff issued the Draft Proposed Decision.<sup>17</sup>  
09/28/2018 The Controller filed comments on the Draft Proposed Decision.<sup>18</sup>  
10/12/2018 The claimant filed comments on the Draft Proposed Decision.<sup>19</sup>

## II. Background

### A. Enrollment Fee Collection and Waivers Program

The test claim statutes and regulations for the *Enrollment Fee Collection and Waivers* program require community colleges to implement enrollment fees and adopt regulations for their collection and specify the groups of students for which fees are waived or exempted and for whom BOG waivers are available (e.g., low income students, recipients of public assistance, or students who have been determined financially eligible for federal and/or state need-based financial aid, or other eligible groups).<sup>20</sup> Community colleges retain two percent of the enrollment fees collected.<sup>21</sup>

On April 24, 2003, the Commission partially approved the consolidated Test Claims *Enrollment Fee Collection*, 99-TC-13, and *Enrollment Fee Waivers*, 00-TC-15, and determined that the *Enrollment Fee Collection and Waiver* program imposed a reimbursable state-mandated program on community college districts.

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<sup>13</sup> Exhibit B, Controller’s Late Comments on the IRC, page 5.

<sup>14</sup> Exhibit A, IRC, page 53 (Final Audit Report cover letter).

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

<sup>16</sup> Exhibit B, Controller’s Late Comments on the IRC.

<sup>17</sup> Exhibit C, Draft Proposed Decision.

<sup>18</sup> Exhibit D, Controller’s Comments on the Draft Proposed Decision.

<sup>19</sup> Exhibit E, Claimant’s Comments on the Draft Proposed Decision.

<sup>20</sup> Education Code section 76300. Statutes 1984, 2d Ex. Sess., chapter 1; Statutes 1984, chapters 274 and 1401; Statutes 1985, chapters 920 and 1454; Statutes 1986, chapters 46 and 394; Statutes 1987, chapter 1118; Statutes 1989, chapter 136; Statutes 1991, chapter 114; Statutes 1992, chapter 703; Statutes 1993, chapters 8, 66, 67, and 1124; Statutes 1994, chapters 153 and 422; Statutes 1995, chapter 308; Statutes 1996, chapter 63; and Statutes 1999, chapter 72. California Code of Regulations, title 5, sections 58501 – 58503, 58611 – 58613, 58620 and 58630.

<sup>21</sup> Education Code section 76300(c).

On January 26, 2006, the Commission adopted the Parameters and Guidelines with the reimbursement period beginning July 1, 1998 (for enrollment fee collection) and July 1, 1999 (for enrollment fee waivers), for the following activities:

Enrollment Fee Collection (*Reimbursement Period begins July 1, 1998*)

- a. One-time activities of preparing policies and procedures for collecting enrollment fees and related staff training (one-time per employee).
- b. Calculating and collecting the student enrollment fee for each student enrolled, except for nonresidents and special part-time students. This includes the following activities:
  1. **[activity 1]** Referencing student accounts and records to determine course workload, status of payments, and eligibility for fee waiver. Printing a list of enrolled courses.
  2. **[activity 2]** Calculating the total enrollment fee to be collected. Identifying method of payment. Collecting cash and making change as necessary. Processing credit card and other non-cash payment transactions (however, any fees that may be charged to a community college district by a credit card company or bank are not reimbursable). Preparing a receipt for payment received.
  3. **[activity 3]** Answering student's questions regarding enrollment fee collection or referring them to the appropriate person for an answer.
  4. **[activity 4]** Updating written and computer records for the enrollment fee information and providing a copy to the student. Copying and filing enrollment fee documentation.
  5. **[activity 5]** Collecting delinquent enrollment fees, including written or telephonic collection notices to students, turning accounts over to collection agencies, or small claims court action.
  6. **[activity 6]** For students who establish fee waiver eligibility after the enrollment fee has been collected, providing a refund or [sic] enrollment fees paid and updating student and district records as required. (Refund process for change in program is not reimbursable).

Enrollment Fee Waivers

- a. One-time activities of preparing policies and procedures for determining which students are eligible for waiver of the enrollment fees, and related staff training (one-time per employee).
- b. Adopting procedures that will document all financial assistance provided, and including in the procedures the rules for retention of support documentation that will enable an independent determination regarding accuracy of the district's certification of need for financial assistance.

Recording and maintaining records that document all of the financial assistance for the waiver of enrollment fees.

- c. Waiving student fees in accordance with groups listed in Education Code section 76300(g) and (h), and waiving fees for students who apply and are eligible for the BOG fee waiver. This includes the following activities:
1. **[activity 7]** Answering student's questions regarding enrollment fee waivers or referring them to the appropriate person for an answer.<sup>22</sup>
  2. **[activity 8]** Receiving of waiver applications from students by mail, fax, computer online access, or in person, or in the form of eligibility information processed by the financial aid office.
  3. **[activity 9]** Evaluating each application and verification documents (dependency status, household size and income, SSI and TANF/CalWorks, etc.) for compliance with eligibility standards utilizing information provided by the student, from the student financial aid records (e.g., Free Application for Federal Student Aid (FAFSA)), and other records.
  4. **[activity 10]** In the case of an incomplete application or incomplete documentation, notify the student of the additional required information and how to obtain that information. Hold student application and documentation in suspense file until all information is received.
  5. **[activity 11]** In the case of an approved application, copy all documentation and file the information for further review or audit. Entering the approved application information into district records and /or notifying other personnel performing other parts of the process (e.g., cashier's office). Providing the student with proof of eligibility or an award letter, and file paper documents in the annual file.
  6. **[activity 12]** In the case of a denied application, reviewing and evaluating additional information and documentation provided by the student if the denial is appealed by the student. Provide written notification to the student of the results of the appeal or any change in eligibility status.
- d. Reporting to the Chancellor's Office the number of and amounts provided for BOG fee waivers.<sup>23</sup>

Section IV. of the Parameters and Guidelines further provides that reimbursement may be claimed based on actual costs incurred that are traceable and supported by contemporaneous source documents that show the validity of the costs, when they were incurred, and their relationship to the reimbursable activities.<sup>24</sup>

Section V. states that when claiming salaries and benefits that are eligible for reimbursement, claimants are required to specify each employee performing the reimbursable activities the employee's job classification, and the productive hourly rate (defined as total wages and related

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<sup>22</sup> Activities 7-12 are identified consistently with the Controller's analysis in the Final Audit Report. Exhibit A, IRC, page 89 (Final Audit Report).

<sup>23</sup> Exhibit A, IRC, pages 128-129 (Parameters and Guidelines).

<sup>24</sup> Exhibit A, IRC, page 127 (Parameters and Guidelines).

benefits divided by productive hours). Section V. also requires a description of the activities performed and the hours devoted to them.<sup>25</sup>

Section VII. of the Parameters and Guidelines governs offsetting savings and reimbursements, requiring claimants to offset their claims by revenues received from any source, including services fees collected, federal funds, and other state funds. Offsetting revenues required to be deducted from the costs claimed includes:

- For the *Enrollment Fee Collection* program, two percent of the revenue received from enrollment fees.<sup>26</sup>
- For the *Enrollment Fee Waivers* program, from July 1, 1999, to July 4, 2000:
  - Two percent of the fees waived and allocated to community college districts from the Board of Governors from funds in the State Budget Act, for low income students, recipients of public assistance, or dependents or surviving spouses of National Guard soldiers killed or permanently disabled in the line of duty.
  - Seven percent of the fees waived and allocated to community college districts from the Board of Governors from funds in the State Budget Act, for the determination of financial need and delivery of student financial aid services.<sup>27</sup>
- For the *Enrollment Fee Waivers* program, beginning July 5, 2000:
  - Two percent of the fees waived and allocated to community college districts from the Board of Governors from funds in the State Budget Act, for low income students, recipients of public assistance, or dependents or surviving spouses of National Guard soldiers killed or permanently disabled in the line of duty.
  - \$0.91 per credit unit waived and allocated to community college districts from the Board of Governors from funds in the State Budget Act, for the determination of financial need and delivery of student financial aid services.<sup>28</sup>

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<sup>25</sup> Exhibit A, IRC, page 130 (Parameters and Guidelines).

<sup>26</sup> At the time the Parameters and Guidelines were adopted, Education Code section 76300(c) stated the following: “For the purposes of computing apportionments to community college districts pursuant to Section 84750, the chancellor shall subtract from the total revenue owed to each district, 98 percent of the revenues received by districts from charging a fee pursuant to this section.”

<sup>27</sup> Education Code section 76300 (g) and (h), which identify the students eligible for a fee waiver. Education Code section 76300(m) directed the Board of Governors, from funds provided in the annual Budget Act, to allocate the funds to community college districts.

<sup>28</sup> Education Code section 76300 (g) and (h), which identify the students eligible for a fee waiver. Education Code section 76300(m) directed the Board of Governors, from funds provided in the annual Budget Act, to allocate the funds to community college districts.

- Any budget augmentation received under the Board Financial Assistance Program Administrative Allowance, or any other state budget augmentation received for administering the fee waiver.<sup>29</sup>

In 2008, the Legislature amended Education Code section 76300(m) to clarify its intent that the offsetting revenues identified above shall “directly offset mandated costs claimed by community college districts pursuant to Commission on State Mandates consolidated Test Claims 99-TC-13 (Enrollment Fee Collection) and 00-TC-15 (Enrollment Fee Waivers).”<sup>30</sup>

## **B. The Controller’s Audit and Summary of the Issues**

The Controller states that it commenced the audit of claimant’s reimbursement claims for fiscal years 1998-1999 through 2010-2011 on September 1, 2011, and completed it on August 6, 2013.<sup>31</sup> The audit concludes that all of the \$15,955,585 claimed during the audit period is unallowable, due to overstated direct and related indirect costs, and understated offsetting revenues.<sup>32</sup>

The Final Audit Report consists of six findings, concluding that unallowable costs were claimed for: calculating and collecting enrollment fees (finding 1); adopting procedures and recording and maintaining records for enrollment fee waivers (finding 2); waiving student fees for eligible students (finding 3); unallowable indirect costs (finding 4); misstated offsetting reimbursements (finding 5); and overstated average productive hourly rates of employees calculating and collecting enrollment fees and waiving student fees (finding 6).<sup>33</sup> The claimant is not challenging the reductions in findings 2 (adopting procedures and recording and maintaining enrollment fee records) and finding 4 (indirect costs).<sup>34</sup> Thus, findings 1, 3, 5, and 6 are at issue in this IRC.

### **1. Findings 1 and 6 (salaries and benefits claimed for collecting enrollment fees)**

For fiscal years 1998-1999 through 2010-2011, the Controller found that of the \$10,560,754 claimed in salaries and benefits for calculating and collecting enrollment fees during the audit period, only \$873,378 was allowable and \$9,687,376 was unallowable. The Controller determined salaries and benefits for calculating and collecting enrollment fees by multiplying the staff time to perform the six ongoing activities, by number of students who paid enrollment fees (the multiplier), by the employee’s productive hourly rate (which is discussed in audit finding 6).<sup>35</sup>

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<sup>29</sup> Exhibit A, IRC, pages 132-133 (Parameters and Guidelines, adopted Jan. 26, 2006).

<sup>30</sup> Statutes 2008, chapter 757, section 31 (AB 757).

<sup>31</sup> Exhibit B, Controller’s Late Comments on the IRC, page 5; Exhibit A, IRC, page 53 (Final Audit Report).

<sup>32</sup> Exhibit A, IRC, page 53 (Final Audit Report).

<sup>33</sup> Exhibit A, IRC, pages 52-115 (Final Audit Report).

<sup>34</sup> Exhibit A, IRC, pages 27-28, 31.

<sup>35</sup> Exhibit A, IRC, pages 70-85, 108-109 (Final Audit Report).

a. Staff time to perform the reimbursable activities

To claim these costs, the claimant estimated the time required to perform the activities, based on survey forms certified by the claimant's employees.<sup>36</sup> The survey forms identify the employee's name, department, and position, and request the employee to circle the fiscal years [from 1998-1999 through 2010-2011] for which the employee "report[ed] below the average amount of time spent (in minutes) by you to implement each of the reimbursable activities for the mandated program."<sup>37</sup> The employees estimated the average time in minutes it took them to perform the six activities per student per year on the forms, and then signed and dated the forms below the following certification:

The State of California requires that school district personnel maintain a record of data for state mandates in order for the district to receive reimbursement. Your signature on this form certifies that you have reported actual data or have provided a good faith estimate which you "certify (or declare) under penalty of perjury under the laws of the State of California to be true and correct based on your personal knowledge or information."<sup>38</sup>

The claimant's time estimates to perform the six activities required to collect enrollment fees ranged from 22.10 to 40.40 minutes.<sup>39</sup>

The claimant did not report actual time spent on the program, or provide source documentation other than the survey forms, to support the estimated times claimed. Thus, the Controller found that the claimant did not comply with the documentation requirements of the Parameters and Guidelines.<sup>40</sup> However, the Controller's Office "realized that district staff performed the reimbursable activities; therefore time spent by SCO auditors conducting interviews was for the purpose of gaining testimonial evidence from district staff that performed the reimbursable activities concerning the relevance of the district's time estimates."<sup>41</sup> Accordingly, "[a]ny allowable costs for these activities were based upon the reasonableness of the time estimates alone, not on the quality or type of documentation provided by the district."<sup>42</sup>

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<sup>36</sup> Exhibit A, IRC, pages 23, 71 (Final Audit Report).

<sup>37</sup> Exhibit A, IRC, pages 616-686; Exhibit B, Controller's Late Comments on the IRC, pages 47-54.

<sup>38</sup> Exhibit A, IRC, pages 23, 616-686, 689-728, 916-1037, 1096-1237, 1297-1379, 1383-1429, 1489-1547, 1551-1586, 1655-1725, 1730-1798 (survey forms); Exhibit B, Controller's Late Comments on the IRC, pages 47-54, 58-65 (survey forms).

<sup>39</sup> Exhibit A, IRC, page 72 (Final Audit Report).

<sup>40</sup> Exhibit A, IRC, page 71 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 25.

<sup>41</sup> Exhibit B, Controller's Late Comments on the IRC, page 26; See also, Exhibit A, IRC, page 72 (Final Audit Report).

<sup>42</sup> Exhibit B, Controller's Late Comments on the IRC, page 26.

The Controller held discussions with the claimant's staff to determine the procedures followed.<sup>43</sup> In addition, the Controller observed district staff in the Admissions and Records Office and in the Bursar's Office who collect enrollment fees from students, and documented the average time increments spent to collect enrollment fees during the open enrollment period from January 23-26, 2012.<sup>44</sup> The Controller determined that the average time to perform activities 1 through 4 (referencing student accounts, calculating the fee, answering questions, and updating records), based on the observation of the claimant's staff performing the mandated activities, was 2.76 minutes, or 0.69 minutes per activity, and that claimant's time estimates for these four activities (between 22.10 and 27.90 minutes for all four activities, or 3.40 to 5.90 minutes per activity) was overstated.<sup>45</sup> The audit report states:

Over several days, we observed 178 payment transactions processed by district staff. Of these, 78 involved the payment of enrollment fees encompassing Activities 1 through 4 totaling 214.78 minutes. The average time to perform all four activities was 2.76 minutes, or 0.69 minutes per activity. The Office Supervisors were encouraged to watch over the auditors while our observations were being documented. We documented the average time increments spent by district staff to perform the reimbursable activities based on our observation. We reviewed the observations as they took place with the Office Supervisors. The district's mandated cost consultant and district management staff advised the Office Supervisors and the college campus staff not to comment on any of our analysis results, determinations, or observations. In addition, the district's District Director advised us not to discuss our audit results with management or any other campus staff.<sup>46</sup>

The Controller found that the claimant's time estimates for activities 5 and 6 (collecting delinquent fees, and providing refunds to students who establish BOG fee waiver eligibility) appeared reasonable, and did not adjust the time claimed for those activities.<sup>47</sup>

b. Number of students who paid enrollment fees (the multiplier)

The Controller also noted variations in the number of students used in the district's calculations for activities 1 through 4. For activities 1, 3, and 4, the claimant used the number of total enrolled students from the "Student Total Headcount" summary report on the Chancellor's website for fiscal years 1998-1999 through 2008-2009. However, this report includes duplicated students by term. In addition, the claimant did not deduct ineligible non-resident and special admit students (who attend a community college while in high school), as required by the Parameters and Guidelines. For activity 2, the claimant used the number of total enrolled

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<sup>43</sup> Exhibit A, IRC, page 72 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 35.

<sup>44</sup> Exhibit A, IRC, page 83 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, pages 29, 77-97 [Tab 9, auditor's observation logs].

<sup>45</sup> Exhibit A, IRC, page 72 (Final Audit Report).

<sup>46</sup> Exhibit A, IRC, page 73 (Final Audit Report).

<sup>47</sup> Exhibit A, IRC, pages 75, 76 (Final Audit Report).

students less the number of BOG fee waivers granted. For activity 4, the claimant used the number of total enrolled students without excluding the number of BOG fee waivers for fiscal years 1998-1999 through 2008-2009, but excluded the number of BOG fee waivers for fiscal years 2009-2010 and 2010-2011.<sup>48</sup>

The Controller updated the claimant's calculation of eligible students for activities 1 and 3 (referencing student accounts and answering questions) based on the number of students enrolled in the district as reported to the California Community College Chancellor's Office and maintained on the Chancellor's MIS system, which eliminates duplicate students by term based on their Social Security numbers. The Controller then subtracted those students excluded from the mandate (nonresidents and special admit students who attend a community college while in high school).

The Controller also updated the claimant's calculations of eligible students for activities 2 and 4 (calculating the fee and updating the records) by deducting the number of BOG fee waiver recipients by term based on the Chancellor's MIS data. The Controller then added the number of students who received refunds because they were subsequently granted a BOG fee waiver, and subtracted the number of students who paid their enrollment fee through the claimant's online system (based on documentation provided by the claimant for fiscal years 2002-2003 through 2010-2011, and based on an agreement with the claimant that 75 percent of students paid enrollment fees in person in the earlier fiscal years of 1998-1999 through 2000-2001).<sup>49</sup>

The Controller's adjustment to the number of students for activities 1 through 4 resulted in a decrease of 1,099,609 students over the audit period.<sup>50</sup>

The Controller did not adjust the number of students for activities 5 (collecting delinquent enrollment fees) and 6 (providing a refund or enrollment fees paid and updating student records).<sup>51</sup>

c. Productive hourly rates

The Controller determined that the claimant overstated the average productive hourly rates for activities 1 through 6. The claimant's productive hourly rates included staff who did not perform activities 1 through 6 (staff in the Financial Aid Department); and excluded staff who did not complete the time survey form, but performed the reimbursable activities. In addition, the claimant did not weigh the average rates by employee classification based on their involvement in performing the reimbursable activities. The Controller recalculated the average productive hourly rates based on employees actually involved in calculating and collecting enrollment fee activities and changed the claimed rates, as follows:<sup>52</sup>

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<sup>48</sup> Exhibit A, IRC, page 73 (Final Audit Report).

<sup>49</sup> Exhibit A, IRC, page 74 (Final Audit Report).

<sup>50</sup> Exhibit A, IRC, page 77 (Final Audit Report).

<sup>51</sup> Exhibit A, IRC, pages 75, 76 (Final Audit Report).

<sup>52</sup> Exhibit A, IRC, pages 74, 108-109 (Final Audit Report).

We accepted the rates that the district claimed per staff and made minor changes to the claimed rates when the supporting documentation showed different information than what was claimed. We excluded staff that did not perform the reimbursable activities for Calculating and Collecting Enrollment Fees Based on our observations of the reimbursable activities being performed; we determined the following level of involvement by district staff to perform the reimbursable activities:

- Student Hourly Staff – 45%
- Classified Salaried Staff – 50%
- Supervisory Staff – 5%

We provided the district with our analysis and attempted to engage in a dialogue with them in an effort to advise us of any issues involving the weight of involvement percentages that we calculated, in addition to any variances in the level of effort for the different colleges in the district and/or the different years during the audit period. However, the district declined to comment on our analysis or provide any additional information.<sup>53</sup>

The Controller's calculation of productive hourly rates reduced the claimant's productive hourly rates for each fiscal year in the audit period by \$4.19 to \$11.50.<sup>54</sup>

## **2. Findings 3 and 6 (salaries and benefits claimed for waiving student fees)**

For fiscal years 1999-2000 through 2010-2011, the Controller found that of the \$4,285,990 claimed for salaries and benefits for activities related to waiving student fees for student groups identified in Education Code section 76300(g) and (h), and for students who apply for and are eligible for a BOG fee waiver, only \$236,628 was allowable and \$4,049,362 was unallowable. The Controller determined the salaries and benefits for waiving student fees by multiplying the staff time to perform the six ongoing activities (activities 7 through 12), by the number of students who receive the waiver (the multiplier), by the employee's productive hourly rate (which is discussed in audit finding 6).<sup>55</sup>

### **a. Staff time to perform the reimbursable activities**

To claim these costs, the claimant estimated the time required to perform the six activities, as identified on the survey forms certified by the employees and developed by the district's mandated cost consultant. The time estimates for activities 7 through 12 ranged from 16.70 to 67.50 minutes during the audit period. The claimant did not report actual time spent on the program, or provide source documentation other than the employee certification forms to support the estimated times claimed.<sup>56</sup>

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<sup>53</sup> Exhibit A, IRC, page 109 (Final Audit Report).

<sup>54</sup> Exhibit A, IRC, page 109 (Final Audit Report).

<sup>55</sup> Exhibit A, pages 87-98, 108, 110-113 (Final Audit Report).

<sup>56</sup> Exhibit A, IRC, page 89 (Final Audit Report).

The Controller realized that the mandated activities were performed and assessed whether the claimant's time estimates were reasonable.<sup>57</sup> The Controller held discussions with the claimant's staff to determine the procedures followed for each of the activities. In addition, the Controller observed 225 fee waiver transactions handled by the claimant's employees on October 12, 2011, and December 5-9, 2011. Based on these observations, the Controller determined that the claimant's time estimates were overstated, and that the average time to perform activities 7 through 11 was 2.60 minutes, or 0.52 minutes per activity.<sup>58</sup>

The Controller did not apply any time increments to activity 12 (appeals of denied BOG fee waiver applications), because the claimant does not have a process in place to review denied BOG fee waiver applications. Instead, students are instructed to apply for Financial Aid. Thus, the costs claimed for activity 12 were reduced to zero (\$0).<sup>59</sup>

b. Number of students who received the fee waiver (multiplier)

The Controller also adjusted the claimant's number of students who receive the waiver. For activities 7 (answering student questions), 8 (receiving enrollment fee waiver applications), and 9 (evaluating applications and verifying documentation), the claimant used the number of students who received a BOG fee waiver plus the number of denied and incomplete BOG fee waiver applications, based on district records. For activity 10 (notify students of additional required information for incomplete applications or documentation), the claimant used the number of incomplete BOG fee waiver applications at the end of the year. For activity 11 (copy and file all documentation for approved applications), the claimant used the number of students who received a BOG fee waiver. For activity 12 (appealing a BOG fee waiver application), the claimant used the same number of BOG fee waivers that were incomplete at the end of the year as the number of applications that were appealed by students for incorrect information.<sup>60</sup>

For activities 7 through 9, the Controller used the number of students that received BOG fee waivers according to statistics provided by the Chancellor's Office. Using the data the claimant reported, the Chancellor's Office identified the unduplicated number of BOG recipients by term based on MIS data, which the Controller adjusted by including students whose fee waiver applications were incomplete and denied at the end of the year.<sup>61</sup> This resulted in a decrease of 7,479 students for each of activities 7, 8, and 9.<sup>62</sup>

For activity 10 (notify students of additional required information for incomplete applications or documentation), the Controller used the number of incomplete BOG fee waiver applications at the end of the year claimed by the district and included the number of students who received

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<sup>57</sup> Exhibit A, IRC, page 89 (Final Audit Report).

<sup>58</sup> Exhibit A, IRC, pages 93, 95 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, pages 30, 78-115 (time study logs).

<sup>59</sup> Exhibit A, IRC, pages 93-95 (Final Audit Report).

<sup>60</sup> Exhibit A, IRC, page 94 (Final Audit Report).

<sup>61</sup> Exhibit A, IRC, page 94 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 40.

<sup>62</sup> Exhibit A, IRC, page 95 (Final Audit Report).

BOG fee waivers according to statistics provided by the Chancellor's Office. This represents the maximum number of incomplete applications that may have been processed by the claimant.<sup>63</sup> The Controller's recalculation *increased* the number of students by 256,475, which increased costs.<sup>64</sup>

For activity 11 (copy and file all documentation for approved applications), the Controller used the number of students that received BOG fee waivers according to statistics provided by the Chancellor's Office. Using the data the claimant reported, the Chancellor's Office identified the unduplicated number of BOG recipients by term based on MIS data.<sup>65</sup> This resulted in a decrease of 7,479 students.<sup>66</sup>

And for activity 12 (appeals), the Controller did not allow any multiplier because the claimant does not have a process in place to review denied BOG fee waiver applications. Students are instead instructed to apply for financial aid.<sup>67</sup>

c. Productive hourly rates

The Controller also determined that the claimant overstated the average productive hourly rates for activities 7 through 11. The claimant's average productive hourly rates for waiving student fees included staff who did not perform the reimbursable activities and excluded staff who did perform the reimbursable activities. The excluded staff were employees who did not receive a time survey form, including student hourly staff. In addition, the claimant did not weigh the average rate by employee classification. Instead, all employee classifications were weighted at the same level as if they performed the reimbursable activities to the same extent.<sup>68</sup>

The Controller provided the claimant an opportunity to revisit the average productive hourly rates to appropriately reflect the weight of involvement based on employee classification, but the claimant declined.<sup>69</sup> Therefore, the Controller recalculated productive hourly rates by excluding staff that did not perform the mandated activities, and applied weighted rates by employee classification (45% for the student hourly classification, 50% for the classified salary classification, and 5% for supervisory classification).

In addition, the Controller determined that the rates claimed for the Director of Financial Aid were understated and made adjustments accordingly.<sup>70</sup>

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<sup>63</sup> Exhibit A, IRC, page 94 (Final Audit Report).

<sup>64</sup> Exhibit A, IRC, page 95 (Final Audit Report).

<sup>65</sup> Exhibit A, IRC, page 94 (Final Audit Report).

<sup>66</sup> Exhibit A, IRC, page 95 (Final Audit Report).

<sup>67</sup> Exhibit A, IRC, page 94 (Final Audit Report).

<sup>68</sup> Exhibit A, IRC, page 95 (Final Audit Report).

<sup>69</sup> Exhibit A, IRC, page 108 (Final Audit Report).

