



July 7, 2016

Mr. Christian Keiner
Dannis Woliver Kelly
555 Capitol Mall, Suite 645
Sacramento, CA 95814

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

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

Re: Proposed Decision

Enrollment Fee Collection and Waivers, 13-9913-I-01
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, and 2007-2008
Gavilan Community College District, Claimant

Dear Mr. Keiner and Ms. Kanemasu:

The Proposed Decision for the above-named matter is enclosed for your review.

Hearing

This matter is set for hearing on **Friday, July 22, 2016**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. This matter is proposed for the Consent Calendar. Please let us know in advance if you oppose having this item placed on consent and wish to testify at the hearing or have a representative testify on your behalf, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Special Accommodations

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

Sincerely,

Heather Halsey
Executive Director

ITEM 7
INCORRECT REDUCTION CLAIM
PROPOSED DECISION

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

Enrollment Fee Collection and Waivers

Fiscal Years 1998-1999, 1999-2000, 2000-2001,
2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, and 2007-2008

13-9913-I-01

Gavilan Community College District, Claimant

EXECUTIVE SUMMARY

This Incorrect Reduction Claim (IRC) challenges the State Controller's (Controller's) finding that the Gavilan Community College District (claimant) claimed unallowable costs of \$3,766,932 for the *Enrollment Fee Collection and Waivers* program for fiscal years 1998-1999 through 2007-2008. The Controller found unsupported and ineligible salaries and benefits and contract services claimed, overstated indirect cost rates, and overstated offsetting savings and reimbursements. The claimant disputes the merits of these audit findings, and argues that the audit was not completed within the two-year deadline in Government Code section 17558.5 and is therefore void.

Staff finds there is no evidence that the audit was completed within the two-year deadline in Government Code section 17558.5, thereby rendering the audit findings void.

In late comments on the Draft Proposed Decision, the Controller states it is not challenging the Proposed Decision, and has pulled the audit report off of its website and notified the claimant of its withdrawal. According to the Controller, "The State will pay the district for the withdrawn audit findings upon availability of funds."¹ However, because the IRC has not been withdrawn by the claimant, the Commission must still render a decision.

¹ Exhibit D, Controller's Late Comments on the Draft Proposed Decision, page 1.

Procedural History

Claimant signed reimbursement claim forms for fiscal years 1998-1999 through 2004-2005 on July 11, 2006.² Claimant signed the reimbursement claim form for fiscal year 2005-2006 on January 8, 2007.³ Claimant signed the reimbursement claim form for fiscal year 2006-2007 on January 21, 2008.⁴ Claimant signed the reimbursement claim form for fiscal year 2007-2008 on February 12, 2009.⁵

The Controller sent the claimant an entrance conference letter dated April 8, 2009.⁶ The Final Audit Report cover letter was dated April 8, 2009.⁷ Claimant received the Final Audit Report on April 18, 2011.⁸ The claimant filed the IRC on March 26, 2014.⁹ The Controller filed late comments on the IRC on January 15, 2016.¹⁰ The claimant did not file rebuttal comments.

Commission staff issued the Draft Proposed Decision on May 20, 2016.¹¹ The Controller filed late comments on the Draft Proposed Decision on June 14, 2016.¹² Claimant did not file comments on the Draft Proposed Decision.

Commission Responsibilities

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

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to the local agency or school district. If the

² Exhibit A, IRC, pages 212, 248, 297, 345, 397, 451, 506, (dated reimbursement claims). It is unclear from page 212 whether the 1998-1999 was filed July 1, or July 11, 2006.

³ Exhibit A, IRC, page 571.

⁴ Exhibit A, IRC, page 636.

⁵ Exhibit A, IRC, page 684.

⁶ Exhibit A, IRC, page 203 (audit confirmation letter). Exhibit B, Controller's Late Comments on the IRC, page 14. Claimant asserts that the audit was initiated by some preliminary communication on or before March 16, 2009, see Exhibit A, IRC, pages 7-10.

⁷ Exhibit A, IRC, page 32 (Final Audit Report cover letter).

⁸ Exhibit A, IRC, pages 8-9, 200-201.

⁹ Exhibit A, IRC.

¹⁰ Exhibit B, Controller's Late Comments on the IRC. 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, the Controller's comments have been considered in this analysis since they were received before the analysis was prepared.

¹¹ Exhibit C, Draft Proposed Decision.

¹² Exhibit D, Controller's Late Comments on the Draft Proposed Decision.

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 incorrectly reduced costs be reinstated.

The Commission must review questions of law, including interpretation of 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 6.¹³ 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.”¹⁴

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.¹⁵

The Commission must also review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.¹⁶ 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.¹⁷

Claims

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

Issue	Description	Staff Recommendation
Was the audit timely completed?	Government Code section 17558.5 requires an audit to be “completed	<i>There is no evidence that the audit was completed within the two-year deadline in</i>

¹³ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

¹⁴ *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.

¹⁵ *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.

¹⁶ *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

¹⁷ Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission’s decision is not supported by substantial evidence in the record.

	<p>not later than two years after the date that the audit is commenced.”</p> <p>Claimant argues the audit was commenced on or before March 16, 2009. The