<sup>70</sup> Exhibit A, IRC, pages 87-93, 108-111 (Final Audit Report).

As a result, the Controller's calculation of productive hourly rates for activities 7 through 11 reduced the claimant's rates during each fiscal year in the audit period by \$7.17 to \$13.77.<sup>71</sup>

### **3. Finding 5 (offsetting revenues)**

The Controller found that offsetting revenues the claimant identified for the enrollment fee collection and waiver activities were misstated because the claimant did not accurately report the amounts received in offsetting revenues from the Chancellor's Office in any fiscal year of the audit period.<sup>72</sup>

For enrollment fee collection activities, the claimant identified \$1,152,929 in offsetting revenues based on two percent of the revenues from the enrollment fee. The Controller obtained a report from the Chancellor's Office confirming offsetting revenues paid to the claimant during the audit period for enrollment fee collection, totaling \$2,030,411. The Controller limited offsetting revenues to allowable direct and indirect costs totaling \$1,202,950.<sup>73</sup>

For enrollment fee waivers, the claimant identified \$3,266,094 in offsetting revenues based on the seven or two percent offset from the enrollment fees waived, and the \$0.91 per credit unit waived. The Controller obtained a report from the Chancellor's Office confirming offsetting revenues paid to the claimant during the audit period totaling \$3,272,412. The Controller limited offsetting revenues to allowable direct and indirect costs totaling \$374,793.<sup>74</sup>

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

### **A. North Orange County Community College District**

The claimant contends that the Controller incorrectly reduced the costs claimed and requests that the Commission direct the Controller to reinstate the costs reduced. The arguments raised by the claimant are summarized below.

**Audit Standards:** The claimant asserts that the Controller either used the wrong standard for the audit or has misrepresented the actual nature and scope of the audit because the citations given for the audit authority either do not provide an audit standard or provide a standard not specific to mandate reimbursement claims. If Government Code section 12410 is the standard, the Controller has not shown that the audit adjustments were made in accordance with this standard. As to Generally Accepted Government Auditing (or Yellow Book) standards, the Controller does not cite any law, agreement or policy that makes these standards applicable to audits of state-mandated costs. Nonetheless, the audit makes no findings on Yellow Book criteria for a performance audit, but instead is a documentation audit.<sup>75</sup>

**Documentation Standards:** According to the claimant, the audit incorrectly applied the documentation standards in the Parameters and Guidelines, which require contemporaneous

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<sup>71</sup> Exhibit A, IRC, page 111 (Final Audit Report).

<sup>72</sup> Exhibit A, IRC, pages 102-107 (Final Audit Report).

<sup>73</sup> Exhibit A, IRC, page 103 (Final Audit Report).

<sup>74</sup> Exhibit A, IRC, page 104 (Final Audit Report).

<sup>75</sup> Exhibit A, IRC, pages 7-11.

source documentation. Instead, the audit relied on post facto anecdotal information.<sup>76</sup> The claimant points out that the Parameters and Guidelines were adopted and first claiming instructions issued seven years after the first fiscal year in the audit period, so claimants were not on notice of the activities approved for reimbursement that should be documented until the eighth year of the eligibility period. The claimant disputes the Controller's contention that the claimant should have developed "actual cost documentation" or performed a time study, arguing that these could not have been done before the reimbursable activities were published by the State. While admitting that some historic staff time can be reconstructed, the claimant argues that "staff time cannot and must be reported as a good-faith estimate where the desired information is not maintained in the regular course of business" and "it would be a more realistic standard when the districts know what documentation is needed."<sup>77</sup>

The claimant states that the Controller (or any other governmental entities that establish the financial accounting standards and reporting requirements that community college districts are subject to) does not publish any standards or reporting requirements for state mandate cost accounting. In the absence of standards, claimants must retroactively rely on documentation produced in the regular course of business as well as forms to collect data on staff time spent on the reimbursable activities. The claimant argues that staff were surveyed seven times over the audit period, and the forms used to document its time are "in the nature of certified declarations of time logs that are within the scope of the parameters and guidelines documentation standards."<sup>78</sup> The claimant further states that the Controller accepted the average staff time per activity in some cases even though it was recorded on the same forms as the rejected average staff time, so the Controller's inconsistent treatment of similar documentation makes the Controller's reliance seem "capricious and not credible."<sup>79</sup>

**Underground Rulemaking:** The claimant also asserts that the Controller's time study (or "stopwatch method") to determine time spent on activities does not meet the requirements of the Controller's published guidelines for time studies, nor does the audit report establish that a few days of observation are representative of an entire fiscal year or of the 13-year audit period. The claimant further argues that the time study "stopwatch method" has been used in other audits and is an unenforceable underground regulation.<sup>80</sup>

The claimant also takes issue with the Controller's use of the Chancellor's Office data to calculate the workload multiplier (i.e., the number of student enrollment fee collection or enrollment fee waiver transactions that are reimbursable). According to the claimant, "the auditor simply substitutes the Chancellor's statistics rather than validating the claimed statistics." Because it has been used in other audits, the claimant argues that the Controller's use of this

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<sup>76</sup> Exhibit A, IRC, page 12.

<sup>77</sup> Exhibit A, IRC, pages 13-14.

<sup>78</sup> Exhibit A, IRC, page 14.

<sup>79</sup> Exhibit A, IRC, pages 15, 23.

<sup>80</sup> Exhibit A, IRC, pages 15-18.

audit method is a standard of general application without appropriate state agency rulemaking and is therefore unenforceable.<sup>81</sup>

The Controller used an average productive hourly rate in its claims, which the Controller replaced with a weighted productive hourly rate (that weights supervisor and clerical staff time differently), but there is no requirement in the Parameters and Guidelines to use a weighted productive hourly rate, and the Controller provided no factual basis to do so. The Parameters and Guidelines require that the claimant:

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the reimbursable activities performed and the hours devoted to each reimbursable activity performed.<sup>82</sup>

The claimant did not provide this information for all employees, and the Controller did not use the data required by the Parameters and Guidelines in its audit. Since the Controller used a weighted average productive hourly rate in other audits of this program, the claimant argues that doing so is an unenforceable underground regulation.<sup>83</sup>

**Audit Finding 1:** Regarding the audit reduction of the salaries and benefits to perform activities 1 through 4 (collecting the enrollment fee), the claimant argues that the auditor's observation process does not constitute a representative time study sample. The 178 transactions the auditors observed are inadequate to account for the 1.04 million transactions that occurred during the 13-year audit period, so the observation sample size is statistically meaningless. "For these and many other reasons the auditor's observation process does not constitute a representative 'time study' sample."<sup>84</sup> And the Controller did not observe activity 5, collecting delinquent fees, or activity 6, providing a refund for fee waiver eligibility, yet determined that the time claimed appeared to be reasonable, even though the same claimant forms and time survey method was used for all activities claimed.<sup>85</sup>

The claimed workload multipliers for activities 1 through 4 treated all enrollment fee collection transactions as an "in-person" transaction at the cashier's office. The claimant does not dispute a plausible reduction of the multiplier by the number of online transactions. The audit findings, however, do not replace the claimed staff time lost from these eliminated in-person transactions with the costs to operate the online payment collections. Thus, no costs are recognized by the audit for the online transactions. The claimant disagrees with the Controller's statement in the audit report that this adjustment is "not the SCO's responsibility."<sup>86</sup>

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<sup>81</sup> Exhibit A, IRC, page 19.

<sup>82</sup> Exhibit A, IRC, page 21.

<sup>83</sup> Exhibit A, IRC, pages 20-22.

<sup>84</sup> Exhibit A, IRC, page 24.

<sup>85</sup> Exhibit A, IRC, pages 23-25.

<sup>86</sup> Exhibit A, IRC, pages 26-27.

**Audit Finding 3:** Regarding the unallowable ongoing costs for waiving enrollment fees, the claimant argues that the sample size for the Controller’s time study is statistically meaningless because the audited number of fee waiver transactions is 267,412, but the auditors observed only 225 transactions.<sup>87</sup>

The claimant also questions the disallowance of claimed time for appealing a denied fee waiver application (activity 12) based on the claimant not having a process in place to review denied fee waiver applications. According to the claimant, “the District did claim average times of 5.5 to 14.3 minutes for 10,937 appeals of denied BOG fee waiver applications for four years of the audit period. The auditor was unable to observe this process during the two weeks of fieldwork because no formal appeals were received.”<sup>88</sup> The claimant points out that there is no requirement in the Parameters and Guidelines for a formal appeal process and the claimant reported more than 10,000 appeals for the audit period.<sup>89</sup>

The claimant also notes that for activities 7 through 10, which involve processing the enrollment fee waiver application, the Controller adjusted the Chancellor’s Office workload multiplier, but there is no apparent reduction for online transactions.

**Audit Finding 5:** Regarding misstated offsetting reimbursements, the claimant states that its amounts do not always match the revenue of the Chancellor’s Office reported in the audit, which is “based on a post-facto specific data query to the Chancellor’s data using seasoned data not available at the time of preparation.”<sup>90</sup> The claimant asserts that this would be a continuing source of minor differences with the annual claims that are based on contemporaneous enrollment information and the source of units waived. The claimant argues that since the audit report does not include the source documentation for the adjusted offsets, there is no way to evaluate this source documentation, and no factual basis for these adjustments.<sup>91</sup>

The claimant disputes the application of offsetting revenues to claimed costs for the preparation of policies and procedures and staff training because the two percent enrollment fee is for the administrative cost of collecting the fee, and the enrollment fee waiver program funds are for determining financial need and delivering student financial aid services.<sup>92</sup>

The claimant also asserts that only the relevant revenue offsets should be applied to the relevant costs claimed or allowed, arguing:

Specifically, in Finding 1 the audited "multiplier calculation" for the enrollment fees collection process is reduced by various percentages for online transaction percentages retroactive to FY 1998-99. That is, the claimed and audited costs are both based only on "in-person" enrollment fee collections. The audit incorrectly

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<sup>87</sup> Exhibit A, IRC, pages 28-29.

<sup>88</sup> Exhibit A, IRC, pages 29-30.

<sup>89</sup> Exhibit A, IRC, page 30.

<sup>90</sup> Exhibit A, IRC, pages 31-32.

<sup>91</sup> Exhibit A, IRC, page 32.

<sup>92</sup> Exhibit A, IRC, page 33.

applies all of the program revenues, that is, the revenues generated by both the in-person and online computer collections, to the audited enrollment fee in-person only collection costs. The audited revenue offset should be reduced by the same percentage each fiscal year that the cost multiplier is reduced for the percentage of online transactions costs in order to properly match revenues and costs as required by generally accepted accounting principles.<sup>93</sup>

**Audit Finding 6:** Regarding overstated productive hourly rates because the claimant did not weight the productive hourly rates of staff and supervisors separately, the claimant argues that the Controller’s “choice of methods is not supported by facts or documentation sufficient to support its universal application or sufficient for annual claims had the same method been used by a claimant.”<sup>94</sup> The claimant did not provide support or rebuttal for the Controller’s weighted averages because there is no requirement in the Parameters and Guidelines to use weighted productive hourly rates and no factual basis was given by the auditor for doing so. Because the weighted productive hourly rates used by the Controller were based on discussions with staff and observations of staff performing the reimbursable activities, the claimant argues: “This type of anecdotal information does not meet the parameters and guidelines standards nor the Controller’s audit standards because it is unsupported by documentation.”<sup>95</sup>

The claimant submitted comments respectfully disagreeing with the Draft Proposed Decision and reasserted all of its arguments set forth in the IRC.<sup>96</sup>

#### **B. State Controller’s Office**

The Controller contends that the reductions are correct and that the IRC should be denied. The Controller responds to the claimant’s arguments in the IRC as follows:

**Audit Standards:** The Controller states that it used the correct standard of review for the audit that complies with applicable law and the Generally Accepted Government Auditing Standards (or the Yellow Book).<sup>97</sup>

The Controller cites Government Code section 17561, which authorizes it to audit the claimant’s records to verify actual mandate-related costs *and* reduce any claim that is excessive or unreasonable. In this case, the claims were excessive and unreasonable. The number of hours claimed was considered unreasonable because it was based on estimates rather than actual source documentation related to the reimbursable activities, and evidence the Controller gathered indicated that the time claimed was excessive.<sup>98</sup>

**Documentation Standards:** The Controller disagrees that it is unreasonable to require contemporaneous source documentation when the Parameters and Guidelines were not adopted

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<sup>93</sup> Exhibit A, IRC, pages 33-34.

<sup>94</sup> Exhibit A, IRC, page 34.

<sup>95</sup> Exhibit A, IRC, page 35.

<sup>96</sup> Exhibit E, Claimant’s Comments on the Draft Proposed Decision, pages 1-2.

<sup>97</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 21-24.

<sup>98</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 23.

until the eighth year of the audit period. The Controller points out that the unsupported costs were claimed and the time spent on the activities was estimated, which is not allowed under the Parameters and Guidelines. Estimates are merely corroborating evidence and do not comply with the actual cost documentation requirements of the Parameters and Guidelines. And the claimant did not verify any of its time estimates for reasonableness.

However, acknowledging that the claimant performed the reimbursable activities, auditors interviewed staff and observed staff performing the reimbursable activities. In some cases, auditors accepted the claimant's time estimates based on "the reasonableness of the time estimates alone, not on the quality or type of documentation provided by the district."<sup>99</sup>

**Underground Rulemaking:** The Controller denies that there is a standard of general application that auditors are expected to apply to audits of this program, so the audit methods do not constitute an underground regulation.<sup>100</sup>

The Controller also disputes that its time study does not comply with its own guidelines on time studies. The Controller states that the guidelines are not requirements and have not been adopted as regulations. Additionally, the auditors developed a time study plan by determining the period of time to be studied at one of the claimant's open enrollment periods and coordinated with staff to study activities 1 through 4 for the enrollment fee collection activities, and activities 7 through 11 for the enrollment fee waiver activities. The auditors also, based on discussions with claimant's staff, prepared brief narratives of procedures the staff followed to perform the activities. The auditors further determined which employees to study in the Bursar's Office (for enrollment fee collection) and the Financial Aid Office (for enrollment fee waivers), without knowing the classifications of the employees before performing the time study and without selecting which employees to study.<sup>101</sup>

The auditors documented the time by contemporaneously recording the documentation as the claimant's staff assisted students. Auditors recorded the transaction, the time involved, which employee performed the activity, and relevant comments from January 23-26, 2012 (for enrollment fee collection activities) and on October 12, 2011 and December 5-9, 2011 (for enrollment fee waiver activities). The comments the auditors inserted in the time logs were sufficiently detailed to reflect all mandated and non-mandated activities. The auditors determined that it was unnecessary to conduct the time study over one or more pay periods because the activities were more conducive to open enrollment periods than pay periods.<sup>102</sup>

The Controller also disagrees that observations over a few days are not representative of the 13-year audit period, saying "we do not believe that any one of the district's open enrollment periods would be more representative of any other to determine the time required to perform the reimbursable activities." The Controller also invited the claimant to perform its own time analysis or provide information describing procedures in place during earlier years of the audit

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<sup>99</sup> Exhibit B, Controller's Late Comments on the IRC, page 26.

<sup>100</sup> Exhibit B, Controller's Late Comments on the IRC, pages 26, 31.

<sup>101</sup> Exhibit B, Controller's Late Comments on the IRC, page 29.

<sup>102</sup> Exhibit B, Controller's Late Comments on the IRC, pages 29-30, 78-115 (time study logs).

period that showed time beyond what the auditors observed, but the district declined to perform its own analysis or provide additional information.<sup>103</sup>

The Controller disagrees that its audit methodology of conducting observations of district staff performing some of the reimbursable activities is a standard of general application requiring rulemaking under the Administrative Procedure Act. There is no standard of general application that auditors are expected to apply during audits of this program. Auditors begin by reviewing the evidence included by the claimants in filing their claims to support their findings and conclusions. The claimant provided auditors with information supporting how its claims were filed, which were all based on estimates of staff time performing the reimbursable activities. Instead of determining that all of the staff time was unallowable, the audit methodology was designed to work with the claimant to allow claimant to provide actual cost documentation on which to base allowable costs.<sup>104</sup>

The Controller notes that the data it used for the workload multiplier was submitted to the Chancellor's Office by the claimant, and the claimant did not apply all the exclusions from the Parameters and Guidelines, or make other adjustments that reflect the reimbursable activities. The Controller disagrees that its data collection is an underground regulation, saying "there is no audit method for the use of data."<sup>105</sup>

In response to the claimant's argument that the Parameters and Guidelines do not require weighing the productive hourly rates and no factual basis to do so was provided, the Controller argues that the audit decision to weight the productive hourly rate is consistent with the Parameters and Guidelines, which recognize "that all employees do not perform the reimbursable activities equally."<sup>106</sup> For both the multiplier and the productive hourly rate, the Controller states "we do not believe that auditing to the requirements contained in the parameters and guidelines constitutes a standard of general application."<sup>107</sup>

**Audit Findings:** The audit findings are summarized in the Summary of the Audit and are more fully analyzed in the Discussion below. The Controller stands by its audit findings.

The Controller submitted comments agreeing with the Draft Proposed Decision.<sup>108</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>103</sup> Exhibit B, Controller's Late Comments on the IRC, page 30.

<sup>104</sup> Exhibit B, Controller's Late Comments on the IRC, page 31.

<sup>105</sup> Exhibit B, Controller's Late Comments on the IRC, page 31.

<sup>106</sup> Exhibit B, Controller's Late Comments on the IRC, page 32.

<sup>107</sup> Exhibit B, Controller's Late Comments on the IRC, pages 31, 32.

<sup>108</sup> Exhibit D, Controller's Comments on the Draft Proposed Decision, page 1.

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>109</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>110</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>111</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>112</sup>

The Commission must review the Controller's audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>113</sup> In addition, sections 1185.1(f)(3) and 1185.2(d) and (e) of the Commission's regulations require that any assertions of fact by the parties to an IRC must be supported by

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<sup>109</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>110</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>111</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space Dist.* (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>112</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>113</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

documentary evidence. The Commission's ultimate findings of fact must be supported by substantial evidence in the record.<sup>114</sup>

**A. The IRC Was Timely Filed Within Three Years of the Claimant's Receipt of Notice of the Adjustment, as Required by the Commission's Regulations.**

Government Code section 17561 authorizes the Controller to audit the reimbursement claims and records of local government to verify the actual amount of the mandated costs, and to reduce any claim that the Controller determines is excessive or unreasonable. If the Controller reduces a claim on a state-mandated program, the Controller is required to notify the claimant in writing, specifying the claim components adjusted, the amounts adjusted, interest charges on claims adjusted to reduce the overall reimbursement to the claimant, and the reason for the adjustment.<sup>115</sup> The claimant may then file an IRC with the Commission "pursuant to regulations adopted by the Commission" contending that the Controller's reduction was incorrect and to request that the Controller reinstate the amounts reduced to the claimant.<sup>116</sup>

At the time this IRC was filed in June 2016, the Commission's regulations required that an IRC be timely filed "no later than three years following the date of the Office of State Controller's final audit report, letter, remittance advice, or other written notice of adjustment to a reimbursement claim" in order to be complete.<sup>117</sup>

The Final Audit Report, dated August 6, 2013, specifies the claim components and amounts adjusted, and the reasons for the adjustments and thus, complies with the notice requirements in Government Code section 17558.5(c). The claimant filed the IRC on June 27, 2016, less than three years from the date of the Final Audit Report.

Therefore, the Commission finds that the IRC was timely filed.

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<sup>114</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>115</sup> Government Code section 17558.5(c).

<sup>116</sup> Government Code sections 17551(d), 17558.7; California Code of Regulations, title 2, sections 1185.1, 1185.9.

<sup>117</sup> Former California Code of Regulations, title 2, sections 1185.1(c), 1185.2(a) (Register 2014, No. 21). Section 1185.1(c) was amended, operative October 1, 2016, to clarify that: "All incorrect reduction claims shall be filed with the Commission no later than three years following the date a claimant first receives from the Office of State Controller a final state audit report, letter, or other written notice of adjustment to a reimbursement claim, which complies with Government Code section 17558.5(c) by specifying the claim components adjusted, the amounts adjusted, interest charges on claims adjusted to reduce the overall reimbursement to the claimant, and the reasons for the adjustment. The filing shall be returned to the claimant for lack of jurisdiction if this requirement is not met."

**B. The Commission Has No Jurisdiction to Determine the Correctness of an Adjustment to the Number of Students for Enrollment Fee Waiver Activity 10, Which Does Not Result in a Reduction.**

Pursuant to Government Code section 17551(d), the Commission's jurisdiction for IRCs is limited to determining whether "the Controller has incorrectly reduced payments to the local agency." The plain language of Government Code section 17551(d) limits the Commission's jurisdiction on an IRC to the issue of whether payments have been "incorrectly *reduced*." And here, with regard to adjusting (i.e. increasing) the number of students involved with activity 10 (notify the student of additional required information regarding an incomplete application or documentation),<sup>118</sup> there has been no reduction of costs claimed.

Therefore, the Commission finds that it has no jurisdiction over the adjustment to the number of students for Enrollment Fee Waiver activity 10.

**C. The Controller's Reduction to the Salaries and Benefits Claimed for the Enrollment Fee Collection Activities Is Correct as a Matter of Law and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

The Parameters and Guidelines, adopted January 26, 2006, authorize reimbursement, beginning July 1, 1998, for the following activities to calculate and collect student enrollment fees:

1. **[activity 1]** Referencing student accounts and records to determine course workload, status of payments, and eligibility for fee waiver. Printing a list of enrolled courses.
2. **[activity 2]** Calculating the total enrollment fee to be collected. Identifying method of payment. Collecting cash and making change as necessary. Processing credit card and other non-cash payment transactions (however, any fees that may be charged to a community college district by a credit card company or bank are not reimbursable). Preparing a receipt for payment received.
3. **[activity 3]** Answering student's questions regarding enrollment fee collection or referring them to the appropriate person for an answer.
4. **[activity 4]** Updating written and computer records for the enrollment fee information and providing a copy to the student. Copying and filing enrollment fee documentation.
5. **[activity 5]** Collecting delinquent enrollment fees, including written or telephonic collection notices to students, turning accounts over to collection agencies, or small claims court action.
6. **[activity 6]** For students who establish fee waiver eligibility after the enrollment fee has been collected, providing a refund or enrollment fees paid and updating student and district records as required. (Refund process for change in program is not reimbursable).<sup>119</sup>

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<sup>118</sup> Exhibit A, IRC, page 129 (Parameters and Guidelines).

<sup>119</sup> Exhibit A, IRC, pages 70-71 (Final Audit Report), 128 (Parameters and Guidelines).

Section IV. of the Parameters and Guidelines requires claims to be based on actual costs that are traceable and supported by contemporaneous source documents.<sup>120</sup>

The claimant calculated these costs by multiplying the staff time to perform the mandated activities, by the number of students who paid enrollment fees and were affected by these activities, by the productive hourly rates of the employees. The Controller adjusted each of these factors, resulting in a reduction of costs for the calculation and collection activities. As analyzed below, the Commission finds that the Controller's reductions are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

**1. The Controller's reduction of the claimant's estimated staff time to perform activities 1 through 4 to calculate and collect enrollment fees is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.**

The Controller reduced the average time estimates provided by the claimant for activities 1 through 4 to calculate and collect enrollment fees. The Parameters and Guidelines require that reimbursement claims for these activities be based on actual costs incurred that are traceable and supported by contemporaneous source documents. The claimant contends, however, that the Parameters and Guidelines were adopted in 2006, seven years after the first fiscal year in the audit period and thus, it was impossible for community college districts to recreate contemporaneous source documents to support the actual time it took to calculate and collect enrollment fees.<sup>121</sup> Therefore, the claimant estimated the staff time to perform the mandated activities for all fiscal years in question and submitted employee time surveys to support the average times reported.<sup>122</sup>

The claimant is correct that the contemporaneous source document rule cannot apply to the reimbursement claims for costs incurred before the Parameters and Guidelines were adopted in January 2006, since the claimants were not on notice of the requirements. Parameters and guidelines are regulatory in nature and are binding.<sup>123</sup> However, if provisions in the parameters and guidelines affect substantive rights or liabilities of the parties that change the legal consequences of past events, then the application of those provisions may be considered unlawfully retroactive under due process principles.<sup>124</sup> Due process requires that a claimant

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<sup>120</sup> Exhibit A, IRC, page 127 (Parameters and Guidelines).

<sup>121</sup> Exhibit A, IRC, page 13.

<sup>122</sup> Exhibit A, IRC, page 23. See also, Exhibit A, IRC, pages 616-686, 689-728, 916-1037, 1096-1237, 1297-1379, 1383-1429, 1489-1547, 1551-1586, 1655-1725, 1730-1798, (survey forms); Exhibit B, Controller's Late Comments on the IRC, pages 47-54, 58-65 (survey forms).

<sup>123</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201; *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 799.

<sup>124</sup> *Department of Health Services v. Fontes* (1985) 169 Cal.App.3d 301, 304-305; *Tapia v. Superior Court* (1991) 53 Cal.3d 282; 287-292; *Murphy v. City of Alameda* (1993) 11 Cal.App.4th 906, 911-912.



connection between those factors, the choice made, and the purposes of the enabling statute.” [Citation.]’ ”<sup>131</sup>

The Commission finds that the Controller’s reduction of the time to perform the mandated activities 1 through 4 is not arbitrary, capricious, or without evidentiary support.

The claimant’s average time estimates to perform activities 1 through 4, based on surveys of claimant’s staff, ranged from 22.10 to 27.90 minutes (or between 3.40 to 5.90 minutes per activity) during the audit period, and the claimant asserts that the estimates are certified and constitute “good faith estimates.”<sup>132</sup> The claimant did not provide any source documents or evidence of actual cost data to support the time required to perform the activities.<sup>133</sup> In addition, the Controller found that the claimant’s time estimates were not verified for reasonableness, and that the times reported varied significantly between staff and years.<sup>134</sup> The audit report states:

The times recorded by the employees surveyed to complete reimbursable activities 1-4 varied in length as follows:

- Activity 1 (Reference student accounts) – 1 to 60 minutes
- Activity 2 (Calculate/collect enrollment fee) – 1 to 30 minutes
- Activity 3 (Answer student questions) – 1 to 60 minutes
- Activity 4 (Updating student records ) – 1 to 38 minutes

The consultant took the time recorded on the survey forms and divided it by the number of responses without verifying the time recorded on the survey forms. All responses were given equal weight even though all employees surveyed did not perform the mandated activities at the same level. In addition, some employees surveyed worked in the district’s Financial Aid Office and did not perform the activities of calculating and collecting enrollment fees from students.<sup>135</sup>

The claimant does not dispute the Controller’s findings that the times varied, or that some employees surveyed did not perform the activities. And the record supports the assertion that the claimant’s estimates varied widely.<sup>136</sup>

Thus, in order to determine if the time estimates were reasonable, the Controller’s Office held discussions with claimant’s staff, observed claimant’s staff performing activities 1 through 4

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<sup>131</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>132</sup> Exhibit A, IRC, pages 15, and 72, 79 (Final Audit Report).

<sup>133</sup> Exhibit B, Controller’s Late Comments on the IRC, page 29.

<sup>134</sup> Exhibit A, IRC, pages 81-82 (Final Audit Report).

<sup>135</sup> Exhibit A, IRC, page 82 (Final Audit Report).

<sup>136</sup> For example, for activity 1, referencing student accounts, time estimates submitted with the claimant’s IRC ranged from 30 seconds to 30 minutes. (Exhibit A, IRC, pages 638, 673.)

during the open enrollment period of January 23-26, 2012, and recorded the time taken to perform these activities. The Controller's Office describes the process as follows:

- The auditors determined the time period to be studied by deciding to conduct observations of district staff performing the reimbursable activities during one of the district's open enrollment periods. They coordinated with district staff to determine the dates for the open enrollment periods during the school year.
- Based on discussions with district staff, the auditors determined to study reimbursable activities 1 through 4 for enrollment fee collection activities . . .
- Based on discussions with district staff, the auditors prepared brief narratives of procedures that district staff followed to perform the reimbursable activities.
- The auditors determined the employee universe to be all of the employees that worked in the Bursar's Office (for enrollment fee collection activities) . . . The auditors did not know nor could have known the actual classifications of employees that performed the reimbursable activities in these offices prior to performing their observations.
- The auditors did not select specific district employees to participate in a time study, as it depended solely on which district employees were performing the reimbursable activities on the days that the auditors scheduled their observations during the open enrollment period.
- The auditors determined that the time increments to be recorded would be in small increments (minutes and fractions of minutes) for the short-term tasks involved with this mandated program.<sup>137</sup>

The Controller observed 178 payment transactions, 78 of which involved the payment of enrollment fees pursuant to activities 1 through 4.<sup>138</sup> The observations of the Controller's auditors were recorded contemporaneously on observation logs filed by the Controller as students were assisted by the claimant's employees.<sup>139</sup> "As each student appeared at the front of the counter for assistance, the auditors recorded what transaction took place, the amount of time required, which specific district employee performed the activity, as well as any relevant comments that seemed appropriate."<sup>140</sup> As a result, the Controller found that the claimant's time estimate of 22.10 to 27.90 minutes to perform activities 1 through 4 (or between 3.40 to 5.90 minutes per activity) was overstated and instead was shown to take only 2.76 minutes for all four activities, or 0.69 minutes per activity.<sup>141</sup>

The Controller discussed the results of the observations with the claimant, and advised the claimant that it could perform its own time analysis or provide additional information describing

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<sup>137</sup> Exhibit B, Controller's Late Comments on the IRC, page 29.

<sup>138</sup> Exhibit A, IRC, page 73 (Final Audit Report).

<sup>139</sup> Exhibit B, Controller's Late Comments on the IRC, pages 29, 78-97 (Tab 9, observation logs for enrollment fee calculation and collection activities).

<sup>140</sup> Exhibit B, Controller's Late Comments on the IRC, page 29.

<sup>141</sup> Exhibit A, IRC, page 73 (Final Audit Report).

procedures and systems in place during the earlier years of the audit period that required time beyond what the Controller observed in 2012. The claimant, however, declined.<sup>142</sup>

Based on this record, the Commission finds that the Controller “adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the” state-mandated program, and thus the Controller’s findings are not arbitrary, capricious, or without evidentiary support.<sup>143</sup> The claimant has the burden of proving actual costs mandated by the state included in a claim for reimbursement.<sup>144</sup> In this case, the claimant provided estimates based on employee time surveys after the claimant had notice of what activities were approved for reimbursement. Those estimates varied widely and were not supported by any other information provided by the claimant. The Controller questioned claimant’s staff about the enrollment fee calculation and collection procedures and observed district staff performing the mandate,<sup>145</sup> finding that they took less time than the claimant’s estimates reported. The Controller’s reported times are based on contemporaneous observations and thus, are more reliable than a best or “good faith” guess. The Controller then invited the claimant to rebut its time study findings, but the claimant declined and has provided no evidence that the Controller’s findings are incorrect.

Instead, the claimant alleges that the Controller’s time-study sample size of 178 transactions is “statistically meaningless” and did not comply with the Controller’s time study guidelines. The claimant states it made 1,043,307 transactions during the audit period and thus, alleges the time study is not representative of an entire fiscal year or the 13-year audit period.<sup>146</sup> Also, the claimant asserts that the time study did not comply with the Controller’s time-study guidelines because it did not span one or more pay periods, and only a portion of the mandated activities were observed.<sup>147</sup> The claimant, however, provides no evidence that the Controller’s time study sample size or time study calculations are incorrect or should not apply to all fiscal years in the audit period, despite opportunities to provide additional information to the Controller. Nor has the claimant shown that one of the district’s open enrollment periods, during which the Controller made its time study, would be more representative than any other.<sup>148</sup>

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<sup>142</sup> Exhibit A, IRC, page 83 (Final Audit Report); Exhibit B, Controller’s Late Comments on the IRC, page 30.

<sup>143</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>144</sup> Government Code section 17564(b); Exhibit A, IRC, pages 127, 130 (Parameters and Guidelines, Sections IV and V); Evidence Code section 500; and *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>145</sup> Exhibit A, IRC, page 73 (Final Audit Report).

<sup>146</sup> Exhibit A, IRC, page 24.

<sup>147</sup> Exhibit A, IRC, pages 16-17.

<sup>148</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 30, 78-97 (observation logs).

The claimant also argues that the Controller's time study is an unenforceable underground regulation.<sup>149</sup> According to the claimant, "The Controller's use of this method for audit purposes is a standard of general application without appropriate state agency rulemaking and is therefore unenforceable."<sup>150</sup> However, the claimant has not demonstrated that the Controller intended its time study, or any other audit method it used, to be rules that apply generally to a class of cases.<sup>151</sup> Here, the time study was conducted because the claimant did not comply with the requirements in the Parameters and Guidelines to claim "actual costs" incurred to comply with the mandate, and did not verify the time estimates provided by the employees. The Supreme Court has held that interpretations that arise in the course of case-specific adjudications are not regulations.<sup>152</sup>

Further, the claimant argues that the Controller "either used the wrong audit standard . . . or has misrepresented the actual nature and scope of the audit."<sup>153</sup> However, when the Controller is authorized to exercise discretion in its audit, as it has done here, the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. Instead, the scope of review of the Controller's audit findings are limited, out of deference to the Controller's authority and expertise.<sup>154</sup>

Accordingly, the Commission finds that the Controller's reduction of the claimant's estimated staff time to perform activities 1 through 4 to calculate and collect enrollment fees is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

**2. The Controller's reduction to the number of students used in the calculation of costs for activities 1 through 4 is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.**

The Controller also noted variations in the number of students used in the claimant's calculations for activities 1 through 4, resulting in a decrease of 1,099,609 students over the audit period.<sup>155</sup>

For activities 1 (referencing student accounts), 3 (answering student questions), and 4 (updating student records), the claimant used the total number of enrolled students, determined by the "Student Total Headcount" summary report on the Chancellor's Office website for fiscal years 1998-1999 through 2008-2009. The Controller compared this data to the number of enrolled students reported by the claimant to the Chancellor's Office and maintained on the Chancellor's Office MIS, and determined that the claimant's number included duplicated students by term.<sup>156</sup>

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<sup>149</sup> Exhibit A, IRC, pages 15-18.

<sup>150</sup> Exhibit A, IRC, page 19.

<sup>151</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>152</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>153</sup> Exhibit A, IRC, pages 8-9.

<sup>154</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>155</sup> Exhibit A, IRC, page 77 (Final Audit Report).

<sup>156</sup> Exhibit A, IRC, page 73 (Final Audit Report).

The MIS data is information submitted by community college districts regarding the districts' students, faculty and staff, and courses. This information is collected and maintained by the Chancellor's Office and the Board of Governors to fulfill their role of providing general supervision over the community college districts.<sup>157</sup> Pursuant to these duties, the Chancellor's Office published the MIS user's manual for district data submission, which states that community college districts are required to certify that they will fully implement the data reporting requirements as follows:

As a condition of receiving grant funds, districts certified that they would fully implement the collection and reporting requirements of [MIS], pursuant to the standards adopted by the Chancellor's Office as specified in the MIS Data Element Dictionary. Participation is required of all 72 districts (108 colleges).<sup>158</sup>

The data reported by the community college districts to the Chancellor's Office includes student headcount (MIS data element STD7),<sup>159</sup> and duplicate students by term are removed from the data based on students' Social Security numbers.<sup>160</sup> Thus, the MIS data provides a more accurate student enrollment count.

The claimant does not provide evidence that the MIS data on student enrollment is wrong, but only asserts that the use of the Chancellor's Office data constitutes an underground regulation.<sup>161</sup> The Commission disagrees. The Controller used data reported by the claimant to the Chancellor's Office to determine the "reasonable" costs incurred to comply with activities 1 through 4. The Chancellor's official duty to collect and maintain the MIS data is presumed to have been regularly performed and to be correct, absent evidence to the contrary.<sup>162</sup> Under these circumstances, the Controller's use of this data arose in the course of a case-specific audit, which is not a regulation.<sup>163</sup> Moreover, when the Controller is authorized to exercise discretion in its audit, as it has done here, the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. Instead, the scope of review of the Controller's audit findings are limited, out of deference to the Controller's authority and expertise.<sup>164</sup> Therefore,

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<sup>157</sup> Education Code section 70901(b)(3).

<sup>158</sup> Exhibit F, Chancellor's Office Management Information System, User's Manual: Data Submission (2004), page 3.

<sup>159</sup> Exhibit F, Chancellor's Office Management Information System, User's Manual: Data Submission (2004), page 65.

<sup>160</sup> Exhibit A, IRC, page 73 (Final Audit Report).

<sup>161</sup> Exhibit A, IRC, page 19.

<sup>162</sup> Evidence Code section 664 establishes a presumption that an official duty has been regularly performed

<sup>163</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>164</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

the Commission finds that the adjustment to student enrollment for activities 1, 3, and 4, is not arbitrary, capricious, or entirely lacking in evidentiary support.

In addition, the Controller found that the claimant did not deduct from the student multiplier for activities 1 and 3, ineligible non-resident and special admit students as required by the Parameters and Guidelines.<sup>165</sup> Section IV.A.2.a. of the Parameters and Guidelines states that “Calculating and collecting the student enrollment fee for each student enrolled, *except for nonresidents, and except for special part-time students cited in section 76300, subdivision (f)*” is reimbursable.<sup>166</sup> Therefore, the Controller’s subtraction of non-resident students and special admit students who attend a community college while in high school when calculating the student headcount for activities 1 and 3 is correct as a matter of law.

The Controller also adjusted the claimant’s calculations of eligible students for activities 2 and 4 (calculating the fee and updating the records). First the Controller deducted the number of BOG waiver recipients by term based on the Chancellor’s MIS data on student financial aid awards received.<sup>167</sup> The Controller then added the number of students who received refunds because they were subsequently granted a BOG waiver, and subtracted the number of students who paid their enrollment fee through the claimant’s online system (based on documentation provided by the claimant for fiscal years 2002-2003 through 2010-2011, and based on an agreement with the claimant that 75 percent of students paid their enrollment fees in person in the earlier fiscal years of 1998-1999 through 2000-2001).<sup>168</sup> The Commission finds that these adjustments are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

Activity 2 requires:

Calculating the total enrollment fee to be collected. Identifying method of payment. Collecting cash and making change as necessary. Processing credit card and other non-cash payment transactions (however, any fees that may be charged to a community college district by a credit card company or bank are not reimbursable). Preparing a receipt for payment received.<sup>169</sup>

Activity 4 requires:

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<sup>165</sup> Exhibit A, IRC, page 73 (Final Audit Report).

<sup>166</sup> Exhibit A, IRC, page 128 (Parameter and Guidelines).

<sup>167</sup> Exhibit A, IRC, page 74 (Final Audit Report, page 19, which states the following: “We also updated the district’s calculations of eligible students for Activities 2 and 4 by deducting the number of BOGG recipients from reimbursable student enrollment confirmed by the Chancellor’s Office. The Chancellor’s Office identifies the unduplicated number of BOGG recipients by term based on MIS data element SF21 and all codes with the first letter of B or F.”); see also, Exhibit F, Chancellor’s Management Information System Data Dictionary, defining the “SF21” data as identifying the student financial aid awards received.

<sup>168</sup> Exhibit A, IRC, page 74 (Final Audit Report).

<sup>169</sup> Exhibit A, IRC, page 128 (Parameters and Guidelines).

Updating written and computer records for the enrollment fee information and providing a copy to the student. Copying and filing enrollment fee documentation.<sup>170</sup>

By law, calculating an enrollment fee is not required for students who receive a BOG fee waiver.<sup>171</sup> In addition, the Parameters and Guidelines separately require updating student records (activity 4) for BOG fee waiver recipients in section IV.B.2.:

In the case of an approved application, copy all documentation and file the information for further review or audit. *Entering the approved application information into district records and /or notifying other personnel performing other parts of the process* (e.g., cashier's office). Providing the student with proof of eligibility or an award letter, and file paper documents in the annual file.<sup>172</sup>

Thus, the Controller's reduction of the number of BOG fee waiver recipients from activities 2 and 4 is correct as a matter of law. Moreover, there is no evidence in the record that the Controller's use of the Chancellor's MIS data to determine the number of students who received a BOG fee waiver is arbitrary, capricious, or entirely lacking in evidentiary support.

The Controller also adjusted the multiplier for activities 2 and 4 by adding the number of refunds claimed for students who paid their fees and were subsequently granted a fee waiver.<sup>173</sup> Recalculating the enrollment fee (to zero) and updating records would have to be performed for students who were subsequently granted a fee waiver, so this adjustment to the multiplier for activities 2 and 4 is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

Finally, for activities 2 and 4 the Controller included only students who conducted in-person transactions and subtracted the number of students who paid their enrollment fees using the claimant's online system in fiscal years 2002-2003 through 2010-2011.<sup>174</sup> The claimant did not have online transaction fee data for 1998-1999 to 2000-2001, so the Controller and the claimant agreed that 75 percent was a reasonable percentage of fees that may have been paid in person during those years because that was the percentage that the claimant was able to support in 2001-2002.<sup>175</sup>

The claimant does not dispute a reduction of the multiplier for online transactions, but argues that "[t]he audit findings do not replace the previously claimed staff time lost from these eliminated in-person transactions with the costs to operate the online payment collections. Thus, no costs are recognized by the audit for the online transactions."<sup>176</sup> However, the evidence in the

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<sup>170</sup> Exhibit A, IRC, page 128 (Parameters and Guidelines).

<sup>171</sup> Education Code section 76300(g),(h); Exhibit A, IRC, page 129 (Parameters and Guidelines).

<sup>172</sup> Exhibit A, IRC, page 129. Emphasis added.

<sup>173</sup> Exhibit A, IRC, page 74 (Final Audit Report).

<sup>174</sup> Exhibit A, IRC, page 74 (Final Audit Report).

<sup>175</sup> Exhibit A, IRC, page 74 (Final Audit Report).

<sup>176</sup> Exhibit A, IRC, page 27.

record indicates that the claimant “gave no significance to fees paid online or through a telephone payment system when preparing its claims.”<sup>177</sup> The record also indicates that calculating the fee and updating student records “are performed automatically by the district’s computerized systems and require little, if any, involvement by district staff.”<sup>178</sup> Moreover, the claimant did not provide any information or documentation supporting “replacement costs.”<sup>179</sup> Thus, the Controller’s audit decision to exclude online and telephone payment transactions from the student multiplier for activities 2 and 4 is not arbitrary, capricious, or entirely lacking in evidentiary support.

Accordingly, the Commission finds that the Controller’s reduction to the number of students used in the calculation of costs for activities 1 through 4 is correct as a matter of law, and not arbitrary, capricious, or without evidentiary support.

**3. The Controller’s reduction to the average productive hourly rates of the employees performing activities 1 through 6 is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.**

The Controller found that the claimant overstated its average productive hourly rate when calculating the reimbursable salary and benefit costs of employees calculating and collecting enrollment fees (activities 1 through 6). The claimant included staff in its calculations who did not perform the reimbursable activities, such as employees who worked in the Financial Aid Office.<sup>180</sup> In addition, the claimant excluded staff who did not receive a time survey form.<sup>181</sup> The claimant also calculated the average productive hourly rate using a straight average methodology that did not weigh the involvement of the various employee classifications that performed the reimbursable activities. Instead, the claimant weighted all employee classifications at the same level, as if they all performed the reimbursable activities to the same extent. In this respect, the claimant weighed the involvement of supervisors at the same level as the staff and student employees who performed the bulk of the reimbursable activities.<sup>182</sup>

The Controller provided the claimant with an opportunity to revisit the average productive hourly rates to appropriately reflect the weight of involvement for the various employee classifications the performed the reimbursable activities, but the claimant declined. “The district did not provide any additional support (e.g., staffing requirements) or guidance (e.g., weight of involvement of various employee classifications) regarding the conduct of the reimbursable activities at the different colleges throughout the audit period.”<sup>183</sup>

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<sup>177</sup> Exhibit A, IRC, page 83 (Final Audit Report).

<sup>178</sup> Exhibit A, IRC, page 82 (Final Audit Report).

<sup>179</sup> Exhibit A, IRC, page 84 (Final Audit Report).

<sup>180</sup> Exhibit A, IRC, page 108 (Final Audit Report).

<sup>181</sup> Exhibit A, IRC, page 108 (Final Audit Report).

<sup>182</sup> Exhibit A, IRC, page 108 (Final Audit Report).

<sup>183</sup> Exhibit A, IRC, page 108 (Final Audit Report).

Therefore, the Controller recalculated the productive hourly rates based on the supporting documentation for the productive hourly rates used in the reimbursement claims.<sup>184</sup> The Controller determined the level of involvement of the claimant's staff after discussions with the claimant's staff, and by observing claimant's staff performing the reimbursable activities.<sup>185</sup> The Controller recognized that student employees performed the bulk of front-counter interactions with students, but could not work unsupervised.<sup>186</sup> The Controller also found that student workers and classified staff performed the reimbursable activities at approximately the same level, with supervisory staff replacing classified staff on occasion for breaks.<sup>187</sup> The Controller's weighted recalculation resulted in the following levels of employee involvement: student hourly staff – 45 percent; classified salaried staff – 50 percent; supervisory staff – 5 percent.<sup>188</sup> The Controller's calculation of productive hourly rates reduced the rates used by the claimant during each fiscal year in the audit period by \$4.19 to \$11.50.<sup>189</sup>

The claimant argues that there is no requirement in the Parameters and Guidelines to use weighted productive hourly rates and no factual basis to do so was provided by the auditor. The claimant also states that the weighted percentages for staff involvement are based on anecdotal information and do not meet the Parameters and Guidelines' standards or the Controller's audit standards because they are unsupported by documentation.<sup>190</sup>

The Controller contends that the weighted percentages are based on its observations of varying levels of employee involvement during the time study and on discussions with the claimant's staff. In addition, the Controller relies on the Parameters and Guidelines, which recognize that not all employees perform the reimbursable activities to the same extent, so weighting staff involvement is appropriate and consistent with the Parameters and Guidelines.<sup>191</sup>

The Commission finds that the Controller's adjustments to the productive hourly rates are correct as a matter of law, and are not arbitrary, capricious, or entirely lacking in evidentiary support.

Section V.A.1. of the Parameters and Guidelines governs how salaries and benefits are claimed, and requires the claimant to identify the employee performing the mandate, their job classification, and the hours devoted to each reimbursable activity performed. Thus, the Parameters and Guidelines do require the claimant to specifically identify staff involvement in the mandate. Section V.A.1. of the Parameters and Guidelines states:

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided

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<sup>184</sup> Exhibit A, IRC, page 108 (Final Audit Report).

<sup>185</sup> Exhibit A, IRC, page 108 (Final Audit Report).

<sup>186</sup> Exhibit B, Controller's Late Comments on the IRC, page 44.

<sup>187</sup> Exhibit B, Controller's Late Comments on the IRC, page 44.

<sup>188</sup> Exhibit A, IRC, pages 108-109 (Final Audit Report).

<sup>189</sup> Exhibit A, IRC, page 109 (Final Audit Report).

<sup>190</sup> Exhibit A, IRC, page 35.

<sup>191</sup> Exhibit B, Controller's Late Comments on the IRC, page 43.

by productive hours). Describe the reimbursable activities performed and the hours devoted to each reimbursable activity performed.<sup>192</sup>

In this case, the claimant did not comply with the Parameters and Guidelines. The claimant did not “[d]escribe the reimbursable activities performed and the hours devoted to each reimbursable activity performed” as required by the Parameters and Guidelines, but instead weighted all employee classifications at the same level, as if they all performed the reimbursable activities to the same extent, and included staff that did not perform the mandate.<sup>193</sup> The Parameters and Guidelines are regulatory in nature and are binding on the parties.<sup>194</sup> Thus, the Controller’s recalculation is correct as a matter of law.

Additionally, there is no evidence that the Controller’s recalculation was arbitrary, capricious, or entirely lacking in evidentiary support. The recalculations were based on information in the reimbursement claims, and observations of and discussions with the claimant’s staff. The claimant has provided no evidence that the weighted percentages are incorrect, or are arbitrary or capricious.

Accordingly, the Commission finds that the Controller’s reduction to the average productive hourly rates of the employees performing activities 1 through 6 is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

**D. The Controller’s Reduction to the Salaries and Benefits Claimed for the Enrollment Fee Waiver Activities Is Correct as a Matter of Law and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

The Parameters and Guidelines, adopted January 26, 2006, authorize reimbursement, beginning July 1, 1999, for the following activities to waive student enrollment fees for students identified in Education Code section 76300(g) and (h), and for students eligible for a BOG fee waiver:

1. **[activity 7]** Answering student's questions regarding enrollment fee waivers or referring them to the appropriate person for an answer. . .
2. **[activity 8]** Receiving of waiver applications from students by mail, fax, computer online access, or in person, or in the form of eligibility information processed by the financial aid office.
3. **[activity 9]** Evaluating each application and verification documents (dependency status: household size and income, SSI and TANF/CalWorks, etc.) for compliance with eligibility standards utilizing information provided by the student, from the student financial aid records (e.g., Free Application for Federal Student Aid) . . . , and other records.
4. **[activity 10]** In the case of an incomplete application or incomplete documentation, notify the student of the additional required information and how to obtain that

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<sup>192</sup> Exhibit A, IRC, page 130 (Parameters and Guidelines).

<sup>193</sup> Exhibit A, IRC, page 130 (Parameters and Guidelines).

<sup>194</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201; *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 799.

information. Hold student application and documentation in suspense file until all information is received.

5. **[activity 11]** In the case of an approved application, copy all documentation and file the information for further review or audit. Entering the approved application information into district records and/or notifying other personnel performing other parts of the process (e.g., cashier's office). Providing the student with proof of eligibility or an award letter, and file paper documents in the annual file.
6. **[activity 12]** In the case of a denied application, reviewing and evaluating additional information and documentation provided by the student if the denial is appealed by the student. Provide written notification to the student of the results of the appeal or any change in eligibility status.
7. **[activity 13]** Reporting to the Chancellor's Office the number of and amounts provided for BOG fee waivers. (Cal. Code Regs., tit. 5, § 58611.)<sup>195</sup>

Section IV. of the Parameters and Guidelines requires claims to be based on actual costs that are traceable and supported by contemporaneous source documents.<sup>196</sup>

The claimant calculated these costs by multiplying the staff time to perform the mandated activities, by the number of students who paid enrollment fees and were affected by these activities, by the productive hourly rates of the employees. The Controller adjusted each of these factors, resulting in a reduction of costs for the enrollment fee waiver activities. As analyzed below, the Commission finds that the Controller's reductions are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

**1. The Controller's reduction of the claimant's estimated staff time to perform activities 7 through 12 to waive student enrollment fees is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.**

The Controller reduced the average time estimates provided by the claimant for activities 7 through 12 to waive student enrollment fees. As stated in the Background, the Parameters and Guidelines require that reimbursement claims for these activities be based on actual costs incurred that are traceable and supported by contemporaneous source documents. The claimant contends, however, that because the Parameters and Guidelines were adopted in 2006, several years after the first fiscal year in the audit period, it was impossible for community college districts to recreate contemporaneous source documents to support the actual time it took to calculate and collect enrollment fees.<sup>197</sup> Therefore, the claimant estimated the staff time to perform the mandated activities for all fiscal years in question, including fiscal years after the

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<sup>195</sup> Exhibit A, IRC, pages 128-130 (Parameters and Guidelines).

<sup>196</sup> Exhibit A, IRC, page 127 (Parameters and Guidelines).

<sup>197</sup> Exhibit A, IRC, page 13.

Parameters and Guidelines were adopted in 2006, and submitted employee time surveys to support the average times reported.<sup>198</sup>

The claimant is correct that the contemporaneous source document rule cannot apply to the 1999-2000 through 2005-2006 reimbursement claims without violating due process principles since the claimants were not on notice of the documentation requirements before the Parameters and Guidelines were adopted in January 2006.<sup>199</sup> However, the claimant had actual notice of the requirement to claim actual costs supported by contemporaneous source documents for the costs incurred in fiscal years 2006-2007 through 2011-2012. Nevertheless, the claimant continued to use time estimates based on the surveys.<sup>200</sup> Thus, for fiscal years 2006-2007 through 2011-2012, the Controller could have reduced the costs claimed for salaries and benefits to \$0, and that reduction would have been correct as a matter of law.<sup>201</sup> Instead, the Controller used the same audit method it used to evaluate the costs claimed for activities 1 through 4, and allowed costs for salaries and benefits during all fiscal years in the audit period for activities 7 through 12 based on time estimates the Controller found to be reasonable.<sup>202</sup>

As described below, the Commission finds that the Controller's reduction of the time to perform the mandated activities 7 through 12 is not arbitrary, capricious, or without evidentiary support.

The claimant used the employee surveys to estimate the average minutes to perform activities 7 through 12, which ranged from 16.70 to 67.50 minutes during the audit period.<sup>203</sup> The claimant did not provide any source documents or evidence of actual cost data to support the estimated times to perform the activities.<sup>204</sup> In addition, the Controller found that some employees surveyed did not perform the mandated activities, that the times reported were not verified, and that times reported varied significantly between staff and years.<sup>205</sup> The audit report states:

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<sup>198</sup> Exhibit A, IRC, page 28. See also, Exhibit A, IRC, pages 616-686, 689-728, 916-1037, 1096-1237, 1297-1379, 1383-1429, 1489-1547, 1551-1586, 1655-1725, 1730-1798 (survey forms); Exhibit B, Controller's Late Comments on the IRC, pages 47-54, 58-65 (survey forms).

<sup>199</sup> *Department of Health Services v. Fontes* (1985) 169 Cal.App.3d 301, 304-305; *Tapia v. Superior Court* (1991) 53 Cal.3d 282; 287-292; *Murphy v. City of Alameda* (1993) 11 Cal.App.4th 906, 911-912; *In re Cindy B.* (1987) 192 Cal.App.3d 771, 783-784; *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 803-807.

<sup>200</sup> Exhibit B, Controller's Late Comments on the IRC, page 25.

<sup>201</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

<sup>202</sup> Exhibit A, IRC, page 89 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 37.

<sup>203</sup> Exhibit A, IRC, page 89 (Final Audit Report).

<sup>204</sup> Exhibit A, IRC, page 89 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 39.

<sup>205</sup> Exhibit A, IRC, page 97 (Final Audit Report).

The district's mandated cost consultant developed the employee survey forms. Annual survey forms were completed by an average of 49 employees for enrollment fee waivers [sic] activities for the audit period. Staff members who completed the survey forms estimated the amount of time required to complete various activities. The times recorded by the employees surveyed to complete reimbursable activities 7-11 varied in length as follows:

- Activity 7 (Answer student questions) – 1 to 30 minutes
- Activity 8 (Receive applications) – 1 to 30 minutes
- Activity 9 (Evaluate applications) – 1 to 25 minutes
- Activity 10 (Incomplete applications) – 1 to 30 minutes
- Activity 11 (Approved applications) – 1 to 30 minutes

The consultant took the time recorded on the survey forms and divided it by the number of responses without verifying the time recorded on the survey forms. All responses were given equal weight even though all employees surveyed did not perform the mandated activities at the same level. In addition, some employees surveyed worked in the district's Admissions and Records Office and did not perform the activities of processing BOGG fee waiver applications for students.<sup>206</sup>

Thus, to determine if the claimant's estimates were reasonable, the Controller's Office held discussions with claimant's staff to determine the procedures followed for each of the fee waiver activities.<sup>207</sup>

In addition, the Controller's Office observed 225 fee waiver transactions handled by the claimant's employees on October 12, 2011, and December 5-9, 2011.<sup>208</sup> The Final Audit Report summarizes the Controller's observations for activities 7 through 11:

**Activity 7 – Answering student questions**

We observed Student Hourly staff, Clerical Assistants, Financial Aid Technicians, and a Financial Aid Specialist helping students who applied in person for a BOGG fee waiver. At the front counters, staff answer BOGG fee waiver questions and direct students to fill out the BOGG fee waiver application online at a computer located adjacent to the counter. Financial Aid staff at the back counters of the Financial Aid Office evaluate BOGG fee waiver supporting documents, notify students by email of approved, incomplete, and denied applications, and call students to obtain additional information.

**Activity 8 – Receiving enrollment fee waiver applications**

The district received paper BOGG Fee waiver applications up to FY 2004-05. Currently, the district may receive BOGG fee waiver applications through the

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<sup>206</sup> Exhibit A, IRC, page 97 (Final Audit Report).

<sup>207</sup> Exhibit A, IRC, pages 89-93 (Final Audit Report).

<sup>208</sup> Exhibit A, IRC, page 93 (Final Audit Report).

district's BOGW online system or through the FAFSA website. All of the BOGG fee waivers currently processed by the district are through the district's BOGW online system and through the FAFSA website.

**Activity 9** – Evaluating waiver applications and verifying documentation

The Financial Aid Technicians and Financial Aid Specialist evaluated and processed the paper BOGG fee waiver applications prior to FY 2004-05. Beginning in FY 2005-06, the BOGG fee waivers were automated.

The automated BOGG fee waiver applications approved online with no documentation requirements are not evaluated by district staff. However, the Financial Aid Technicians and Financial Aid Specialists evaluate BOGG fee waiver supporting documents on an ongoing basis. In addition, the Financial Aid Technicians and Financial Aid Specialists evaluate FAFSA applications throughout the year. Therefore, while evaluating the financial Aid requirements, district staff also verifies BOGG fee waiver eligibility.

Furthermore, if a student makes an error while completing the online BOGG fee waiver application, the district requires the student to provide proof (documentation) in order to correct the error. Once the proper documentation is provided, staff is able to “reset” a new BOGG fee waiver online application for the student to complete again.

**Activity 10** – Notifying students of additional required information, in the case of an incomplete application

Financial Aid Office staff indicated that students can't finish the application if they don't answer all the questions. The district uses “myGateway,” which is the district's student portal system. At the end of the BOGG fee application process, students receive either a congratulations notification or an “I'm sorry, you don't qualify” notification. Most students initiate communication with district staff if the BOGG fee waiver has not been granted or posted. Staff may access a student's computer file and view prior comments or notes and inform students of any additional required information.

As noted above, if a student makes an error on the online BOGG fee waiver application, the district requires the student to provide proof (documentation) in order to correct the error. Once the proper documentation is provided, staff is able to “reset” a new BOGG fee waiver online application for the student to complete again.

**Activity 11** – Copying all documentation and file the information for further review, in the case of an approved application

We observed staff accepting BOGG fee waiver supporting documents (Activity 8), evaluating applications and supporting documents for eligibility (Activity 9), copying all supporting documents, and filing the information for further review (Activity 11). If the district determined that the student is eligible for a BOGG fee waiver, staff post the fee waiver and create a “budget” for the student.

In addition, during the FAFSA application process, the student's information is loaded into the district's student database from the FAFSA website. During the FAFSA application process, staff briefly reviews student information to determine if the student is eligible for a BOGG fee waiver. If the student is eligible for a BOGG fee waiver, staff posts the BOGG waiver to the student's account.<sup>209</sup>

The observations of the Controller's auditors were recorded contemporaneously on observation logs filed by the Controller as students were assisted by the claimant's employees.<sup>210</sup> "As each student appeared at the front of the counter for assistance, the auditors recorded what transaction took place, the amount of time required, which specific district employee performed the activity, as well as any relevant comments that seemed appropriate."<sup>211</sup> Based on these observations, the Controller determined that the claimant's time estimates were overstated, and that the average time to perform the fee waiver activities 7 through 11 was 2.60 minutes, or 0.52 minutes per activity.<sup>212</sup>

The Controller did not apply any time increments to activity 12 (appeals of denied BOG fee waiver applications) because the Controller determined that the claimant has no formal appeal process and, thus, incurred no costs to comply with activity 12. In addition, when a BOG fee waiver is denied, the student is instructed to apply for financial aid using the FAFSA website (a process that is not part of the mandate).<sup>213</sup>

Based on this record, the Commission finds that the Controller "adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the" state-mandated program, and thus the Controller's findings are not arbitrary, capricious, or without evidentiary support.<sup>214</sup> The claimant has the burden of proving the actual costs mandated by the state included in a claim for reimbursement.<sup>215</sup> In this case, the claimant provided estimates based on time surveys completed by employees, some of which did not perform the mandate. The estimates for activities 7 through 11 varied widely and were not supported by any actual cost data or other information provided by the claimant. The Controller questioned claimant's staff about the enrollment fee waiver procedures and observed district staff performing the mandate, which took less time than the claimant's estimates

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<sup>209</sup> Exhibit A, IRC, pages 91-93 (Final Audit Report).

<sup>210</sup> Exhibit B, Controller's Late Comments on the IRC, pages 29, 98-115 (Tab 10, observation logs for enrollment fee waiver activities).

<sup>211</sup> Exhibit B, Controller's Late Comments on the IRC, page 29.

<sup>212</sup> Exhibit A, IRC, pages 93, 95 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, pages 30, 98-115 (Tab 10, observation logs for enrollment fee waiver activities).

<sup>213</sup> Exhibit A, IRC, page 93 (Final Audit Report).

<sup>214</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>215</sup> Government Code section 17564(b); Exhibit A, IRC, pages 127, 130 (Parameters and Guidelines, Sections IV. and V.); Evidence Code section 500; and *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

reported. The Controller's reported times are based on contemporaneous observations of claimant's staff and thus, are more reliable than a best or "good faith" guess. The claimant has provided no evidence that these findings are incorrect.

With respect to activity 12, the claimant asserts that it reported more than 10,000 appeals for the audit period, and argues that it did not receive any appeals during the Controller's fieldwork on October 12, 2011, and December 5-9, 2011, and, thus, the "audit report defaults to total disallowance of this activity based on lack of documentation."<sup>216</sup> However, the Controller's finding, based on discussions with the claimant's staff, is that the claimant *does not have* an appeal process for denied BOG fee waiver applications. As the Controller noted in its comments on the IRC, for the few denied BOG fee waiver applications that the claimant may have, the claimant's staff told students to apply for financial aid using the FAFSA website. Although the claimant has procedures in place to process appeals of denied financial aid applications, these appeals are not reimbursable.<sup>217</sup> In addition, the claimant has provided no evidence to support the assertion that it incurred costs for the appeals process for a denied BOG fee waiver. As the Controller notes, part of the reimbursable activity for the denial of a BOG fee waiver appealed by a student is to "provide written notification to the student of the results of the appeal or any change in eligibility status."<sup>218</sup> The claimant has not provided these notices, or any other evidence to support its allegations.

In addition, the claimant argues that the Controller's time-study sample size of 225 fee waiver transactions is "statistically meaningless" and did not comply with the Controller's time study guidelines. The claimant states it made 267,412 fee waiver transactions during the audit period and thus, alleges the time study is not representative of an entire audit period.<sup>219</sup> Also, the claimant asserts that the time study did not span one or more pay periods, and only a portion of the mandated activities were observed.<sup>220</sup> The claimant, however, provides no evidence that the Controller's time study sample size or time study calculations are incorrect or should not apply to all fiscal years in the audit period. Nor has the claimant shown that one of the district's open enrollment periods, during which the Controller made its time study, would be more representative than any other.<sup>221</sup>

The claimant also asserts that the Controller's fee waiver time study is an unenforceable underground regulation.<sup>222</sup> However, the time study was conducted because the claimant did not comply with the requirements in the Parameters and Guidelines to claim "actual costs" incurred to comply with the mandate, and did not verify the time estimates provided by the employees.

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<sup>216</sup> Exhibit A, IRC, page 30.

<sup>217</sup> Exhibit B, Controller's Late Comments on the IRC, page 39.

<sup>218</sup> Exhibit A, IRC, page 129 (Parameters and Guidelines); Exhibit B, Controller's Late Comments on the IRC, page 39.

<sup>219</sup> Exhibit A, IRC, page 29.

<sup>220</sup> Exhibit A, IRC, page 29.

<sup>221</sup> Exhibit B, Controller Late Comments on the IRC, pages 30, 78-97 (observation logs).

<sup>222</sup> Exhibit A, IRC, page 29.

The Supreme Court has held that interpretations that arise in the course of case-specific adjudications are not regulations.<sup>223</sup>

When the Controller exercises discretion in its audit, as it has done here, the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. Instead, the scope of review of the Controller's audit findings are limited, out of deference to the Controller's authority and expertise.<sup>224</sup>

Accordingly, the Commission finds that Controller's reduction of the claimant's estimated staff time to perform activities 7 through 12 to waive student enrollment fees is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

**2. The Controller's reduction to the number of students used in the calculation of costs for activities 7 through 9, and 11 through 12 is not arbitrary, capricious, or entirely lacking in evidentiary support.**

The Controller also adjusted the number of students used in the calculations for activities 7 through 12. The Controller's adjustments resulted in an increase of students for activity 10, which increased costs, and a decrease of students for activities 7 through 9 and 11 by 7,479 students for each activity, which decreased costs.<sup>225</sup> The Controller did not allow any student multiplier for activity 12 because, as stated above, the claimant does not have an appeals process in place to review denied BOG fee waiver applications.<sup>226</sup>

The Commission further finds that the Controller's adjustments to the student multiplier for activities 7 (answering student questions), 8 (receiving waiver applications), 9 (evaluating each application and verifying documents) and 11 (copy and file all documentation for approved applications), are not arbitrary, capricious, or entirely lacking in evidentiary support. For activities 7 through 9, the claimant used the number of students who received a BOG fee waiver based on district records, plus the number of denied and incomplete BOG fee waiver applications. For activity 11, the claimant used the number of students who received a BOG fee waiver based on district records.<sup>227</sup>

The Controller also used the number of BOG fee waiver recipients for activities 7 through 9 and 11, but determined the unduplicated number of students that received BOG fee waivers based on the Chancellor's MIS data, which is based on annual records provided by the claimant.<sup>228</sup>

The claimant does not provide evidence that the Chancellor's MIS data on students that received BOG fee waivers is wrong, but only asserts that that the use of the Chancellor's Office data

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<sup>223</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>224</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>225</sup> Exhibit A, IRC, page 95 (Final Audit Report).

<sup>226</sup> Exhibit A, IRC, page 94 (Final Audit Report).

<sup>227</sup> Exhibit A, IRC, page 94 (Final Audit Report).

<sup>228</sup> Exhibit A, IRC, pages 94-95 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 40.

constitutes an underground regulation.<sup>229</sup> The Commission disagrees. As indicated above, the data and information reported by the community college districts to the Chancellor's Office includes student headcount (MIS data element STD7),<sup>230</sup> and one record per student for every award received during the prior fiscal year.<sup>231</sup> The Controller used this data to determine the "reasonable" costs incurred to comply with activities 7 through 9 and 11. The Chancellor's official duty to maintain the MIS data is presumed to have been regularly performed and accurate, absent evidence to the contrary.<sup>232</sup> Under these circumstances, the Controller's use of this data arose in the course of a case-specific audit, which is not a regulation.<sup>233</sup> Moreover, when the Controller is authorized to exercise discretion in its audit, as it has done here, the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. Instead, the scope of review of the Controller's audit findings are limited, out of deference to the Controller's authority and expertise.<sup>234</sup>

Finally, the Commission finds that the disallowance of a student multiplier for activity 12 (BOG fee waiver appeals) is not arbitrary, capricious, or entirely lacking in evidentiary support since, as stated above, the Controller found that the claimant does not have an appeals process for denied BOG fee waivers; instead the claimant instructs students who are denied to apply for financial aid using the FAFSA website.<sup>235</sup> Because the claimant has provided no evidence or documentation of actual costs to support the assertion that it incurred costs for the appeals process for a denied BOG fee waiver, the Controller's conclusion with respect to activity 12 is not arbitrary, capricious, or entirely lacking in evidentiary support.<sup>236</sup>

Therefore, the Commission finds that the adjustment to student enrollment in activities 7 through 9, and 11 through 12, is not arbitrary, capricious, or entirely lacking in evidentiary support.

**3. The Controller's reduction to the average productive hourly rates of the employees performing activities 7 through 11 is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.**

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<sup>229</sup> Exhibit A, IRC, page 31.

<sup>230</sup> Exhibit F, Chancellor's Office Management Information System, User's Manual: Data Submission (2004), pages 5, 65.

<sup>231</sup> Exhibit F, Chancellor's Office Management Information System, User's Manual: Data Submission (2004), pages 5-6.

<sup>232</sup> Evidence Code section 664 establishes a presumption that official duty has been regularly performed.

<sup>233</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>234</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>235</sup> Exhibit A, IRC, page 92 (Final Audit Report).

<sup>236</sup> Exhibit A, IRC, page 129 (Parameters and Guidelines); Exhibit B, Controller's Late Comments on the IRC, page 39.

The Controller found that the claimant overstated its average productive hourly rates when calculating the reimbursable salary and benefit costs of employees waiving student enrollment fees (activities 7 through 11). The claimant included some staff in its calculations who did not perform the reimbursable activities, and excluded staff who did perform the mandate.<sup>237</sup> The claimant also calculated the average productive hourly rates using a straight average methodology that did not weigh the involvement of the various employee classifications that performed the reimbursable activities. Instead, the claimant weighed all employee classifications at the same level, as if they all performed the reimbursable activities to the same extent. In this respect, the claimant weighed the involvement of supervisors at the same level as the district staff who performed the bulk of the reimbursable activities.<sup>238</sup>

The Controller provided the claimant with an opportunity to revisit the average productive hourly rates to appropriately reflect the weight of involvement for the various employee classifications that performed the reimbursable activities, but the claimant declined. “The district did not provide any additional support (e.g., staffing requirements) or guidance (e.g., weight of involvement of various employee classifications) regarding the conduct of the reimbursable activities at the different colleges throughout the audit period.”<sup>239</sup>

Therefore, the Controller calculated weighted average rates based on the supporting documentation for the productive hourly rates used in the reimbursement claims, and increased the rate used for the claimant’s current Director of Financial Aid, which was understated by the claimant.<sup>240</sup>

The Controller determined the level of involvement of the claimant’s staff after discussions with the claimant’s staff, and by observing claimant’s staff performing the reimbursable activities.<sup>241</sup> The Controller recognized that student employees performed the bulk of front-counter interactions with students, but could not work unsupervised.<sup>242</sup> The Controller also found that student workers and classified staff performed the reimbursable activities at approximately the same level, with supervisory staff replacing classified staff on occasion for breaks.<sup>243</sup> The Controller’s weighted recalculation resulted in the following levels of employee involvement: student hourly staff – 45 percent; classified salaried staff – 50 percent; supervisory staff – 5 percent.<sup>244</sup> The Controller then states that:

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<sup>237</sup> Exhibit A, IRC, page 108 (Final Audit Report).

<sup>238</sup> Exhibit A, IRC, page 108 (Final Audit Report).

<sup>239</sup> Exhibit A, IRC, page 108 (Final Audit Report).

<sup>240</sup> Exhibit A, IRC, pages 108, 110 (Final Audit Report).

<sup>241</sup> Exhibit A, IRC, page 108 (Final Audit Report).

<sup>242</sup> Exhibit A, IRC, page 110 (Final Audit Report); Exhibit B, Controller’s Late Comments on the IRC, page 44.

<sup>243</sup> Exhibit B, Controller’s Late Comments on the IRC, page 44.

<sup>244</sup> Exhibit A, IRC, page 110 (Final Audit Report).

We provided the district our analysis and attempted to engage in a dialogue with them in an effort to advise us of any issues involving the weight of involvement percentages that we calculated, in addition to any variances in the level of effort for the different colleges in the district and/or the different years during the audit period. However, the district declined to comment on our analysis or provide any additional information.<sup>245</sup>

As a result, the Controller's calculation of productive hourly rates for activities 7 through 11 reduced the rates used by the claimant during each fiscal year in the audit period by \$7.17 to \$13.77.<sup>246</sup>

The claimant argues that there is no requirement in the Parameters and Guidelines to use weighted productive hourly rates and no factual basis to do so was provided by the auditor. The claimant also states that the weighted percentages for staff involvement are based on anecdotal information and do not meet the Parameters and Guidelines standards or the Controller's audit standards because they are unsupported by documentation.<sup>247</sup>

The Controller contends that the weighted percentages are based on its observations of varying levels of involvement by the claimant's staff during the time study and on discussions with the claimant's staff. In addition, the Controller relies on the Parameters and Guidelines, which recognize that not all employees perform the reimbursable activities to the same extent, so weighing staff involvement is appropriate and consistent with the Parameters and Guidelines.<sup>248</sup>

The Commission finds that the Controller's adjustments to the productive hourly rates are correct as a matter of law, and are not arbitrary, capricious, or entirely lacking in evidentiary support.

Section V.A.1. of the Parameters and Guidelines governs how salaries and benefits are claimed, and requires the claimant to identify the employee performing the mandate, their job classification, and the hours devoted to each reimbursable activity performed. Thus, the Parameters and Guidelines do require the claimant to specifically identify staff involvement in the mandate. Section V.A.1. of the Parameters and Guidelines states:

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the reimbursable activities performed and the hours devoted to each reimbursable activity performed.<sup>249</sup>

In this case, the claimant did not comply with the Parameters and Guidelines. The claimant did not "[d]escribe the reimbursable activities performed and the hours devoted to each reimbursable activity performed" as required by the Parameters and Guidelines, but instead weighed all employee classifications at the same level, as if they all performed the reimbursable activities to

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<sup>245</sup> Exhibit A, IRC, page 110 (Final Audit Report).

<sup>246</sup> Exhibit A, IRC, page 111 (Final Audit Report).

<sup>247</sup> Exhibit A, IRC, page 35.

<sup>248</sup> Exhibit B, Controller's Late Comments on the IRC, page 43.

<sup>249</sup> Exhibit A, IRC, page 130 (Parameters and Guidelines).

the same extent, and included staff that did not perform the mandate.<sup>250</sup> The Parameters and Guidelines are regulatory in nature and are binding on the parties.<sup>251</sup> Thus, the Controller's recalculation is correct as a matter of law.

Additionally there is no evidence that Controller's recalculation was arbitrary, capricious, or entirely lacking in evidentiary support. The recalculations were based on information in the reimbursement claims, and observations of and discussions with the claimant's staff. The claimant was given opportunities to provide additional information to the Controller, but declined. The claimant has provided no evidence that the weighted percentages are incorrect, or are arbitrary or capricious.

Accordingly, the Commission finds that the Controller's reduction to the average productive hourly rates of the employees performing activities 7 through 11 is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

**E. The Controller's Adjustments to Offsetting Revenues Are Correct as a Matter of Law.**

Section VII. of the Parameters and Guidelines governs offsetting savings and reimbursements, and requires claimants to offset their claims for enrollment fee collection and waiver activities by the following revenues received and allocated from the Chancellor's Office in accordance with Education Code section 76300:

- For the *Enrollment Fee Collection* program, an offset of two percent of the revenue received from enrollment fees pursuant to former Education Code section 76300(c), which stated: "For the purposes of computing apportionments to community college districts pursuant to Section 84750, the chancellor shall subtract from the total revenue owed to each district, 98 percent of the revenues received by districts from charging a fee pursuant to this section."
- For the *Enrollment Fee Waiver* program, from July 1, 1999, to July 4, 2000:
  - An offset of two percent of the fees waived and allocated to community college districts from the Board of Governors from funds in the State Budget Act, for low income students, recipients of public assistance, or dependents or surviving spouses of National Guard soldiers killed or permanently disabled in the line of duty.
  - An offset of seven percent of the fees waived and allocated to community college districts from the Board of Governors from funds in the State Budget Act, for the determination of financial need and delivery of student financial aid services.<sup>252</sup>

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<sup>250</sup> Exhibit A, IRC, page 130 (Parameters and Guidelines).

<sup>251</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201. *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 799.

<sup>252</sup> Education Code section 76300 (g) and (h), which identified the students eligible for a fee waiver. Education Code section 76300(m) directed the Board of Governors, from funds provided in the annual Budget Act, to allocate the funds to community college districts.

- For the *Enrollment Fee Waiver* program, beginning July 5, 2000:
  - An offset of two percent of the fees waived and allocated to community college districts from the Board of Governors from funds in the State Budget Act, for low income students, recipients of public assistance, or dependents or surviving spouses of National Guard soldiers killed or permanently disabled in the line of duty.
  - An offset of \$0.91 per credit unit waived and allocated to community college districts from the Board of Governors from funds in the State Budget Act, for the determination of financial need and delivery of student financial aid services.<sup>253</sup>

The Controller found that offsetting revenues identified by the claimant were misstated because the claimant did not accurately report the amounts received in offsetting revenues from the Chancellor's Office.<sup>254</sup> The Controller found that the claimant received more offsetting revenues than the amounts identified in the reimbursement claims for both the enrollment fee collection and enrollment fee waiver activities.

For enrollment fee collection activities, the claimant identified \$1,152,929 in offsetting revenues based on two percent of the revenues from the enrollment fee. The Controller obtained a report from the Chancellor's Office confirming offsetting revenues allocated to the claimant during the audit period for enrollment fee collection, totaling \$2,030,411.<sup>255</sup> The Controller limited offsetting revenues to allowable direct and indirect costs totaling \$1,202,950.<sup>256</sup>

For enrollment fee waivers, the claimant identified \$3,266,094 in offsetting revenues based on the seven or two percent offset from the enrollment fees waived, and the \$0.91 per credit unit waived. The Controller obtained a report from the Chancellor's Office confirming offsetting revenues allocated to the claimant during the audit period totaling \$3,272,412.<sup>257</sup> The Controller limited offsetting revenues to allowable direct and indirect costs totaling \$374,793.<sup>258</sup>

The Commission finds that Controller's adjustments for offsetting revenues is correct as a matter of law. The plain language of the Parameters and Guidelines and Education Code section 76300(m) require that funds allocated from the Board of Governors for fee collection and fee waivers be identified as offsetting revenues. Moreover, in 2008, the Legislature amended Education Code section 76300(m) to clarify its intent that the offsetting revenues identified

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<sup>253</sup> Education Code section 76300 (g) and (h), which identified the students eligible for a fee waiver. Education Code section 76300(m) directed the Board of Governors, from funds provided in the annual Budget Act, to allocate the funds to community college districts.

<sup>254</sup> Exhibit A, IRC, pages 102-107 (Final Audit Report).

<sup>255</sup> Exhibit B, Controller's Late Comments on the IRC, pages 69-72 (Tab 7, Chancellor's Office confirmation of enrollment fee collection offsets dated January 7, 2008 and February 7, 2011).

<sup>256</sup> Exhibit A, IRC, page 103 (Final Audit Report).

<sup>257</sup> Exhibit B, Controller's Late Comments on the IRC, pages 73-76 (Tab 8, Chancellor's Office confirmation of enrollment fee waiver offsets dated January 4, 2012).

<sup>258</sup> Exhibit A, IRC, page 104 (Final Audit Report).

above shall “directly offset mandated costs claimed by community college districts pursuant to Commission on State Mandates consolidated Test Claims 99-TC-13 (Enrollment Fee Collection) and 00-TC-15 (Enrollment Fee Waivers).”<sup>259</sup>

The claimant does not dispute the law, or provide any evidence to indicate that the amounts identified by the Chancellor’s Office are wrong. The claimant, however, states that if the offset amounts are misstated, it is because the Chancellor’s data was not available at the time of claim preparation.<sup>260</sup> The claimant also asserts that the audit does not include source documentation, so there is no way to evaluate the source documentation and no factual basis for the adjustments.<sup>261</sup> However, the Controller included in its comments on the IRC the documentation from the Chancellor’s Office identifying the amounts received.<sup>262</sup>

In addition, the claimant argues that the offsetting revenue should not be applied to the preparation of policies and procedures and staff training because the audit report does not indicate that these costs are within the scope of costs for which the program funds are applicable.<sup>263</sup> The claimant’s argument is not legally correct. Offsetting revenues apply to the whole program. Section VII. of the Parameters and Guidelines expressly states that “reimbursement for this mandate from any source, . . . shall be identified and deducted from this claim.” And offsetting revenues specifically include the following:

The costs of the Enrollment Fee Collection **program** are subject to an offset of two percent (2%) of the revenue from enrollment fees. . . . The cost of the Enrollment Fee Waiver **program** are subject to the following offsets [as detailed above].”<sup>264</sup>

The one-time costs for preparing policies and procedures and training district staff were found to be reasonably necessary to carry out the mandated programs and are identified as reimbursable costs in sections IV.A.1. and IV.B.1. of the Parameters and Guidelines.<sup>265</sup> Thus, the one-time costs are within the scope of costs for which the program funds are applicable.

Finally, the claimant states that the offsetting revenues received for the enrollment fee collection program includes revenues collected from both in-person and online enrollment fee payments. Since the claimant did not claim any costs for online enrollment fees, the claimant asserts that the offsetting revenues should be reduced and be based only on in-person transactions.<sup>266</sup> However, the plain language of Section VII. of the Parameters and Guidelines requires that all

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<sup>259</sup> Statutes 2008, chapter 757, section 31 (AB 757).

<sup>260</sup> Exhibit A, IRC, pages 31-32.

<sup>261</sup> Exhibit A, IRC, pages 33-34.

<sup>262</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 69-72 (Tab 7, Chancellor’s Office confirmation of enrollment fee collection offsets dated January 7, 2008 and February 7, 2011).

<sup>263</sup> Exhibit A, IRC, pages 33-34.

<sup>264</sup> Exhibit A, IRC, page 132 (Parameters and Guidelines). Emphasis added.

<sup>265</sup> Exhibit A, IRC, pages 128-129 (Parameters and Guidelines).

<sup>266</sup> Exhibit A, IRC, pages 33-34.

costs claimed for the enrollment fee collection program are subject to an offset of two percent of the revenue from enrollment fees. There is no provision allowing the claimant to use only a portion of the offsetting revenue.

Accordingly, the Commission finds that the Controller's adjustments to offsetting revenues is correct as a matter of law.

**V. Conclusion**

Based on the foregoing analysis, the Commission denies this IRC.



RE: **Decision**

*Enrollment Fee Collection and Waivers, 15-9913-I-02*

Education Code Section 76300; Statutes 1984, 2d Ex. Sess., Chapter 1; Statutes 1984, Chapters 274 and 1401; Statutes 1985, Chapters 920 and 1454; Statutes 1986, Chapters 46 and 394; Statutes 1987, Chapter 1118; Statutes 1989, Chapter 136; Statutes 1991, Chapter 114; Statutes 1992, Chapter 703; Statutes 1993, Chapters 8, 66, 67, and 1124; Statutes 1994, Chapters 153 and 422; Statutes 1995, Chapter 308; Statutes 1996, Chapter 63; Statutes 1999, Chapter 72; California Code of Regulations, Title 5, Sections 58501-58503, 58611-58613, 58620, and 58630

Fiscal Years: 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, and 2010-2011  
North Orange County Community College District, Claimant

On November 30, 2018, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

  
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Heather Halsey, Executive Director

Dated: December 7, 2018

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

**IN RE INCORRECT REDUCTION CLAIM**

Penal Code Sections 11165.9, 11166, 11166.2, 11166.9<sup>1</sup>, 11168 (formerly 11161.7), 11169, 11170, and 11174.34 (formerly 11166.9) as added or amended by Statutes 1977, Chapter 958; Statutes 1980, Chapter 1071; Statutes 1981, Chapter 435; Statutes 1982, Chapters 162 and 905; Statutes 1984, Chapters 1423 and 1613; Statutes 1985, Chapter 1598; Statutes 1986, Chapters 1289 and 1496; Statutes 1987, Chapters 82, 531, and 1459; Statutes 1988, Chapters 269, 1497, and 1580; Statutes 1989, Chapter 153; Statutes 1990, Chapters 650, 1330, 1363, and 1603; Statutes 1992, Chapters 163, 459, and 1338; Statutes 1993, Chapters 219 and 510; Statutes 1996, Chapters 1080 and 1081; Statutes 1997, Chapters 842, 843, and 844; Statutes 1999, Chapters 475 and 1012; and Statutes 2000, Chapter 916

California Code of Regulations, Title 11, Section 903 (Register 98, Number 29)

“Child Abuse Investigation Report” Form SS 8583 (Rev. 3/91)

Fiscal Years 1999-2000 through 2012-2013

Filed on November 7, 2017

City of Palmdale, Claimant

Case No.: 17-0022-I-01

*Interagency Child Abuse and Neglect Investigation Reports (ICAN)*

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

*(Adopted November 30, 2018)*

*(Served December 7, 2018)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on November 30, 2018. Annette Chinn appeared on behalf of the City of Palmdale (claimant). Masha Vorobyova appeared on behalf of the State Controller’s Office (Controller).

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<sup>1</sup> Renumbered at Penal Code section 11174.34 (Stats. 2004, ch. 842 (SB 1313)).

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 sections 17500 et seq., and related case law.

The Commission adopted the Proposed Decision to deny the IRC by a vote of 4-0, as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	Yes
Ken Alex, Director of the Office of Planning and Research	Yes
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	Yes
Sarah Olsen, Public Member	Absent
Carmen Ramirez, City Council Member	Absent
Yvette Stowers, Representative of the State Controller	Yes
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	Absent

**Summary of the Findings**

This IRC addresses reductions made by the State Controller’s Office (Controller) to reimbursement claims filed by the City of Palmdale (claimant) for costs incurred during fiscal years 1999-2000 through 2012-2013 (audit period) for the *Interagency Child Abuse and Neglect Investigation Reports (ICAN)* program. The claimant disputes reductions totaling \$2,552,314 for the audit period.

The Commission denies this IRC, finding that reductions related to the claimant’s time study, and disallowance of indirect costs, as claimed, for all fiscal years were correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

Specifically, the Controller adjusted the results of the claimant’s time study for the investigation and reporting to the Department of Justice (DOJ) mandate component, based on excluding one investigation from the sample that included unallowable activities after the case was determined to be substantiated, and rejecting an additional thirty minutes of report writing time that the claimant alleged in its amended claims to be omitted from the allowed time. In addition, the Controller disallowed all indirect costs claimed, based on the claimant’s failure to comply with the Parameters and Guidelines and claiming instructions. The Commission finds these reductions to be correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

The claimant also asserted a number of preliminary investigative activities that should be subject to reimbursement, and argued they were not, but should have been, accounted for in the time study. These activities, however, were neither specifically claimed nor specifically disallowed. Therefore, they are not the subject of a reduction and the Commission does not have jurisdiction over these issues.

## COMMISSION FINDINGS

### I. Chronology

12/06/2007	The Commission adopted the Test Claim Decision.
12/16/2013	The Commission adopted the Parameters and Guidelines.
04/28/2014	The Controller issued claiming instructions for the initial claiming period, fiscal years 1999-2000 through 2012-2013, to be filed by July 15, 2014. <sup>2</sup>
07/03/2014	The claimant filed its initial reimbursement claim. <sup>3</sup>
12/19/2014	The Controller notified the claimant of the audit. <sup>4</sup>
07/15/2015	The claimant filed amended claims for fiscal years 1999-2000 through 2012-2013. <sup>5</sup>
03/30/2016	The Controller issued the Draft Audit Report. <sup>6</sup>
04/11/2016	The claimant filed comments on the Draft Audit Report. <sup>7</sup>
05/19/2016	The Controller issued the Final Audit Report. <sup>8</sup>
11/07/2017	The claimant filed the IRC. <sup>9</sup>
02/22/2018	The Controller filed comments on the IRC. <sup>10</sup>
05/07/2018	The claimant filed late rebuttal comments. <sup>11</sup>
07/23/2018	Commission staff issued the Draft Proposed Decision. <sup>12</sup>
07/27/2018	The claimant requested an extension of time to file comments on the Draft Proposed Decision.
07/31/2018	The claimant was granted an extension until August 24, 2018 to file comments on the Draft Proposed Decision.

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<sup>2</sup> Exhibit A, IRC, page 229 [Controller's Claiming Instructions, Cover Letter].

<sup>3</sup> Exhibit B, Controller's Comments on the IRC, page 30.

<sup>4</sup> Exhibit B, Controller's Comments on the IRC, page 6.

<sup>5</sup> Exhibit A, IRC, pages 299-380 [Claim Documentation, Amended Claim Forms].

<sup>6</sup> Exhibit A, IRC, page 265 [Controller's Final Audit Report, page 4].

<sup>7</sup> Exhibit A, IRC, page 292 [Claimant's Comments on the Draft Audit Report].

<sup>8</sup> Exhibit A, IRC, page 259 [Controller's Final Audit Report, Cover Letter].

<sup>9</sup> Exhibit A, IRC, page 1.

<sup>10</sup> Exhibit B, Controller's Comments on the IRC, page 1.

<sup>11</sup> Exhibit C, Claimant's Late Rebuttal Comments, page 1.

<sup>12</sup> Exhibit D, Draft Proposed Decision.

- 08/08/2018            The Controller filed comments on the Draft Proposed Decision.<sup>13</sup>
- 08/24/2018            The claimant filed comments on the Draft Proposed Decision.<sup>14</sup>
- 08/31/2018            The Controller filed late comments on the Draft Proposed Decision.<sup>15</sup>
- 09/07/2018            The claimant requested an extension to respond to the Controller’s late comments and a postponement of the September 28, 2018 hearing, which was approved.
- 09/27/2018            The claimant filed a response to the Controller’s late comments.<sup>16</sup>

**II. Background**

**A. The *Interagency Child Abuse and Neglect Investigation Reports (ICAN)* Program**

The *Interagency Child Abuse and Neglect Investigation Reports (ICAN)* program addresses statutory amendments to California’s mandatory child abuse reporting laws. A child abuse reporting law was first added to the Penal Code in 1963, and initially required medical professionals to report suspected child abuse to local law enforcement or child welfare authorities. The law was regularly expanded to include more professions required to report suspected child abuse (now termed “mandated reporters”), and in 1980, California reenacted and amended the law, entitling it the “Child Abuse and Neglect Reporting Act,” or CANRA.

As part of this program, the DOJ maintains a Child Abuse Centralized Index, which, since 1965, maintains reports of child abuse statewide. A number of changes to the law have occurred, particularly with a reenactment in 1980, and substantive amendments in 1997 and 2000. The act, as amended, provides for reporting of suspected child abuse or neglect by certain individuals, identified by their profession as having frequent contact with children. The act provides rules and procedures for local agencies, including law enforcement, receiving such reports. The act provides for cross-reporting among law enforcement and other child protective agencies, and to licensing agencies and district attorneys’ offices. The act requires reporting to DOJ when a report of suspected child abuse is “not unfounded.” The act requires an active investigation before a report can be forwarded to DOJ. As of January 1, 2012, the act no longer requires law enforcement agencies to report to DOJ, and now requires reporting only of “substantiated” reports by other agencies.<sup>17</sup> The act imposes additional cross-reporting and recordkeeping duties in the event of a child’s death from abuse or neglect. The act requires agencies and DOJ to keep records of investigations for a minimum of 10 years, and to notify suspected child abusers that they have been listed in the Child Abuse Central Index. The act also imposes certain due process

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<sup>13</sup> Exhibit E, Controller’s Comments on the Draft Proposed Decision.

<sup>14</sup> Exhibit F, Claimant’s Comments on the Draft Proposed Decision.

<sup>15</sup> Exhibit G, Controller’s Late Comments on the Draft Proposed Decision.

<sup>16</sup> Exhibit H, Claimant’s Response to the Controller’s Late Comments on the Draft Proposed Decision.

<sup>17</sup> See Exhibit A, IRC, page 240 [Parameters and Guidelines, p. 8 (citing amendment to Penal Code section 11169(b), enacted by Statutes 2011, chapter 468)].

protections owed to persons listed in the index, and provides certain other situations in which a person would be notified of his or her listing in the index.

On December 19, 2007, the Commission approved the Test Claim for cities and counties (specifically city and county police or sheriff's departments, county welfare departments, county probation departments designated by the county to receive mandated reports, district attorneys' offices, and county licensing agencies) to perform the following categories of reimbursable activities:

- Distribute the child abuse reporting form adopted by the Department of Justice (currently known as the "Suspected Child Abuse Report" Form SS 8572) to mandated reporters;
- Receive reports from mandated reporters of suspected child abuse; refer those reports to the correct agency when the recipient agency lacks jurisdiction; cross-report to other local agencies with concurrent jurisdiction and to the district attorneys' offices; report to licensing agencies; and make additional reports in the case of a child's death from abuse or neglect;
- Investigate reports of suspected child abuse to determine whether to report to the Department of Justice (DOJ);
- Notify suspected abusers of listing in the Child Abuse Central Index;
- Retain records, as specified; and
- Provide due process procedures to those individuals reported to the DOJ's Child Abuse Central Index.<sup>18</sup>

The Parameters and Guidelines were adopted on December 6, 2013, with a period of reimbursement beginning fiscal year 1999-2000.<sup>19</sup>

At issue in this IRC is the scope of the investigative activities of suspected child abuse performed by the claimant's law enforcement agency necessary to determine whether to report to DOJ and to complete the report.

As discussed at length in the Parameters and Guidelines and Test Claim Decisions, "reimbursement is not required for the full course of investigative activities performed by law enforcement agencies [when they receive a report of suspected child abuse], but only the investigative activities necessary to determine whether a report of suspected child abuse is unfounded, inconclusive, or substantiated, for purposes of preparing and submitting the Form SS 8583 to DOJ."<sup>20</sup> From July 1, 1999, through December 31, 2011, child abuse reports determined by law enforcement agencies to be substantiated or inconclusive shall be reported to DOJ.

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<sup>18</sup> Exhibit I, Statement of Decision and Parameters and Guidelines, *Interagency Child Abuse and Neglect Investigation Reports*, 00-TC-22, pages 41-47.

<sup>19</sup> Exhibit A, IRC, page 233 [Parameters and Guidelines, page 1].

<sup>20</sup> Exhibit I, Statement of Decision and Parameters and Guidelines, *Interagency Child Abuse and Neglect Investigation Reports*, 00-TC-22, page 28. See also, Exhibit I, Test Claim Statement of Decision, *Interagency Child Abuse and Neglect Investigation Reports*, 00-TC-22, page 31.

Unfounded reports shall not be filed with DOJ.<sup>21</sup> Thus, the Commission found that the mandate only requires enough information to determine whether to file a Form SS 8583 with DOJ, or subsequent designated form, and enough information to render the Form SS 8583 a “retainable report,” under California Code of Regulations, title 11, section 903.<sup>22</sup> As indicated above, beginning January 1, 2012, local law enforcement agencies are no longer mandated to report to DOJ.<sup>23</sup>

The Decision adopting the Parameters and Guidelines also reasoned that the underlying Act, CANRA, was not a mandate focused on criminal investigation and prosecution, but was focused on the protection of children and early intervention in abusive or neglectful situations, and that the investigation mandate specifically arises in the context of early reporting requirements.<sup>24</sup> As such, the Decision concluded that investigative activities in connection with the criminal investigation and prosecution of abuse or neglect are not within the scope of the mandate.

Accordingly, the Parameters and Guidelines define and specify the scope of the investigation activities necessary to satisfy the DOJ reporting requirement to include:

- Review of the initial Suspected Child Abuse Report (SCAR) Form adopted by DOJ;
- Conducting initial interviews with parents, victims, suspects, or witnesses, where applicable; and
- Making a report of the findings of those interviews, which may be reviewed by a supervisor.<sup>25</sup>

The Parameters and Guidelines also make clear that reimbursement is not required for:

- Investigative activities conducted by a mandated reporter to complete the SCAR;
- In the event that the mandated reporter completing the SCAR is employed by the same agency investigating the report, reimbursement is not required if the investigation required to complete the SCAR is also sufficient to satisfy the DOJ reporting requirement; and
- Investigative activities undertaken subsequent to the determination whether the report is substantiated, inconclusive, or unfounded for purposes of preparing the report for DOJ

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<sup>21</sup> See Exhibit A, IRC, page 241 [Parameters and Guidelines, p. 9 (citing Penal Code section 11169(a))].

<sup>22</sup> Exhibit I, Statement of Decision and Parameters and Guidelines, *Interagency Child Abuse and Neglect Investigation Reports*, 00-TC-22, page 29.

<sup>23</sup> Exhibit A, IRC, page 240 [Parameters and Guidelines, p. 8 (citing amendment to Penal Code section 11169(b), enacted by Statutes 2011, chapter 468)].

<sup>24</sup> Exhibit I, Statement of Decision and Parameters and Guidelines, *Interagency Child Abuse and Neglect Investigation Reports*, 00-TC-22, pages 34-35. See also, Exhibit I, Test Claim Decision, *Interagency Child Abuse and Neglect Investigation Reports*, 00-TC-22, page 31.

<sup>25</sup> Exhibit A, IRC, pages 240-241 [Parameters and Guidelines, pages. 8-9].

(Form 8583), including the collection of physical evidence, the referral to a child abuse investigator, and the conduct of follow-up interviews.

Section IV. of the Parameters and Guidelines requires reimbursement for those costs actually incurred to implement the mandated activities, which must be traceable and supported by contemporaneous source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities.<sup>26</sup> As noted, in this case the Controller allowed the use of a time study for the initial claiming period due to the likely unavailability of documentation, so the contemporaneous source document rule is not in issue in this IRC.

Section V. defines direct costs to include contract services costs, which must be claimed as follows:

#### Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.<sup>27</sup>

And Section V. provides with regard to indirect cost claiming:

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both: (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in 2 CFR Part 225 (Office of Management and Budget (OMB) Circular A-87). Claimants have the option of using *10% of direct labor*, excluding fringe benefits, *or preparing an Indirect Cost Rate Proposal (ICRP)* if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B)). However, unallowable costs

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<sup>26</sup> Exhibit A, IRC, page 235 [Parameters and Guidelines, pages 3].

<sup>27</sup> Exhibit A, IRC, pages 246-247 [Parameters and Guidelines, pages 14-15].

must be included in the direct costs if they represent activities to which indirect costs are properly allocable. The distribution base may be: (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.); (2) direct salaries and wages; or (3) another base which results in an equitable distribution.<sup>28</sup>

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

The reimbursement claims for fiscal years 1999-2000 through 2012-2013 totaled \$5,600,497. The Controller found that \$2,961,652 was allowable, and \$2,638,845 was unallowable.<sup>29</sup> The following two findings are in dispute:

### 1. Finding 2, Unallowable Contract Costs for Investigation and Reporting to DOJ

In Finding 2, the Controller found that the claimant reported in its reimbursement claims \$4,956,296 under the "Reporting to the California Department of Justice" component,<sup>30</sup> which, as discussed above, includes the activities to "Complete an investigation for purposes of preparing the report;" and "Forward reports to the Department of Justice."<sup>31</sup>

The claimant contracts with the County of Los Angeles Sheriff's Department to perform all law enforcement activities, including investigating cases of suspected child abuse.<sup>32</sup> The claimant purchases various staff positions (Deputy and Sergeant) each fiscal year and pays the Los Angeles County Sheriff's Department contract rates for the purchased positions. None of the claimant's staff members performed any of the reimbursable activities under the ICAN program.<sup>33</sup>

Thus, costs were claimed to complete an investigation for purposes of preparing the report to DOJ by multiplying the number of SCAR investigations performed, by the *estimated* time increment to complete the investigation, by the respective Los Angeles County Sheriff's Department contract hourly rates.<sup>34</sup> The estimated time, as originally claimed, was based on two time studies conducted by the Los Angeles County Sheriff's Department, Palmdale Station,

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<sup>28</sup> Exhibit A, IRC, page 247 [Parameters and Guidelines, p. 15 (emphasis added)].

<sup>29</sup> Exhibit A, IRC, pages 265; 277-284 [Controller's Final Audit Report, pp. 4; 16-22]. The claimant does not dispute the reduction of \$86,531 under the Cross-Reporting Between Departments component, or the finding that the number of investigations conducted during the audit period was overstated. The Controller identifies the remaining disputed reduction as \$1,132,337. [See Exhibit B, Controller's Comments on the IRC, page 15].

<sup>30</sup> Exhibit A, IRC, page 276 [Controller's Final Audit Report, p. 15]; Exhibit B, Controller's Comments on the IRC, page 16.

<sup>31</sup> Exhibit I, Statement of Decision and Parameters and Guidelines, *Interagency Child Abuse and Neglect Investigation Reports*, 00-TC-22, pages 87-90.

<sup>32</sup> Exhibit A, IRC, page 277 [Final Audit Report, p. 16].

<sup>33</sup> Exhibit A, IRC, page 277 [Final Audit Report, p. 16]; Exhibit B, Controller's Comments on the IRC, page 16.

<sup>34</sup> Exhibit A, IRC, page 277 [Final Audit Report, p. 16].

before the Parameters and Guidelines were adopted on December 6, 2013; the first one conducted between September 2010 and June 2011, provided to the Controller in October 2011, and the second one conducted between September 4, 2013 and September 30, 2013, which recorded the amount of time needed to perform each SCAR investigation.<sup>35</sup> The time studies recorded time for the following four main activities:

1. Initial response to begin documentation of case and to contact County Welfare.
2. Complete an investigation to determine whether a report is unfounded, substantiated, or inconclusive.
3. Prepare a written report for every case investigated of known or suspected child abuse.
4. Review and approval of report.<sup>36</sup>

The first time study showed an average time increment of 3.93 hours per SCAR investigation, and the second time study indicated 3.27 hours per SCAR investigation, based on 14 SCAR investigations.<sup>37</sup> The claimant analyzed the results of both time studies and determined that 3.67 hours per SCAR investigation were needed to perform the claimed activities under this cost component.<sup>38</sup>

On July 3, 2014, the claimant filed initial reimbursement claims covering fiscal years 1999-2000 through 2012-2013.<sup>39</sup> The Controller began the audit on December 19, 2014.<sup>40</sup>

The Controller states that “[d]uring audit fieldwork, we reviewed both time studies performed by the city.”<sup>41</sup> The Controller rejected the first time study because it was not performed contemporaneously, was performed by the deputies who did not complete the actual investigation activities claimed, used a sample of cases that were not representative of the total population of SCAR investigations, thus, was not appropriate to support actual costs.<sup>42</sup> The second time study was performed contemporaneously by the same deputies who performed the reimbursable activities, and the Controller accepted that time study, which resulted in an average

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<sup>35</sup> See Exhibit B, Controller’s Comments on the IRC, pages 156-163.

<sup>36</sup> Exhibit A, IRC, page 284-285 [Final Audit Report, pp. 23-24]; See also Exhibit F, Claimant’s Comments on the Draft Proposed Decision, pages 4 and 7, confirming the four stated activities included in the time study.

<sup>37</sup> Exhibit B, Controller’s Comments on the IRC, pages 16, 169.

<sup>38</sup> Exhibit A, IRC, page 278 [Controller’s Final Audit Report, p. 17].

<sup>39</sup> Exhibit B, Controller’s Comments on the IRC, page 30.

<sup>40</sup> Exhibit B, Controller’s Comments on the IRC, page 6 (Declaration of Lisa Kurokawa, Division Chief, Division of Audits).

<sup>41</sup> Exhibit A, IRC, page 284 [Controller’s Final Audit Report, page 23]; Exhibit B, Controller’s Comments on the IRC, page 16.

<sup>42</sup> Exhibit A, IRC, pages 278, 284 [Controller’s Final Audit Report, pages 17, 23].

time increment of 3.27 hours.<sup>43</sup> However, the Controller found that the second time study included one investigation “with unallowable hours that accounted for activities following the determination of a substantiated status of child abuse.”<sup>44</sup> The Controller discussed the case with a detective, and “[i]t appeared that ineligible activities performed after SVU was contacted were included in the time, which lead to the decision to remove the case from the average time calculation.”<sup>45</sup> Therefore, the Controller accepted the second time study results, “less the one case that included the unallowable time,” which then brought the average time increment to 2.65 hours per SCAR investigation, and used that figure for further analysis.<sup>46</sup>

To verify the 2.65-hour time increment, the Controller conducted a time survey over the phone with Deputies Porter and Deschamps, the deputies who performed the mandate, on July 8, 2015 and July 20, 2015, respectively.<sup>47</sup> Those surveys sought to capture estimates of the time spent to review incoming child abuse reports, and review associated information on the home, prior calls, and prior criminal history.<sup>48</sup> In addition, those surveys asked deputies to estimate the amount of time spent conducting interviews with victims, parents and witnesses, and writing reports for both an unfounded case (15-20 minutes, according to Deputy Megan Deschamps), and a substantiated or inconclusive case (45-50 minutes).<sup>49</sup> Deputy Porter estimated 20 minutes to write the report for an unfounded case and 40 minutes for a substantiated or inconclusive case.<sup>50</sup>

The time survey resulted in overall times ranging from 2.29 hours to 2.71 hours per SCAR investigation.<sup>51</sup> Thus, the 2.65-hour time increment (the claimant’s second time study less the unallowable investigation) fell within that range and was allowed by the Controller.

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<sup>43</sup> Exhibit B, Controller’s Comments on the IRC, page 161; See also Exhibit G, Controller’s Late Comments on the Draft Proposed Decision, page 20 [email from the Controller’s auditor Brejnak to Annette Chinn, which states the following: “The 2<sup>nd</sup> time study was performed contemporaneously and included a proper sample of investigations, however, it did not follow SCO time study guidelines as well. Therefore, further review and employee interviews were needed to verify the time within the time study.”]

<sup>44</sup> Exhibit A, IRC, page 284 [Controller’s Final Audit Report, p. 23].

<sup>45</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 38 [August 19, 2015 email between the claimant’s representative and the Controller’s audit staff].

<sup>46</sup> Exhibit A, IRC, page 284 [Controller’s Final Audit Report, p. 23]; Exhibit B, Controller’s Comments on the IRC, page 16.

<sup>47</sup> Exhibit A, IRC, page 284 [Controller’s Final Audit Report, page 23]; Exhibit B, Controller’s Comments on the IRC, pages 174-179 [Time Survey Questionnaire].

<sup>48</sup> Exhibit B, Controller’s Comments on the IRC, pages 174-179 [Time Survey Questionnaire].

<sup>49</sup> Exhibit B, Controller’s Comments on the IRC, page 176 [Time Survey Questionnaire, Deschamps].

<sup>50</sup> Exhibit B, Controller’s Comments on the IRC, page 179 [Time Survey Questionnaire, Porter].

<sup>51</sup> Exhibit B, Controller’s Comments on the IRC, page 173 [Analysis of Time Survey].

The claimant objected to the exclusion of the single investigation, but also asserted that the average time resulting from the second time study should be increased to add report writing time and some preliminary investigative time, such as checking records for prior reports of abuse or neglect and making phone calls to schedule interviews with witnesses or suspects.<sup>52</sup> The claimant filed amended reimbursement claims, dated July 15, 2015, which sought reimbursement based on an average time increment of 3.66 hours per SCAR investigation.<sup>53</sup> That figure not only included the investigation that the Controller intended to exclude from the sample, but also included an additional thirty minutes of report writing time for 11 of the 14 investigations in which the claimant asserted that report writing had been omitted from the time study.<sup>54</sup> The claimant stated the 30 minute figure was “a conservative amount of time...”<sup>55</sup> and that “an additional 30 mins – 1 hrs on average was spent on this activity based on our first time study & staff interviews.”<sup>56</sup> The claimant also relied on the Controller’s time surveys, which stated 15-20 minutes to prepare a report for an unfounded case, and 45-50 minutes to prepare a report for a substantiated or inconclusive case. The claimant found that the average was closer to 35-37 minutes, and then claimed 30 minutes on the amended claims.<sup>57</sup> It is not apparent from the record, however, that the claimant’s amended time increment of 3.66 hours included the other preliminary investigative time, such as checking records for prior reports of abuse or neglect and making phone calls to schedule interviews with witnesses or suspects.

On March 30, 2016, the Draft Audit Report was issued and maintained the 2.65-hour average time increment.<sup>58</sup> The claimant responded to the Draft Audit Report on April 11, 2016.<sup>59</sup> The claimant argued that although the first time study was not contemporaneous, it contained reliable information from “CAD logs and case files,” and when the second time study was conducted “[b]oth time studies yielded similar results.”<sup>60</sup> The claimant further stated: “however, the second time study did not detail each activity separately and we believe it did not include report writing time which should have added an additional hour per case for a total of 3.67 hours to complete the investigation as mandated and write the report.”<sup>61</sup> The claimant further stated:

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<sup>52</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 37 [email discussion between the claimant’s representatives and the Controller’s audit staff].

<sup>53</sup> Exhibit A, IRC, pages 299-380 [Amended Claim Documentation]; Exhibit B, Controller’s Comments on the IRC, page 169.

<sup>54</sup> Exhibit B, Controller’s Comments on the IRC, page 169.

<sup>55</sup> Exhibit B, Controller’s Comments on the IRC, page 166 [August 17, 2015 email between claimant’s representative and the Controller’s audit staff].

<sup>56</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 25 [August 6, 2015 email between claimant’s representative and the Controller’s audit staff].

<sup>57</sup> Exhibit C, Claimant’s Late Rebuttal Comments, pages 18; 21.

<sup>58</sup> Exhibit A, IRC, page 265 [Final Audit Report, page 4].

<sup>59</sup> Exhibit A, IRC, page 265 [Final Audit Report, page 4].

<sup>60</sup> Exhibit A, IRC, pages 292-293 [Claimant Response to the Draft Audit Report].

<sup>61</sup> Exhibit A, IRC, page 293 [Claimant Response to the Draft Audit Report].

“The City offered to conduct another time study to support their time requested, however the SCO declined to consider this option stating that they believed that the difference in time was due to a disagreement regarding allowable activities, which would not be remedied by conducting another time study.”<sup>62</sup> The claimant went on to cite its disagreement with the scope of activities included in the time study, including reviewing call history and suspect background checks prior to conducting interviews; calling to schedule interviews, especially where a home location requires significant travel time; and inspecting the home of the alleged victim for signs of neglect.<sup>63</sup>

The Final Audit Report, dated May 19, 2016, identifies reductions based on the claimant’s amended reimbursement claims filed July 2015,<sup>64</sup> and indicates that the Controller believed the time study captured all allowable activities, and therefore the Controller rejected the additional report writing time proposed, excluded the unallowable investigation, and maintained the estimated time of 2.65 hours per SCAR investigation in the calculation of costs to conduct an investigation for purposes of preparing a report for DOJ.<sup>65</sup> Of the direct costs claimed, the Controller found that \$2,913,118 is allowable and \$2,043,178 is unallowable. The Controller states that “[t]he portion of the finding relating to the average time increment disputed totals \$1,132,337.”<sup>66</sup>

With respect to the additional preliminary activities asserted by the claimant (but not clearly identified in the amended claims) the Final Audit Report states as follows:

We agree that the deputies perform many additional activities necessary to complete their investigations. However, not all activities within the investigation process are allowable for reimbursement, even when they appear reasonably necessary. We believe that the preliminary investigation activities described above in items 1 and 2 go beyond the scope of the reimbursable component and therefore are unallowable.<sup>67</sup>

## 2. Finding 3, Unallowable Indirect Costs

In Finding 3, the Controller’s audit found that the City claimed unallowable indirect costs, totaling \$509,136. The Controller found that the indirect costs are unallowable because the claimant “inappropriately applied its indirect cost rate to contract service costs.”<sup>68</sup> The Parameters and Guidelines, the Controller explained, allow claimants to either use a 10 percent flat rate, measured against direct salaries and benefits of a local agency’s employees, or prepare

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<sup>62</sup> Exhibit A, IRC, pages 293-294 [Claimant Response to the Draft Audit Report].

<sup>63</sup> Exhibit A, IRC, pages 293-294 [Claimant Response to the Draft Audit Report].

<sup>64</sup> Exhibit A, IRC, pages 259, 266-270 [Final Audit Report, pp. 5-9].

<sup>65</sup> Exhibit A, IRC, pages 284-286 [Final Audit Report, pp. 23-25].

<sup>66</sup> Exhibit B, Controller’s Comments on the IRC, page 15.

<sup>67</sup> Exhibit A, IRC, page 285 [Controller’s Final Audit Report, p. 24].

<sup>68</sup> Exhibit A, IRC, pages 286-287 [Controller’s Final Audit Report, pp. 25-26].

an Indirect Cost Rate Proposal.<sup>69</sup> The claimant here elected to use the 10 percent flat rate, but had no direct salaries and benefits costs because the mandated activities were conducted under contract with the Los Angeles County Sheriff's Department.<sup>70</sup> In other words, none of the claimant's employees were involved in the mandate, and therefore the claimant had no direct salary costs.<sup>71</sup>

To support this conclusion the Controller relies on the language of the Parameters and Guidelines defining indirect costs as "costs that are incurred for a common or joint purpose, benefitting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved."<sup>72</sup> The Parameters and Guidelines also state: "Indirect costs may include both: (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to other departments based on a systematic and rational basis through a cost allocation plan."<sup>73</sup> And finally, the Parameters and Guidelines also limit the use of the 10 percent flat rate, or default rate, to "10% of direct labor, excluding fringe benefits."<sup>74</sup> There is no mention of applying the 10 percent rate to contract costs, or any other direct costs.

The claimant disputed the disallowance of indirect costs, and argued that despite the mandate being performed under contract with the County, the claimant still incurred additional overhead costs both within the contract and outside the contract.<sup>75</sup>

The Controller's finding was unchanged.<sup>76</sup> The Controller notes in its Final Audit Report that the claimant "incorrectly elected to use the option of claiming 10% of direct labor, excluding fringe benefits, to determine the amount of indirect costs...[h]owever, as stated above, the 10% indirect cost rate is to be applied to the amount of direct labor costs [and claimant] did not incur any payroll or direct labor costs."<sup>77</sup> The Controller therefore concludes that, as claimed, the indirect costs are unallowable.<sup>78</sup>

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<sup>69</sup> Exhibit A, IRC, page 279 [Final Audit Report, p. 18].

<sup>70</sup> Exhibit A, IRC, page 279 [Final Audit Report, p. 18].

<sup>71</sup> Exhibit A, IRC, page 287 [Final Audit Report, p. 26].

<sup>72</sup> Exhibit A, IRC, page 287 [Final Audit Report, p. 26 (quoting Parameters and Guidelines, section V.B.)].

<sup>73</sup> Exhibit A, IRC, page 287 [Final Audit Report, p. 26 (quoting Parameters and Guidelines, section V.B.)].

<sup>74</sup> Exhibit A, IRC, page 288 [Final Audit Report, p. 27 (quoting Parameters and Guidelines, section V.B.)].

<sup>75</sup> Exhibit A, IRC, page 288-289 [Final Audit Report, pp. 27-28].

<sup>76</sup> Exhibit A, IRC, page 289 [Final Audit Report, p. 28].

<sup>77</sup> Exhibit A, IRC, page 290 [Final Audit Report, p. 29].

<sup>78</sup> Exhibit A, IRC, page 290 [Final Audit Report, p. 29].

### III. Positions of the Parties

#### A. City of Palmdale

The total amount claimed for fiscal years 1999-2000 through 2012-2013 is \$5,600,497.<sup>79</sup> The total amount reduced was \$2,638,845.<sup>80</sup> The claimant requests reinstatement of \$2,552,314.<sup>81</sup>

The claimant alleges two incorrect reductions within the audit: first, the claimant believes that the Controller's interpretation of the scope of reimbursable activities involved in investigating a report of suspected child abuse or neglect was "excessively restrictive," resulting in adjustments to the average time increment derived from the time study that reduced reimbursement for investigating child abuse and neglect; and second, the claimant asserts that the Controller incorrectly denied indirect costs claimed.

##### 1. Adjustments to the Time Study (Audit Finding 2)

With respect to the scope of investigation-related activities, the claimant asserts that the Controller incorrectly excluded a number of minor tasks or activities the claimant included in its time study. The claimant's response to the Draft Audit Report asserted that "the second time study did not detail each activity separately and we believe it did not include report writing time which should have added an additional hour per case for a total of 3.67 hours to complete the investigation as mandated and write the report."<sup>82</sup> The claimant further stated that it offered to conduct a third time study, which the Controller declined, because, the claimant asserts, "they [the Controller's audit staff] believed that the difference in time was due to a disagreement regarding allowing activities, which would not be remedied by conducting another time study."<sup>83</sup> The claimant further stated that "the SCO and the City disagree on the eligibility of certain activities the Deputy performs in the course of their preliminary investigation to determine if the case is Founded, Unfounded, or Inconclusive as mandated."<sup>84</sup> Specifically, the claimant requested 15 minutes per case to "review prior call history," and sometimes speak to other child welfare agencies before going to conduct interviews; 40 minutes to make phone calls to schedule interviews; and 6 minutes to inspect the home of the alleged victim.<sup>85</sup>

In its IRC narrative, the claimant identifies five investigative steps, including preliminary investigative activities, that it maintains are reimbursable and should be included in the average time study increments:

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<sup>79</sup> Exhibit A, IRC, page 259 [Controller's Final Audit Report Cover Letter].

<sup>80</sup> Exhibit A, IRC, page 259 [Controller's Final Audit Report Cover Letter].

<sup>81</sup> Exhibit A, IRC, page 1. Based on the findings that are not disputed, the Controller maintains that the actual dollar amount in dispute is \$1,132,337 in direct costs and \$509,136 in indirect costs. (Exhibit B, Controller's Comments on the IRC, pp. 15; 22.)

<sup>82</sup> Exhibit A, IRC, page 281 [Final Audit Report, p. 20].

<sup>83</sup> Exhibit A, IRC, page 282 [Final Audit Report, p. 21].

<sup>84</sup> Exhibit A, IRC, page 282 [Final Audit Report, p. 21].

<sup>85</sup> Exhibit A, IRC, pages 282-283 [Final Audit Report, pp. 21-22].

- 1) Review preliminary documents and materials to determine if interviews are necessary. This may include checking to see if a report was already written (duplication), call CPS or reporting agency to obtain more details of the case, checking prior history, and other considerations.  
(SCO is only allowing time to review the SCAR)
- 2) Identify involved parties
- 3) Schedule and set up interviews via phone and/or email when needed
- 4) Travel to meet with parties involved in the investigation
- 5) Inspection of home (in instances related to allegations of neglect) to determine living conditions – food, running water, safe living conditions, etc.<sup>86</sup>

The claimant further argues, in its late rebuttal comments, that the total average time for investigations resulting from the time study does not accurately reflect all the required activities. The claimant asserts that report writing was not fairly reflected in the Controller’s calculation of allowable time, and that longer, outlier investigative cases should not be excluded from the time study.<sup>87</sup> Further, the claimant asserts that its investigation time study was derived primarily from officers’ on-scene time, which, according to the claimant, “is in fact a conservative estimate of actual time spent to conduct an investigation because this time wouldn’t have any additional follow up activities that may have been required such as in the instances when not all the parties were present at the time of the officer’s arrival.”<sup>88</sup> The claimant asserts that “[i]t is common that the deputy must attempt to contact other parties after the initial call for service.”<sup>89</sup>

In response to the Draft Proposed Decision, the claimant filed additional copies of its time study documentation, with additional notations, and new declarations from the claimant representative and from the detective who compiled the time study documentation.<sup>90</sup> Detective Reddy’s declaration states that she is the employee who compiled the time study information, she was never interviewed by the Controller’s audit staff, and therefore the Controller’s conclusions that report writing time was already included in the time study and that the single outlier investigation included unallowable activities and should be struck from the time study, are not

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<sup>86</sup> Exhibit A, IRC, page 3 [As noted, the Controller agrees that inspecting the home is a reimbursable activity, but maintains that this activity is included in the time study. (Exhibit A, IRC, page 285 (Final Audit Report, p. 24))].

<sup>87</sup> Exhibit C, Claimant’s Late Rebuttal Comments, pages 1-2.

<sup>88</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 2.

<sup>89</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 2.

<sup>90</sup> Exhibit F, Claimant’s Comments on the Draft Proposed Decision, pages 5-7 [Declaration of Detective Vanessa Reddy and Time Study documents]; 19-20 [Declaration of Annette Chinn, claimant representative].

supported by the record.<sup>91</sup> The declaration of Detective Reddy, in particular, explains the reason why report writing was not included in the time study:

I tracked the actual time for these activities during the month of September, 2013 but inadvertently did not include time for report writing for all of the cases. This was because I was not clear on the exact parameters and the cases that I did not include report writing time for were for unfounded cases of child abuse. These cases typically end with the numbers “419” at the end of the report number. All of these unfounded cases also had a written internal report prepared, however, because those reports were not sent to the District Attorney’s Office I did not input report writing time on the logs.

It is my believe [sic] that to fairly represent actual time spent on this report writing activity, 15-20 minutes of time should be added to those cases (see attached log with an asterisk) which did not include time for report writing.

I also wanted to note that I was never interviewed by anyone from the State Controller’s Office about this time log or any other issues pertaining to this Child Abuse program or this audit.<sup>92</sup>

Thus, the claimant requests that the time increment for the investigation activities be increased to reflect report writing for unfounded cases, the time reflected by the single outlier investigation, and the preliminary investigative activities.

On September 27, 2018, the claimant filed a response to the Controller’s late comments on the Draft Proposed Decision.<sup>93</sup> The claimant continues to assert in its response that the time increment for the investigation activities needs to be increased to reflect report writing for unfounded cases. However, the claimant is no longer disputing the Controller’s exclusion from the claimant’s time study of a single investigation that included unallowable activities occurring subsequent to the determination whether the case was substantiated, inconclusive, or unfounded. The claimant states the following:

Due to the length of time that has transpired since the original preparation of the time logs (2013) and the difficulty in remembering exact details of specific cases, the City has decided not to pursue this issue.<sup>94</sup>

The claimant also concurs with the conclusion in the Draft Proposed Decision that the Commission does not have jurisdiction to determine whether certain preliminary

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<sup>91</sup> Exhibit F, Claimant’s Comments on the Draft Proposed Decision, pages 5-7 [Declaration of Detective Vanessa Reddy and Time Study documents]; 19-20 [Declaration of Annette Chinn, claimant representative].

<sup>92</sup> Exhibit F, Claimant’s Comments on the Draft Proposed Decision, page 4 [Declaration of Detective Vanessa Reddy].

<sup>93</sup> Exhibit H, Claimant’s Response to the Controller’s Late Comments on the Draft Proposed Decision.

<sup>94</sup> Exhibit H, Claimant’s Response to the Controller’s Late Comments on the Draft Proposed Decision, page 3.

investigative activities should be reimbursable since the Controller did not reduce any costs for preliminary investigative activities.<sup>95</sup>

## 2. Reduction of Indirect Costs (Audit Finding 3)

With respect to the disallowance of indirect costs, the claimant argues that the Controller incorrectly disallowed “the default 10% Indirect Cost Rate Proposal or overhead costs to the City’s claim for reimbursement allowed by the claiming instructions.”<sup>96</sup> The Controller determined that because the claimant implemented the mandate by contracting with the Los Angeles County Sheriff’s Office, the claimant was not claiming direct labor costs, and could not claim indirect costs related to those activities and costs.<sup>97</sup> Further, the Controller opined that “there is already adequate overhead included in the contracted county billed hourly rates...”<sup>98</sup>

The claimant disagrees with the Controller’s conclusion, and asserts that it did claim direct salaries and benefits, and should be entitled to indirect costs.<sup>99</sup> In addition, the claimant argues that it had additional overhead costs both within its contract with the County and outside of the contract. In this respect the claimant characterized administrative and clerical support staff as “overhead,” and states that “[e]ach fiscal year, the City purchased additional supplemental overhead positions through the contract, including Station Clerks, Administrative and Motor Sergeants (in addition to the Sergeants who were already built into the standard billing rates).”<sup>100</sup> The claimant further states “[i]n some years the cities may be able to afford more direct staff and more overhead items and other years they cannot.”<sup>101</sup> The claimant asserts that this may affect response times and service quality for the community.<sup>102</sup> The claimant states, without citing specific support, that “[w]hen the actual overhead rates were calculated, they were found to range between 6%-13%.”<sup>103</sup> The claimant therefore concludes that the 10 percent “default rates is [*sic*] a reasonable approximation of actual overhead costs incurred by the city.”<sup>104</sup>

With respect to “overhead incurred outside of the contract,” the claimant states as follows:

In addition to the County billed overhead, the City also contributed additional funds to support the law enforcement services contract. For example, there are

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<sup>95</sup> Exhibit H, Claimant’s Response to the Controller’s Late Comments on the Draft Proposed Decision, page 3.

<sup>96</sup> Exhibit A, IRC, page 4.

<sup>97</sup> Exhibit A, IRC, page 4.

<sup>98</sup> Exhibit A, IRC, page 4.

<sup>99</sup> Exhibit A, IRC, page 288 [Final Audit Report, p. 27]; Exhibit H, Claimant’s Response to the Controller’s Late Comments on the Draft Proposed Decision, pages 1-2.

<sup>100</sup> Exhibit A, IRC, page 288 [Final Audit Report, p. 27].

<sup>101</sup> Exhibit A, IRC, page 288 [Final Audit Report, p. 27].

<sup>102</sup> Exhibit A, IRC, page 288 [Final Audit Report, p. 27].

<sup>103</sup> Exhibit A, IRC, page 288 [Final Audit Report, p. 27].

<sup>104</sup> Exhibit A, IRC, page 288 [Final Audit Report, p. 27].

City wide overhead costs documented in their FY 13-14 Cost Allocation Plan (\$1,001,171) including administrative time from the City Attorney, City Manager's Office, Finance, Human Resources, and the Public Safety Department.

Then there are additional city costs incurred to contract the Palmdale Sheriff's Station in 2004 including the donation of 11 acres of land estimated (estimated value of \$1.3 million) as well as for city provided infrastructure improvements of (approximately \$1.01 million).

All these are valid examples of additional overhead costs not captured by the LA Sheriff's Deputy billing rate and denied for reimbursement in the SCO audit. The city provided many examples and documents supporting that it is actually incurring overhead costs over and above that which was included in the Deputy's standard billing rate. These types of city wide overhead items are eligible for reimbursement under the instruction and OMB A-87 and should be allowed for inclusion in our claims. (See attached examples).<sup>105</sup>

In its late rebuttal comments, the claimant acknowledges that "most overhead was already included in the Deputies['] hourly rates billed, however the record shows that there were additional overhead charges not included in those billed hourly rates."<sup>106</sup> The claimant argues that "State Mandate statutes require the reimbursement of actual costs incurred to comply with the mandated program and the city believes it has shown that additional overhead costs were incurred and therefore were incorrectly reduced by the SCO."<sup>107</sup>

In response to the Draft Proposed Decision, the claimant provides additional documentation for fiscal years 2006-2007 through 2012-2013, which claimant asserts support its claim for indirect costs. The proposed indirect cost rates for those years range from 5.4 to 11.3 percent, while rates for the same years submitted in earlier documentation ranged from 11.9 to 15.4 percent.<sup>108</sup> The claimant continues to assert that "[b]ased on claiming instructions and Federal guidelines, I believe these overhead costs are eligible for inclusion in the ICRP and are actual ICRP costs which the City is entitled to."<sup>109</sup>

## **B. State Controller's Office**

The Controller urges the Commission to deny this IRC. The Controller states that of the claimant's total reimbursement claims for \$5,600,497 for fiscal years 1999-2000 through 2012-2013, \$2,638,845 "is unallowable because the city overstated the number of suspected child abuse reports (SCARs) investigated, overstated time increments for each fiscal year, and claimed

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<sup>105</sup> Exhibit A, IRC, page 289 [Final Audit Report, p. 28].

<sup>106</sup> Exhibit C, Claimant's Late Rebuttal Comments, page 3.

<sup>107</sup> Exhibit C, Claimant's Late Rebuttal Comments, page 3.

<sup>108</sup> See Exhibit F, Claimant's Comments on the Draft Proposed Decision, pages 49-70; Exhibit A, IRC, pages 110-131.

<sup>109</sup> Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 19 [Declaration of Annette Chinn, claimant representative]; See also, Exhibit H, Claimant's Response to the Controller's Late Comments on the Draft Proposed Decision, pages 1-2.

ineligible indirect costs.”<sup>110</sup> The Controller goes on: “The city does not dispute the portion of the audit findings related to the overstated SCAR investigations claimed for the audit period, nor the misstated \$1,013 in costs claimed within the Forward Reports to DOJ component activity in FY 2001-02.”<sup>111</sup> The remaining disputed reductions for the overstated time increments and ineligible indirect costs, according to the Controller, is limited to \$1,132,337.<sup>112</sup>

The Parameters and Guidelines provide reimbursement to complete an investigation to determine whether a report of suspected child abuse or neglect is unfounded, substantiated, or inconclusive, for purposes of preparing and submitting a required form to DOJ.<sup>113</sup> The Controller acknowledges that “[t]his activity includes reviewing the initial SCAR (Form SS 8572), conducting initial interviews with involved parties, and making a report of the findings of those interviews.”<sup>114</sup> The Controller states that the Commission’s Decision on the Parameters and Guidelines “clarified multiple times...that reimbursement is limited to the activities noted.”<sup>115</sup> Further, the Controller notes that the claimant contracts with the Los Angeles County Sheriff’s Department to perform the law enforcement-related activities of the mandate, including investigations of suspected child abuse. Accordingly, the Controller determined that essentially all salaries and benefits claimed for the audit period should more properly be classified as contract costs.<sup>116</sup>

The Controller explains that the claimant’s contract costs were claimed based on two time studies, the first of which the Controller found “inappropriate to support actual costs, as the study was not performed contemporaneously, was performed by staff who did not complete the actual investigation activities claimed, used time estimates, and used a sample of cases that were not representative of the total population of SCAR investigations.”<sup>117</sup> The second time study the Controller determined was appropriate, “with the exception of the one investigation that included activities occurring after the SCAR was determined to be a substantiated case of child abuse.”<sup>118</sup> The Controller therefore accepted and applied the second time study, with that case excised from the results. The Controller further verified the reasonableness of its results by conducting interviews and a time survey.<sup>119</sup>

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<sup>110</sup> Exhibit B, Controller’s Late Comments on the IRC, page 8.

<sup>111</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>112</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>113</sup> Exhibit I, Statement of Decision and Parameters and Guidelines, *Interagency Child Abuse and Neglect Investigation Reports*, 00-TC-22, pages 25-34.

<sup>114</sup> Exhibit B, Controller’s Comments on the IRC, page 16.

<sup>115</sup> Exhibit B, Controller’s Comments on the IRC, page 16.

<sup>116</sup> Exhibit B, Controller’s Comments on the IRC, page 16.

<sup>117</sup> Exhibit B, Controller’s Comments on the IRC, page 16.

<sup>118</sup> Exhibit B, Controller’s Comments on the IRC, page 16.

<sup>119</sup> Exhibit B, Controller’s Comments on the IRC, page 16.

The claimant, during audit fieldwork, and in this IRC, has sought to augment the results of the time study, and increase the average time increment resulting from the time study, alleging that report writing time, and three preliminary investigative activities, should have been included. The Controller maintains that report writing time and time to inspect the home and living conditions of the alleged victim are included in the results of the time study, and the other activities raised are beyond the scope of the mandate.<sup>120</sup>

With respect to the disallowance of indirect costs, the Controller maintains that the claimant inappropriately applied the 10 percent indirect cost rate to contract service costs.<sup>121</sup> The Controller explains that because the claimant did not incur any direct labor costs for mandated activities, indirect costs are inappropriate; rather, any overhead or indirect costs were included within the contract rates.<sup>122</sup> The Controller also posits that the fact that overhead costs were built into the contract rate was confirmed by the Los Angeles County Sheriff's Department's Contract Law Enforcement Bureau.<sup>123</sup> The Controller further notes that the Parameters and Guidelines allow claimants the option of claiming indirect costs based on 10 percent of direct labor, excluding benefits, or, preparing an indirect cost rate proposal if the 10 percent rate does not seem sufficient.<sup>124</sup> Here, the claimant chose to use the 10 percent rate, but had no direct labor costs.<sup>125</sup> The Controller states that the claimant created "sample Indirect Cost Rate Proposals" for fiscal years 2006-2007 through 2012-2013, but those sample ICRPs were submitted to demonstrate that the 10 percent flat rate was reasonable, and in fact conservative; the claimant only seeks "restoration of the 10% rate and not the indirect cost rates based on the proposed ICRPs."<sup>126</sup>

In comments on the Draft Proposed Decision filed August 8, 2018, the Controller stated that it agrees with the proposed findings to deny the IRC.<sup>127</sup> The Controller filed additional comments on the Draft Proposed Decision and supporting documentation, which were filed late on August 31, 2018, to rebut the claimant's assertion that Detective Reddy, the officer who compiled the second time study, was never interviewed by anyone from the State Controller's Office about the time log or any other issues pertaining to the audit.<sup>128</sup>

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<sup>120</sup> Exhibit A, IRC, page 285 [Controller's Final Audit Report, p. 24].

<sup>121</sup> Exhibit B, Controller's Comments on the IRC, page 22.

<sup>122</sup> Exhibit B, Controller's Comments on the IRC, page 22.

<sup>123</sup> Exhibit B, Controller's Comments on the IRC, page 24.

<sup>124</sup> Exhibit B, Controller's Comments on the IRC, page 24.

<sup>125</sup> Exhibit B, Controller's Comments on the IRC, page 24.

<sup>126</sup> Exhibit B, Controller's Comments on the IRC, page 24.

<sup>127</sup> Exhibit E, Controller's Comments on the Draft Proposed Decision.

<sup>128</sup> Exhibit G, Controller's Late Comments on the Draft Proposed Decision.

#### 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 if the Controller determines that the claim 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 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>129</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>130</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>131</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 judgement 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>132</sup>

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<sup>129</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>130</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>131</sup> *Johnson v. Sonoma County Agricultural Preservation and Open Space Dist.* (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>132</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

The Commission must review the Controller's audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>133</sup> In addition, sections 1185.1(f)(3) and 1185.2(d) and (e) 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>134</sup>

**A. The Claimant Timely Filed this IRC Within Three Years from the Date Claimant First Received from the Controller a Final State Audit Report, Letter, or Other Written Notice of Adjustment to a Reimbursement Claim, Which Complies with Government Code Section 17558.5(c).**

Government Code section 17561 provides that the state shall reimburse local government for all costs mandated by the state. However, the Controller is authorized by section 17561 to audit those claims to verify the amount of mandated costs, and reduce any claim that the Controller determines is excessive or unreasonable. Government Code section 17551 in turn provides that the Commission shall hear and decide upon a claim by a local agency or school district that the Controller has incorrectly reduced payments pursuant to section 17561. California Code of Regulations, title 2, section 1185.1 provides for the period of limitation in which an IRC must be timely filed:

All incorrect reduction claims shall be filed with the Commission no later than three years following the date a claimant first receives from the Office of State Controller a final state audit report, letter, or other written notice of adjustment to a reimbursement claim, which complies with Government Code section 17558.5(c) by specifying the claim components adjusted, the amounts adjusted, interest charges on claims adjusted to reduce the overall reimbursement to the claimant, and the reason for the adjustment. The filing shall be returned to the claimant for lack of jurisdiction if this requirement is not met.<sup>135</sup>

Here, the Final Audit Report is dated May 19, 2016.<sup>136</sup> The IRC was filed with the Commission on November 7, 2017.<sup>137</sup> Less than three years having elapsed between the issuance of the audit report and the filing of the IRC, this IRC was filed within the period prescribed in Code of Regulations, title 2, section 1185.1.

**B. The Commission Does Not Have Jurisdiction to Determine Whether Other Preliminary Investigative Activities Were Accounted for in the Time Study Because There Has Been No Reduction Relating to Preliminary Investigative Activities.**

The claimant's IRC argues that additional time should be added to the 2.65 hours per SCAR investigation that the Controller found to be allowable based on the second time study, to

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<sup>133</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>134</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

<sup>135</sup> California Code of Regulations, title 2, section 1185.1(c) (Register 2016, No. 38).

<sup>136</sup> Exhibit A, IRC, page 259 [Controller's Final Audit Report].

<sup>137</sup> Exhibit A, IRC, page 1.

account for preliminary investigative activities, such as making calls to schedule interviews and reviewing prior case history.<sup>138</sup> The revised time study documentation supporting the amended claims, however, does not specifically identify additional time for preliminary investigative activities.<sup>139</sup> In addition, the evidence in the record does not show that at any point these preliminary activities were ever specifically claimed, or specifically disallowed, either in the original time study and reimbursement claims, or in the amended reimbursement claims filed July 15, 2015.

As indicated in the Final Audit Report, the only reductions taken by the Controller pertain to the exclusion of the one investigation that went beyond the scope of the mandate, and the rejection of the additional report writing time claimed. Accordingly, while the claimant and the Controller have opined on the scope of reimbursement with respect to preliminary investigative activities,<sup>140</sup> there has been no reduction relating to preliminary investigative activities.

Pursuant to Government Code section 17551(d), the Commission only has jurisdiction over *reductions* taken in the context of an audit. Therefore, the Commission does not have jurisdiction to consider these issues in the context of an IRC.<sup>141</sup>

**C. The Controller’s Reduction of Costs Based on the Exclusion of One Investigation from the Claimant’s Time Study that Included Activities Beyond the Scope of the Mandate Is Correct as a Matter of Law, and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

As noted above, the initial claiming period for this mandated program includes fiscal years 1999-2000 through 2012-2013, and initial claims, in accordance with the claiming instructions, were required to be filed no later than July 15, 2014.<sup>142</sup> The Controller did not expect the claimant to have sufficient contemporaneous source documentation extending back to the beginning of the audit period, and therefore permitted the claimant to perform a time study.<sup>143</sup> The claimant performed two time studies, and submitted its initial reimbursement claim on or about

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<sup>138</sup> Exhibit A, IRC, pages 3 and 285 [Final Audit Report, p. 24].

<sup>139</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 15.

<sup>140</sup> See Exhibit A, IRC, pages 285-286 [Final Audit Report, pp. 24-25].

<sup>141</sup> The claimant now agrees with this legal conclusion. (Exhibit H, Claimant’s Response to the Controller’s Late Comments on the Draft Proposed Decision, page 3.)

<sup>142</sup> Exhibit A, IRC, page 229 [initial claiming instructions].

<sup>143</sup> Any attempt to enforce the contemporaneous source document rule retroactively would raise due process implications. (*Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 803-807; *Department of Health Services v. Fontes* (1985) 169 Cal.App.3d 301, 304-305; *Tapia v. Superior Court* (1991) 53 Cal.3d 282; 287-292; *Murphy v. City of Alameda* (1993) 11 Cal.App.4th 906, 911-912.)

July 3, 2014, based on an average time increment calculated from both time studies of 3.67 hours.<sup>144</sup>

As indicated in the Background, the first of two time studies was not contemporaneous with the performance of the activities, and was therefore rejected, but the Controller accepted the claimant's second time study, except that it excluded an investigation "with unallowable hours that accounted for activities following the determination of a substantiated status of child abuse."<sup>145</sup> The Controller recalculated without the unallowable investigation, and found an average time increment of 2.65 hours per SCAR investigation.<sup>146</sup> The Controller thus reduced reimbursement based on excluding from the claimant's time study a single investigation that included unallowable activities occurring subsequent to the determination whether the case was substantiated, inconclusive, or unfounded. That investigation was referred to the Los Angeles County Sheriff's Department Special Victims Unit, and according to interviews with the deputies performing the mandate, including Detective Reddy, the investigation included further activities after that referral to DOJ was made.<sup>147</sup> That investigation also required substantially more time than the others sampled in the time study (660 minutes, as compared to approximately 159 minutes, on average, throughout the remaining sample).<sup>148</sup> The Controller concluded "[t]he average time per case, using the second time study results (less the unallowable hours of one case), totaled 2.65 hours."<sup>149</sup> To verify this time increment, the Controller conducted a time survey with the deputies, which resulted in a range of 2.29 to 2.71 hours per SCAR investigation. Since the 2.65 hours resulting from the time study (less the unallowable hours of one case) fell within that range, the Controller determined that the time study result was reasonable, and accepted the 2.65-hour average time increment.<sup>150</sup>

The claimant argues that even though that investigation was an outlier in terms of the time spent by deputies performing the mandate, it should be included in the time study sample because it reflects the fact that some cases require more time and resources than others:<sup>151</sup>

[T]he longest case in [the claimant's] 2013 [time study] should not have been removed from computation of the average time per case. These types of more

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<sup>144</sup> Exhibit B, Controller's Comments on the IRC, page 30; Exhibit A, IRC, page 278 [Final Audit Report, p. 17].

<sup>145</sup> Exhibit A, IRC, page 284 [Controller's Final Audit Report, p. 23].

<sup>146</sup> Exhibit B, Controller's Comments on the IRC, page 171 [Analysis of Time Study #2]. See also, Exhibit C, Claimant's Late Rebuttal Comments, page 26 [August 4, 2015 Email from Douglas Brejnak to Annette Chinn].

<sup>147</sup> Exhibit A, IRC, page 284 [Controller's Final Audit Report, page 23]; Exhibit C, Claimant's Late Rebuttal Comments, page 38 [email discussion between the claimant's representatives and the Controller's audit staff].

<sup>148</sup> Exhibit B, Controller's Comments on the IRC, page 171.

<sup>149</sup> Exhibit A, IRC, page 284 [Controller's Final Audit Report, p. 23].

<sup>150</sup> Exhibit A, IRC, page 284 [Controller's Final Audit Report, p. 23].

<sup>151</sup> Exhibit C, Claimant's Late Rebuttal Comments, page 34.

involved cases do occur and their lengthier investigation time should also be factored into the average time per case. The time logs accurately reflect actual time spent by station Deputies on the preliminary investigative process to determine if the case was founded, unfounded, or inconclusive and to prepare the written report.<sup>152</sup>

The claimant continues to stress, in its comments on the Draft Proposed Decision, that this investigation should not have been removed from the time study, and that the Controller “would not have been able to make this determination *without interviewing the employee who actually worked on that investigation...*”<sup>153</sup>

The Controller disputes that it did not interview the relevant employees.<sup>154</sup> In its additional comments on the Draft Proposed Decision, which were filed late, the Controller states that it conducted meetings during the initial week of fieldwork, between April 7 and 9, 2015, at the Palmdale Station. The Controller states that Detective Vanessa Reddy “participated in that meeting and answered questions asked of her by the SCO auditor concerning the time study and general SCAR program activities;” and that the “SCO auditor summarized the meetings, including the Detective’s statements, in working papers (Tab 3).”<sup>155</sup> The working papers state, in relevant part, the following:

The second time study was completed by the sheriff’s deputy assigned to investigate SCARs (8572). The time study was completely contemporaneously during September 2013. The deputy recorded her time for each case that was opened during the month, regardless if the case was substantiated, unfounded, or inconclusive. The deputy (Vanessa Reddy) is no longer working the SCAR cases but was available to come by the station to discuss her time study.

Unlike the 1<sup>st</sup> time study, the deputy did not separate the time into different categories. Only a total for each case was recorded within this time study. The time study documented which activities were performed but not the time splits. This time study was not used within the city’s claim. During discussions with Vanessa Reddy, she stated the entire time of her work on the case was included within the time study. For substantiated cases, this would include time after the Special Victims Unit was contacted which may include ineligible activities.<sup>156</sup>

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<sup>152</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 2.

<sup>153</sup> Exhibit F, Claimant’s Comments on the Draft Proposed Decision, page 20 [Declaration of Annette Chinn].

<sup>154</sup> Exhibit G, Controller’s Late Comments on the Draft Proposed Decision, pages 8-17.

<sup>155</sup> Exhibit G, Controller’s Late Comments on the Draft Proposed Decision, page 8.

<sup>156</sup> Exhibit G, Controller’s Late Comments on the Draft Proposed Decision, page 11 (Emphasis in original); see also page 18 [“We interviewed staff who prepared the time study and found that one case within the study included time outside of allowable activities.”].

The Commission finds that the reduction of costs based on the exclusion of one investigation from claimant's time study is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

The scope of the reimbursable activity relating to investigations of suspected child abuse or neglect looms large in the Commission's consideration and analysis of the Parameters and Guidelines, and it remains an issue in this IRC. The Commission's Decision adopting the Parameters and Guidelines reasoned that the requirement to investigate reports of suspected child abuse or neglect derives from the reporting requirement to DOJ; it is not a reimbursable state mandate to investigate reports of child abuse or neglect for purposes of prosecuting crimes.<sup>157</sup> Accordingly, the Parameters and Guidelines place the "Complete an Investigation" activity under the heading, "Reporting to the Department of Justice."<sup>158</sup>

The Decision also analyzed at length the idea that the express goal of CANRA is to protect children from abuse or neglect, not to investigate and prosecute criminal child abuse, sexual assault, neglect, or other crimes.<sup>159</sup> And since the other agencies with similar reporting responsibilities under CANRA do not have law enforcement or criminal prosecution authority, the Parameters and Guidelines limited reimbursement for this mandate to an investigation similar in scope to one conducted by another child welfare agency, and which is conducted for purposes of reporting to DOJ when suspected child abuse is substantiated or inconclusive.<sup>160</sup> The Commission made that determination, in part, because at some point an investigation of suspected child abuse conducted by a law enforcement agency turns from an investigation to determine whether a report is substantiated, inconclusive, or unfounded, to an investigation for purposes of criminal prosecution:

Therefore, because in-person interviews and writing a report of the findings are the last step taken by law enforcement before determining whether to proceed with a criminal investigation or close the investigation, and the last step that county welfare departments take before determining whether to forward the report to DOJ and possibly refer the matter to law enforcement, that degree of investigative effort must be the last step that is necessary to comply with the mandate. All further investigative activities are not reimbursable under the mandate, because, in a very practical sense, once evidence is being gathered for criminal prosecution, the determination that a report is "not unfounded" has been

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<sup>157</sup> Exhibit I, Statement of Decision and Parameters and Guidelines, *Interagency Child Abuse and Neglect Investigation Reports*, 00-TC-22, page 25.

<sup>158</sup> Exhibit A, IRC, pages 240-241 [Parameters and Guidelines, pp. 8-9].

<sup>159</sup> Exhibit I, Statement of Decision on Parameters and Guidelines, *Interagency Child Abuse and Neglect Investigation Reports*, 00-TC-22, page 34.

<sup>160</sup> Exhibit I, Statement of Decision on Parameters and Guidelines, *Interagency Child Abuse and Neglect Investigation Reports*, 00-TC-22, pages 28-38.

made, and the investigative mandate approved in the test claim statement of decision has been satisfied.<sup>161</sup>

The Parameters and Guidelines also include an express disclaimer that reimbursement is not required for: “Investigative activities undertaken *subsequent to the determination* whether a report of suspected child abuse is substantiated, inconclusive, or unfounded...including the collection of physical evidence, the referral to a child abuse investigator, and the conduct of follow-up interviews.”<sup>162</sup>

Here, the Controller determined that one of the 14 investigations sampled for the time study included activities that were “subsequent to the determination” that the report of child abuse was not unfounded. In other words, referral to SVU detectives suggested that the case in question was at minimum not unfounded, and therefore a report to DOJ was required. The evidence in the record shows that this determination was based on conversations with the deputies at the Palmdale station.<sup>163</sup> Following those discussions, the Controller determined correctly as a matter of law that any further investigation subsequent to that determination is beyond the scope of the mandate, and in accordance with the Parameters and Guidelines. Therefore, the Controller excluded that investigation from the sample used for the time study, and recalculated the average time increment based on the other 13 investigations sampled. Then, as noted above, the Controller verified the reasonableness of the time study results after removing that case from the sample, by conducting a time survey, and the 2.65-hour average time increment fell squarely within the results of the time survey.<sup>164</sup>

The claimant’s argument that the 660 minute case should have been included in the sample because “[t]hese types of more involved cases do occur and their lengthier investigation time should also be factored into the average time per case,”<sup>165</sup> ignores the fact that the case was not excluded because of its length, but because the Controller found that the case exceeded the scope of the mandate, based on discussions with the officers performing the mandate.

The claimant’s most recent comments no longer dispute this conclusion.<sup>166</sup>

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<sup>161</sup> Exhibit I, Statement of Decision on Parameters and Guidelines, *Interagency Child Abuse and Neglect Investigation Reports*, 00-TC-22, page 38.

<sup>162</sup> Exhibit A, IRC, pages 240-241 [Parameters and Guidelines, pp. 8-9].

<sup>163</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 38 [ The Controller’s audit staff states in an email to the claimant representative that “we discussed the 660 minute case with Detective Reddy.” The Controller states “[i]t appeared that ineligible activities performed after SVU was contacted were included in the time, which lead to the decision to remove the case from the average time calculation.”]; Exhibit G, Controller’s Late Comments on the Draft Proposed Decision, page 11.

<sup>164</sup> Exhibit A, IRC, page 284 [Final Audit Report, p. 23].

<sup>165</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 2.

<sup>166</sup> Exhibit H, Claimant’s Response to the Controller’s Late Comments on the Draft Proposed Decision, page 3.

Accordingly, the Controller's exclusion of one sample investigation that included unallowable activities from the time study is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

**D. The Controller's Rejection of Claimant's Proposal to Add More Time to Capture Report Writing Time for Unfounded Cases Claimed To Be Omitted from the Allowed Time, Is Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

As indicated in the Background, the claimant filed amended reimbursement claims on or about July 15, 2015, based on a 3.66-hour average time increment per investigation.<sup>167</sup> The 3.66 hours included not only the investigation that the Controller had determined to remove, but also an additional thirty minutes of report writing time for 11 of the 14 investigations in which the claimant asserted that report writing had been omitted from the second time study.<sup>168</sup> During the audit, the claimant's representative stated in an email to Controller staff: "I added a conservative amount of time (30 minutes) for every case [in] the time study that didn't indicate that report writing was included in the time."<sup>169</sup>

The Controller rejected the additional time for report writing, and in the Final Audit Report maintained its original finding that a 2.65-hour average time increment per SCAR investigation was allowable from the claimant's time study. The Controller states that preparing a written report "for every case" is included in that average time. Report writing for every case investigated was one of the four activities clearly and expressly identified in the time study documentation to support the reimbursement claims, and "was in fact recorded by the deputies in a number of investigations within the time study."<sup>170</sup> The Final Audit Report states the following:

The second time study recorded time spent performing four activities. It did not separately identify the time for each activity. The time study noted total hours per case and listed which activities were performed for each case. For each investigation included in the time study, the deputies would mark which of the following four activities were performed:

1. Initial response to begin documentation of case and to contact County Welfare.
2. Complete an investigation to determine whether a report is unfounded, substantiated, or inconclusive.

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<sup>167</sup> Exhibit A, IRC, pages 299-380 [Amended Claim Documentation]; Exhibit B, Controller's Comments on the IRC, page 169.

<sup>168</sup> Exhibit B, Controller's Comments on the IRC, page 169.

<sup>169</sup> Exhibit B, Controller's Comments on the IRC, page 166 [August 17, 2015 Email from claimant representative Annette Chinn to Controller's audit staff Douglas Brejnak].

<sup>170</sup> Exhibit A, IRC, page 285 [Final Audit Report, page 24 (emphasis added)].

3. Prepare a written report for every case investigated of known or suspected child abuse.
4. Review and approval of report.<sup>171</sup>

The time study summary documentation also states: “NOTE that this year ALL activities – ranging from investigation, report writing and review and approval were included in ONE time entry.”<sup>172</sup> The Controller also maintains that the time *survey* it conducted to check the reasonableness of the claimant’s time study captured report writing time: specifically, the time survey asked deputies to estimate the amount of time required to write a report for an unfounded investigation, and the amount of time to write a report for a substantiated or inconclusive investigation.<sup>173</sup> Thus, the Controller did not add 30 minutes for report writing to the average time increment per SCAR investigation because the time was already reflected in the time allowed.

The parties do not dispute that report writing is a reimbursable component of the investigation. The dispute, however, is whether the Controller’s audit decision to reject the claimant’s proposal to add thirty minutes to the average time increment for report writing is arbitrary, capricious, or entirely lacking in evidentiary support. Under this standard, and when reviewing the audit findings of the Controller, the Commission is required to defer to the Controller’s authority and presumed expertise.<sup>174</sup> The Commission may not reweigh the evidence or substitute its judgement for that of the Controller. The Commission’s review is limited to ensuring that the Controller has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, and the choices made.<sup>175</sup>

The facts and documentation regarding this issue, and the various arguments raised at different times during the audit and within the IRC are complex, and at times inconsistent. Based on the evidence in the record, however, the Commission finds that the Controller’s rejection of the claimant’s proposal to add more time to complete an investigation to capture report writing time claimed to be omitted from the allowed time is not arbitrary, capricious, or entirely lacking in evidentiary support.

The record shows that the claimant’s second time study, conducted in September 2013, was based on four activities, which expressly included report writing for every case investigated as

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<sup>171</sup> Exhibit A, IRC, page 284-285 [Final Audit Report, pages 23-24]; See also Exhibit F, Claimant’s Comments on the Draft Proposed Decision, pages 4 and 7, confirming the four stated activities included in the time study.

<sup>172</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 15.

<sup>173</sup> Exhibit A, IRC, page 284 [Final Audit Report, p. 23]; Exhibit B, Controller’s Comments on the IRC, pages 174-179 [Time Survey Questionnaire].

<sup>174</sup> See generally, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837.

<sup>175</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

activity “3.”<sup>176</sup> When the claimant filed its amended claims, and informed the auditor via email of the additional 30 minutes of report writing time it sought, the claimant was relying primarily on the *absence* of report writing time being documented in the TIME LOG for the second time study:

The difference from the original time is that I didn’t exclude the largest case in the 2012-13 time study and I added a conservative amount of time (30 minutes) *for every case [in] the time study that didn’t indicate that report writing was included in the time.*<sup>177</sup>

The attached document to which the email refers is the TIME LOG document provided to the Controller during the audit, which is the same as the document provided by the claimant in its late rebuttal comments, with the additional handwritten caption: “2013 TIME STUDY.”<sup>178</sup> And the same document was provided again in response to the Draft Proposed Decision, this time without the handwritten caption, but with asterisks indicating the cases in which report writing was not recorded.<sup>179</sup> Each version of this document contains the same 14 handwritten entries with dates, case numbers, and total investigative time, and notations of the four activities included in the time study, with activity “3” reflecting report writing for every case investigated of known or suspected child abuse.<sup>180</sup> Eleven of the 14 entries in the time log identify only activities 1, 2, and 4, but do not list activity 3.<sup>181</sup> The claimant suggests that the absence of activity “3” in several entries means that report writing was not reflected in the total time.<sup>182</sup> Another document, this one typed, and labeled “Analysis of Time Study #2” contains the same entries, and the same notations under “Activities Performed.”<sup>183</sup> On a cover page preceding these documents the following assertions appear:

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<sup>176</sup> Exhibit F, Claimant’s Comments on the Draft Proposed Decision, page 7.

<sup>177</sup> Exhibit B, Controller’s Comments on the IRC, page 166 [August 17, 2015 Email from Annette Chinn to Douglas Brejnak (emphasis added)]. See also, Exhibit C, Claimant’s Late Rebuttal Comments, page 1, where it states that the claimant “amended their claim to correct the fact that they did not claim for the costs of preparing ALL child abuse reports due to a misunderstanding of the instructions.”

<sup>178</sup> Exhibit B, Controller’s Comments on the IRC, page 162 [TIME LOG]; Exhibit C, Claimant’s Late Rebuttal Comments, page 12 [2013 TIME STUDY].

<sup>179</sup> Exhibit F, Claimant’s Comments on the Draft Proposed Decision, page 6.

<sup>180</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 12.

<sup>181</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 12.

<sup>182</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 14.

<sup>183</sup> Exhibit C, Claimant’s Late Rebuttal Comments, page 14. This second document may have been prepared by the Controller, but it is unclear from the record. The same document appears in Exhibit B, Controller’s Comments on the IRC, page 171, and in that instance it is labeled “SCO Analysis of Time Study #2.”

SHOWS THAT THE 2013 TIME STUDY THE STATE USED TO DEVELOP THEIR AVERAGE TIMES (2.65 HRS/CASE) DID NOT INCLUDE/ACCOUNT FOR REPORT WRITING FOR ABOUT 80% OF THE CASES.

BECAUSE REPORT WRITING TIME WAS NOT FACTORED IN PROPERLY, TOTAL ALLOWABLE TIME DETERMINED BY THE SCO FOR THIS COMPONENT WAS UNDERSTATED.

LATER SCO TIME SURVEY QUESTIONNAIRE [sic] RESULTS ALSO SHOW THAT REPORT WRITING TIME WAS UNDERSTATED. BASED ON THE QUESTIONNAIRE, [sic] AVERAGE TIME PER CASE SHOULD HAVE BEEN 36 MINUTES PER INVESTIGATION<sup>184</sup>

The claimant also relies on the Controller's time survey which contains separate estimates of the time needed to prepare a report for an unfounded investigation (15-20 minutes) and a substantiated or inconclusive investigation (45-50 minutes).<sup>185</sup> A handwritten comment next to those entries incorrectly states "avg = 37 mins."<sup>186</sup> On the basis of these documents, the claimant requested an additional 30 minutes of report writing time be added to the average time increment per investigation, on the theory that for 11 of the 14 investigations sampled, report writing (activity #3) is not reflected in the handwritten time logs.

The Draft Proposed Decision, however, found that the Controller's finding that the time for report writing was already included in the time study was not arbitrary, capricious, or without evidentiary support, and that the claimant had not provided substantial evidence in the record to rebut that determination. The Draft Proposed Decision found that the claimant's assertions and documentation were all hearsay evidence, which *shall not be sufficient in itself* to support a finding unless it would be admissible over objection in civil actions.<sup>187</sup>

The claimant filed comments on the Draft Proposed Decision, and declarations, including a declaration signed under penalty of perjury from Detective Vanessa Reddy, which explains that report writing was indeed inadvertently omitted from the time study for investigations that were determined to be unfounded, due to a misunderstanding of the instructions for the time study,

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<sup>184</sup> Exhibit C, Claimant's Late Rebuttal Comments, page 11.

<sup>185</sup> Exhibit C, Claimant's Late Rebuttal Comments, page 18.

<sup>186</sup> Exhibit C, Claimant's Late Rebuttal Comments, page 18 [A simple average of the two ranges (15-20 minutes and 45-50 minutes) does not yield an average of 37 minutes; the "average" of these estimates would fall between 30 and 35 minutes. In addition, the time study showed that unfounded investigations were much more common (10 of 14 investigations initially sampled), and therefore augmenting the time study results on the basis of a simple average between longer, more complex reports, and shorter, unfounded reports would skew the allowable time increment. Finally, the evidence in the record shows that only unfounded investigations were omitted from the time study, so there is no need to calculate an average time that includes the time survey estimate for substantiated or inconclusive cases.].

<sup>187</sup> Exhibit D, Draft Proposed Decision; California Code of Regulations, title 2, section 1187.5(a).

and that 15-20 minutes of time should be added for those cases based on her belief.<sup>188</sup> Detective Reddy's declaration states the following:

The time log parameters provided to me by my commanding Sergeant identified four eligible activities and are listed on the attached blank Time Log (Item 2)

- 1- Initial response to begin documentation of case and contacting county [sic] the county welfare department to forward to other agencies if the cases did not occur in the city.
- 2- Complete an investigation to determine whether a report of suspected child abuse or severe [sic] neglect is unfounded, substantiated, or inconclusive, as defined in Penal Code section 12165.12 for purposes of preparing and submitting the state "Child Abuse Investigation Report" form SS 8583, or subsequent designated form to the DOJ.
- 3- Prepare a written report for every case investigated of known or suspected child abuse or severe neglect.
- 4- Review and approve report.

I tracked the actual time for these activities during the month of September, 2013 but inadvertently did not include time for report writing for all of the cases. This was because I was not clear on the exact parameters and the cases that I did not include report writing time for were for unfounded cases of child abuse. These cases typically end with the numbers "419" at the end of the report number. All of these unfounded cases also had a written internal report prepared, however, because those reports were not sent to the District Attorney's Office I did not input report writing time on the logs.

It is my believe [sic] that to fairly represent actual time spent on this report writing activity, 15-20 minutes of time should be added to those cases (see attached log with an asterisk) which did not include time for report writing.

I also wanted to note that I was never interviewed by anyone from the State Controller's Office about this time log or any other issues pertaining to this Child Abuse program or this audit.<sup>189</sup>

Following receipt of the claimant's comments, the Controller filed additional comments on the Draft Proposed Decision and evidence and documentation detailing a number of contacts between audit staff and Detective Reddy during audit fieldwork, to rebut the assertion that the Controller's Office never interviewed Detective Reddy about the time log or the audit.<sup>190</sup> In particular, the Controller's Office states the following:

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<sup>188</sup> Exhibit F, Claimant's Comments on the Draft Proposed Decision, pages 4; 6.

<sup>189</sup> Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 4.

<sup>190</sup> See Exhibit G, Controller's Late Comments on the Draft Proposed Decision, pages 8-20.

Detective Reddy attended a meeting with the SCO auditor, Ms. Chinn, and Sergeant Paul Zarris of the LASD during the initial week of fieldwork between April 7, 2015, and April 9, 2015, at the LASD Palmdale Station. Detective Reddy participated in the meeting and answered questions asked of her by the SCO auditor concerning the time study and general SCAR program activities. The SCO auditor summarized the meetings, including the Detective's statements, in the working papers (Tab 3).

[¶]

. . . . Ms. Chinn's knowledge of this meeting is detailed in the email correspondence dated June 22, 2015, in which she states "You already talked to the Deputy who did the time studies before" (Tab 4). Detective Reddy is identified by the SCO auditor in a reply to Ms. Chinn's email on June 22, 2015, stating, "The interviews will be more in depth and with more emphasis on the time per activity than our previous conversation with Ms. Reddy." (Tab 4).

Furthermore, the SCO auditor provided the city with three status updates via email between August 17, 2015, and September 9, 2015 (Tab 5); held a Status Meeting with city staff on September 30, 2015 (Tab 6); and conducted the Exit Conference with city staff on March 7, 2016 (Tab 7). In all email correspondence and meetings with the city, the auditor referred to the time study issues discovered during the discussion with Detective Reddy. The city never disputed that the meeting with Detective Reddy had taken place, or that the 2013 time study had been discussed at that meeting. Nor did the city make any such statements in its response to the draft report findings or the subsequent IRC.<sup>191</sup>

The claimant's most recent comments state the following:

Thought [sic] the State Controller's Office has shown that Deputy Reddy's recollection of meeting with the SCO auditor was incorrect, we still believe that Deputy Reddy's declaration that she did not included [sic] report writing time for a number of cases is still accurate and valid. As a result, time allowed by the SCO was understated and should be corrected.<sup>192</sup>

The claimant also attached additional declarations in response to the Draft Proposed Decision and the Controller's Late Comments on the Draft Proposed Decision, which state that the claimant's representative, Annette Chinn, "misinterpreted the Statement of Decision and Parameters and Guidelines (Ps and Gs,) and originally gave my clients instructions to only track report writing for cases that resulted in a form SS 8583 report being sent to the Department of Justice."<sup>193</sup> The declaration further states: "The City of Palmdale was the first of my cities to be

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<sup>191</sup> See Exhibit G, Controller's Late Comments on the Draft Proposed Decision, page 8; see also pages 9-11 (Tab 3), 12-15 (Tab 4), 16-27 (Tab 5), 28-35 (Tab 6), 36-53 (Tab 7).

<sup>192</sup> Exhibit H, Claimant's Response to the Controller's Late Comments on the Draft Proposed Decision, pages 2-3.

<sup>193</sup> Exhibit H, Claimant's Response to the Controller's Late Comments on the Draft Proposed Decision, page 4.

audited and until then, I did not know that the Report Writing component was eligible for all cases investigated until after the State Controller's Office initiated its audit on December, 2014."<sup>194</sup>

As analyzed herein, the Commission finds that the Controller's rejection of the claimant's proposal to add more time to complete an investigation to capture report writing time claimed to be omitted is not arbitrary, capricious, or entirely lacking in evidentiary support.

First, there is no dispute that the time study permitted the deputies to log time to "prepare a written report for *every case investigated* of known or suspected child abuse or severe neglect."<sup>195</sup> (Emphasis added.) The claimant has shown with evidence in the record that report writing time for unfounded cases was inadvertently omitted from the time study based on a misunderstanding of the scope of the mandate, but the time study clearly called for this information, and there is no dispute that report writing time for all cases is reimbursable.

Second, although the claimant has shown with evidence in the record that report writing for unfounded cases was omitted from the time log, the claimant does not provide any evidence of the actual time to write those reports. The claimant relies on the "TIME LOG," and the computer-generated facsimile of the same, which only serve to show *an absence of report writing being documented* and do not indicate any times per activity. During the audit, the claimant filed amended claims that sought "a conservative amount of time" added to the allowable time increment for the inadvertently-omitted report writing.<sup>196</sup> As discussed above, this estimate was based in part on the Controller's 2015 time *survey* with two of the deputies performing the mandate, which *estimates* the time for report writing for unfounded cases between 15 and 20 minutes, and substantiated or inconclusive cases between 45 and 50 minutes.<sup>197</sup> But because report writing time was omitted from the time study *only for the unfounded cases*, based on the evidence in the record, the 45 to 50 minute estimate is inapplicable, and so the claimant now requests only 15-20 minutes, based on its Comments on the Draft Proposed Decision.<sup>198</sup>

However, the claimant's request is still based on an estimate, not actual time. As indicated above, the Controller used the time survey to verify the reasonableness of the claimant's time study to complete an investigation. The survey shows that the estimated hours to complete an investigation identified in the survey already captures the time for report writing for unfounded

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<sup>194</sup> Exhibit H, Claimant's Response to the Controller's Late Comments on the Draft Proposed Decision, page 5.

<sup>195</sup> Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 7 [Blank Time Log (Time Study) Worksheet]. See also Exhibit A, IRC, page 285 [Final Audit Report, page 24].

<sup>196</sup> Exhibit B, Controller's Comments on the IRC, page 166 [August 17, 2015 Email from claimant representative Annette Chinn to Controller's audit staff Douglas Brejnak].

<sup>197</sup> Exhibit C, Claimant's Late Rebuttal Comments, pages 18 [Time Survey Questionnaire, with Deputy Deschamps' Responses], 21 [Time Survey Questionnaire, with Deputy Porter's Responses].

<sup>198</sup> Exhibit F, Claimant's Comments on Draft Proposed Decision, page 4 [Declaration of Detective Vanessa Reddy].

cases. In addition, the time survey, which includes report writing time, resulted in overall times ranging from 2.29 hours to 2.71 hours to complete an investigation for purposes of preparing a report for DOJ.<sup>199</sup> Thus, the 2.65-hour time increment allowed by the Controller falls near the top of that range, and includes time for report writing for all cases.

The claimant also relies on the first time study conducted in 2011 before the Parameters and Guidelines were adopted, which indicated an average of 1.28 hours for writing each report.<sup>200</sup> The first time study was rejected by the Controller, however, because it was not contemporaneous, was prepared by deputies that did not perform the mandate, and, thus, did not support actual costs incurred.<sup>201</sup> There is no argument or evidence in the record that the Controller's finding, that the first time study did not provide documentation of actual costs incurred, is arbitrary, capricious, or without evidentiary support.

Finally, the claimant asserts that it was not given the opportunity to conduct a third time study to capture report writing for unfounded cases.<sup>202</sup> The evidence in the record shows that the claimant offered to conduct another time study as early as August 19, 2015. However, that statement was made in the context of a dispute over "cross-reporting," which is not at issue in this IRC. The claimant stated:

Regarding your stance on cross reporting – it is true that the secretary actually transmits the info...but that info that is transmitted first it has to go through the Deputies and Sergeants review and authorization before they can call it in...The 10 minutes is also the minimal amount of time for the Sergeant to review an investigation and it has been logged on our first time study, as well as our interviews with the Sergeants. If this is not satisfactory, I'm sure they can do a quick time study for you in the next couple weeks to verify these 10 minutes per position.<sup>203</sup>

As indicated above, the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. The Commission's review is limited to ensuring that the Controller has adequately considered all relevant factors, and has demonstrated a rational connection between those factors and the choices made.<sup>204</sup>

Based on this record, the Commission concludes that the Controller's rejection of the claimant's proposal to add more time to complete an investigation to capture report writing time claimed to be omitted is not arbitrary, capricious, or without evidentiary support.

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<sup>199</sup> Exhibit B, Controller's Comments on the IRC, page 173 [Analysis of Time Survey].

<sup>200</sup> Exhibit C, Claimant's Late Rebuttal Comments, page 2.

<sup>201</sup> Exhibit A, IRC, pages 278, 284 [Controller's Final Audit Report, pp 17, 23].

<sup>202</sup> Exhibit C, Claimant's Late Rebuttal Comments, page 2.

<sup>203</sup> Exhibit C, Claimant's Late Rebuttal Comments, page 37 [August 19, 2015 Email from Annette Chinn to Douglas Brejnak].

<sup>204</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

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

The final reduction at issue in this IRC relates to the disallowance of indirect costs during the audit period. The Parameters and Guidelines allow claimants to use either a 10 percent indirect cost rate based on direct labor costs, excluding benefits, or prepare an Indirect Cost Rate Proposal if indirect costs exceed the 10 percent rate.<sup>205</sup> In this case, the claimant claimed the 10 percent indirect cost rate for each fiscal year and applied it to *contract services costs* that were incorrectly claimed as direct labor costs.<sup>206</sup> The claimant did not incur any direct labor costs in any fiscal year of the audit period for the mandated activities. The claimant contracts with the Los Angeles County Sheriff's Department to perform all law enforcement activities, including the reimbursable activities here.<sup>207</sup> Therefore, the Controller found that the claimant did not incur any direct labor costs for this program, and that the claimant's methodology to classify and compute costs as indirect based on contract costs is not appropriate. The Controller also found that the claimant's contracted rates *included* overhead costs, which would normally be characterized as indirect costs.<sup>208</sup> In other words, the Controller concluded that much of what would normally be claimed as indirect costs was already included in the contract.

The claimant replies that it is entitled to fair compensation of all direct and indirect actual costs related to the mandated program.<sup>209</sup> In addition, the claimant asserts that the hourly rates of the deputies do not include all overhead, such as additional administrative and support positions, and facility costs.<sup>210</sup> The claimant further explains:

In the Los Angeles County Sheriff Contract, most overhead charges are included in the cost of each Deputy in the contract rate. This overhead includes services such as dispatch, special unit services (homicide, sexual crimes, forensics, etc.), equipment, and other overhead positions such as a base level of administrative and clerical support.

In addition to this base amount of overhead built into the sworn staff rates, each city has the option of purchasing additional supplemental overhead positions to their contract if they require and can afford additional support (such as clerical) or administrative staff (dedicated Lieutenants, and extra Sergeants or Watch Deputies). Each fiscal year, the City purchased additional supplemental overhead positions through the contract. (See Appendix B)

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<sup>205</sup> See Exhibit A, IRC, page 247 [Parameters and Guidelines, p. 15].

<sup>206</sup> See, e.g., Exhibit A, IRC, pages 299 [Reimbursement Claim Form, Fiscal Year 2006-2007]; 111 [Claimant's "Indirect Cost Rate Proposal," showing 15.4% claimed indirect costs, but failing to show the nature or to otherwise describe the direct and indirect costs alleged].

<sup>207</sup> See Exhibit A, IRC, page 61 [Email from Karen Johnson, Finance Manager for the City of Palmdale, to Douglas Brejnak, Auditor, dated August 19, 2015].

<sup>208</sup> Exhibit B, Controller's Comments on the IRC, page 22.

<sup>209</sup> Exhibit A, IRC, page 5.

<sup>210</sup> Exhibit A, IRC, page 5.

In some years the cities may be able to afford more direct staff and more overhead items and in other years they cannot. In the lean years, response times and customer service may decline due to limited fiscal resources. When the actual overhead rates were calculated, they were found to range between 12%-15%. (See Appendix B)<sup>211</sup>

The claimant further asserts that it incurred “approximately \$1 million in City Staff Costs related to the management and oversight of the Sheriff’s Contract/Public Safety program (or 5% of total Law Enforcement Contract with the County).”<sup>212</sup> And finally, the claimant asserts that the donation of 11 acres of land, and “infrastructure improvements associated with the construction of the Palmdale Sheriff’s Station in 2004” constitute reimbursable indirect costs outside the contract.<sup>213</sup>

The Draft Proposed Decision concluded that the Controller’s reduction of indirect costs was correct as a matter of law because the claimant did not comply with the Parameters and Guidelines, and there was no evidence in the record that the claimant developed an indirect cost rate proposal.<sup>214</sup> The Draft Proposed Decision also noted that the claimant was still asserting its indirect cost documentation supported the 10 percent default rate:

As support, the city created sample Indirect Cost Rate Proposals (ICRPs) for FY 2006-07 through FY 2012-13...The city provided its ICRPs to show additional overhead costs that it asserts should be reimbursable. However, the city is asking for the restoration of the 10% rate claimed and not the indirect cost rates based on the proposed ICRPs.<sup>215</sup>

In response to the Draft Proposed Decision, the claimant asserts that it provided sufficient documentation to the Controller to show that the indirect cost rates “were on average, similar to the default rate (10%) claimed.”<sup>216</sup> The claimant further states: “If the Commission feels that the default 10% rate cannot be used, we request that the City’s actual Indirect Cost rates, which we had available and presented to the SCO auditors during and after the audit, on more than one occasion for their review and approval, and that these actual overhead costs be allowed and reinstated.”<sup>217</sup> The claimant’s response also included additional copies, substantially similar to

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<sup>211</sup> Exhibit A, IRC, page 6.

<sup>212</sup> Exhibit A, IRC, page 6.

<sup>213</sup> Exhibit A, IRC, page 6.

<sup>214</sup> Exhibit D, Draft Proposed Decision, pages 42-43.

<sup>215</sup> Exhibit D, Draft Proposed Decision, page 42 [citing Exhibit B, Controller’s Comments on the IRC, p. 25].

<sup>216</sup> Exhibit F, Claimant’s Comments on the Draft Proposed Decision, page 9 [Declaration of Karen Johnston, Finance Manager/City Treasurer].

<sup>217</sup> Exhibit F, Claimant’s Comments on the Draft Proposed Decision, page 10 [Declaration of Karen Johnston, Finance Manager/City Treasurer].

those previously in the record,<sup>218</sup> of documents entitled “Indirect Cost Rate Proposal” for fiscal years 2006-2007 through 2012-2013. However, those documents are not explained in the narrative comments and do not include a description of what costs are listed as direct and indirect; nor is there any indirect cost documentation provided for the first six years of the audit period, fiscal years 1999-2000 through 2005-2006.<sup>219</sup>

Finally, in response to the Controller’s Late Comments on the Draft Proposed Decision, the claimant continues to stress that it “had already developed and presented indirect cost rate proposals for FY 2006-07 through FY 2012-13,” and that “[t]hese rates were computed for use in the preparation of other, prior State Mandate Reimbursement claims.” The claimant also asserts that its rates “were prepared in compliance with Federal OMB and CRF guidelines and reflected actual allowable cost pursuant to the Parameters and Guidelines.”<sup>220</sup> Accordingly, the claimant now requests “that actual overhead rates be allowed in our claims for State Reimbursement.”<sup>221</sup>

The Commission cannot reweigh the evidence and substitute its judgment for the Controller’s.<sup>222</sup> The Commission’s review is limited to ensuring that the Controller has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, and the choices made.<sup>223</sup>

The Parameters and Guidelines state that when claiming indirect costs claimants have the option of using *10 percent of direct labor*, excluding fringe benefits, or *preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds the 10 percent default rate*, as follows:

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both: (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in 2 CFR Part 225 (Office of Management and Budget (OMB) Circular A-87). Claimants have the option of using *10% of direct labor*,

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<sup>218</sup> See Exhibit F, Claimant’s Comments on the Draft Proposed Decision, pages 49-70; Exhibit A, IRC, pages 110-131.

<sup>219</sup> Exhibit F, Claimant’s Comments on the Draft Proposed Decision, pages 49-70.

<sup>220</sup> Exhibit H, Claimant’s Response to the Controller’s Late Comments on the Draft Proposed Decision, page 2.

<sup>221</sup> Exhibit H, Claimant’s Response to the Controller’s Late Comments on the Draft Proposed Decision, page 2.

<sup>222</sup> See generally, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837.

<sup>223</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

excluding fringe benefits, *or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.*

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable. The distribution base may be: (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.); (2) direct salaries and wages; or (3) another base which results in an equitable distribution.<sup>224</sup>

The claimant here filed its initial reimbursement claims as direct salary costs for the deputies and sergeants conducting the mandate, and sought 10 percent of the direct costs as its indirect costs. At all times relevant to this IRC, the claimant, through its reimbursement claims,<sup>225</sup> amended claims,<sup>226</sup> assertions and objections throughout the audit period,<sup>227</sup> and allegations in filing the IRC,<sup>228</sup> has consistently sought indirect costs of *only* the 10 percent default rate applied to the claimant's contract costs. The Final Audit Report states (and the claimant concedes) that “[n]one of the city staff members performed any of the reimbursable activities under this program.”<sup>229</sup> Nevertheless, the claimant continued throughout the audit and in this IRC to assert its belief that the 10 percent default rate was a reasonable and conservative estimate of its indirect costs.<sup>230</sup> Accordingly, as noted above, the Controller disallowed all claimed indirect costs.

The Government Code requires a claimant to file its reimbursement claims in accordance with the parameters and guidelines.<sup>231</sup> And the courts have determined that parameters and guidelines

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<sup>224</sup> Exhibit A, IRC, page 247 [Parameters and Guidelines, p. 15 (emphasis added)].

<sup>225</sup> See, e.g., Exhibit B, Controller's Comments on the IRC, page 30 [Original Reimbursement Claim, Fiscal Year 2012-2013, dated July 3, 2014].

<sup>226</sup> Exhibit A, IRC, pages 299-380 [Amended Claim Forms].

<sup>227</sup> See, e.g., Exhibit A, IRC, pages 60 [July 27, 2015 Email from Annette Chinn, Claimant Representative, to Douglas Brejnak, Auditor]; 297 [Claimant's Response to Draft Audit Report (“[W]e believe that we have already provided more than enough support to justify the inclusion of the default 10% rate allowed in the State instructions.”)].

<sup>228</sup> Exhibit A, IRC, page 5 [“The city has attached the Cost Schedules for each year showing the Supplemental costs incurred through the contract as well as has prepared sample ICRPs to show that the default overhead rate of 10% is justified.”].

<sup>229</sup> Exhibit A, IRC, page 271 [Final Audit Report, p. 10].

<sup>230</sup> Exhibit A, IRC, pages 287 [Final Audit Report, p. 26]; 297 [Claimant's Response to the Draft Audit Report (“We request the restoration of the additional 10% default overhead ICRP costs in the claims.”)].

<sup>231</sup> Government Code section 17561(d)(1).

are regulatory in nature and binding on the parties.<sup>232</sup> In this case, the claimant has not complied with the Parameters and Guidelines in claiming its indirect costs; the 10 percent rate is allowed when the claimant uses its own employees to perform the mandated activities. This claimant contracts for all law enforcement services, including the mandated activities, and therefore the claimant has no direct salaries and benefits upon which to base its claim of indirect costs. The 10 percent default rate is not available to this claimant based on the plain language of the Parameters and Guidelines, irrespective of whatever documentation might be presented to justify it. Therefore, it is correct as a matter of law for the Controller to deny indirect costs, as claimed.

The remaining question then, is whether it was arbitrary and capricious for the Controller to reject the claimant's indirect cost documentation. The Commission finds that it was not. As noted above, in response to the Draft Proposed Decision, the claimant asserts that it provided sufficient documentation to the Controller to show that the indirect cost rates "were on average, similar to the default rate (10%) claimed."<sup>233</sup> The claimant further states: "If the Commission feels that the default 10% rate cannot be used, we request that the City's actual Indirect Cost rates, which we had available and presented to the SCO auditors during and after the audit, on more than one occasion for their review and approval, and that these actual overhead costs be allowed and reinstated."<sup>234</sup>

However, as noted above, the Commission's review is limited to ensuring that the Controller has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, and the choices made.<sup>235</sup> Based on the evidence and documentation in the record, at no time prior to its comments on the Draft Proposed Decision has the claimant requested reimbursement on the basis of its sample Indirect Cost Rate Proposals. The Controller explains:

As support, the city created sample Indirect Cost Rate Proposals (ICRPs) for FY 2006-07 through FY 2012-13 (Exhibit F). The city did not provide ICRPs for FY 1999-00 through FY 2005-06. The city provided its ICRPs to show additional overhead costs that it asserts should be reimbursable. However, the city is asking for the restoration of the 10% rate claimed and not the indirect cost rates based on the proposed ICRPs.<sup>236</sup>

The sample ICRPs that the Controller refers to are each one to three pages, and include "City Wide Costs" without any evidence of an allocation basis for this mandated program; "Allowable Indirect Costs," which coincide with costs for additional sergeants and administrative support (which the Controller suggests are also contract costs, and therefore include some overhead); and

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<sup>232</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201; *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 799.

<sup>233</sup> Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 9 [Declaration of Karen Johnston, Finance Manager/City Treasurer].

<sup>234</sup> Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 10 [Declaration of Karen Johnston, Finance Manager/City Treasurer].

<sup>235</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>236</sup> Exhibit B, Controller's Comments on the IRC, page 25.

“Allocation of Land/Facility Costs,” listed as \$300,000, without any information of the origin of that amount.

Moreover, the documents included in the Claimant’s Comments on the Draft Proposed Decision, which appear to be substantially similar to those provided to the Controller in the context of the audit, do not explain the origin of the purported indirect cost rates calculated, do not identify a distribution base, as required under the Parameters and Guidelines, and are characterized by the Controller as “support” for the claimant requesting “the restoration of the 10% rate claimed.”<sup>237</sup> Both parties also characterize these documents as “*sample* Indirect Cost Rate Proposals.”<sup>238</sup>

The Controller also describes a number of other issues within the sample ICRPs,<sup>239</sup> including the assignment of direct and indirect costs; and the apparent duplication of costs inherent in using contract costs (which already contain overhead and support, i.e., indirect costs) as a direct cost basis for calculating indirect costs; and especially that the OMB regulations prohibit donations, including of real property, from being considered as indirect costs.<sup>240</sup> One of the costs that the claimant asserted as justification for indirect costs, and documented in its amended claims was the donation of land to build a Palmdale station for the Los Angeles County Sheriff’s Department.<sup>241</sup> This cost item has been omitted from the claimant’s more recent filings,<sup>242</sup> but as of the time of the audit the indirect cost documentation included this unallowable cost item.

Based on the evidence in the record, at no time during the audit, or in the early stages of this IRC, did the claimant seek reimbursement based on anything other than the 10 percent default rate, which was correctly denied consistent with the Parameters and Guidelines. Based on the claimant’s position and assertions at that time, as reflected in the record, and based on the many flaws and insufficiencies in the evidence, as identified by the Controller, and which have not been rebutted, it was not arbitrary and capricious for the Controller to deny all indirect costs, as claimed.

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

## **V. Conclusion**

Based on the forgoing analysis, the Commission denies this IRC.

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<sup>237</sup> See Exhibit F, Claimant’s Comments on the Draft Proposed Decision, pages 49-70; Exhibit B, Controller’s Comments on the IRC, page 25.

<sup>238</sup> See Exhibit A, IRC, page 109; Exhibit B, Controller’s Comments on the IRC, page 25.

<sup>239</sup> Exhibit B, Controller’s Comments on the IRC, pages 25-27.

<sup>240</sup> Exhibit B, Controller’s Comments on the IRC, page 26 [Citing 2 CFR Part 225].

<sup>241</sup> See Exhibit A, IRC, pages 6 [IRC Narrative]; 111 [Indirect Cost Documentation, Fiscal Year 2006-2007].

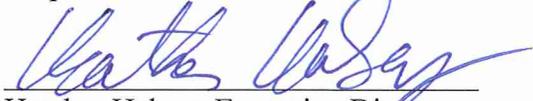
<sup>242</sup> Compare Exhibit A, IRC, page 111 [Indirect Cost Documentation, Fiscal Year 2006-2007]; with Exhibit F, Claimant’s Comments on the Draft Proposed Decision, page 50.



RE: **Decision**

*Interagency Child Abuse and Neglect Investigation Reports (ICAN)*, 17-0022-I-01  
Penal Code Sections 11165.9, 11166, 11166.2, 11166.9<sup>1</sup>, 11168 (formerly 11161.7),  
11169, 11170, and 11174.34 (formerly 11166.9) as added or amended by Statutes 1977,  
Chapter 958; Statutes 1980, Chapter 1071; Statutes 1981, Chapter 435; Statutes 1982,  
Chapters 162 and 905; Statutes 1984, Chapters 1423 and 1613; Statutes 1985, Chapter  
1598; Statutes 1986, Chapters 1289 and 1496; Statutes 1987, Chapters 82, 531, and 1459;  
Statutes 1988, Chapters 269, 1497, and 1580; Statutes 1989, Chapter 153; Statutes 1990,  
Chapters 650, 1330, 1363, 1603; Statutes 1992, Chapters 163, 459, and 1338; Statutes  
1993, Chapters 219 and 510; Statutes 1996, Chapters 1080 and 1081; Statutes 1997,  
Chapters 842, 843, and 844; Statutes 1999, Chapters 475 and 1012; and Statutes 2000,  
Chapter 916; California Code of Regulations, Title 11, Section 903 (Register 98, Number  
29); “Child Abuse Investigation Report” Form SS 8583 (Rev. 3/91)  
Fiscal Years: 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005,  
2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, and  
2012-2013  
City of Palmdale, Claimant

On November 30, 2018, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

  
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Heather Halsey, Executive Director

Dated: December 7, 2018

<sup>1</sup> Renumbered as Penal Code section 11174.34 (Stats. 2004, ch. 842 (SB 1313)).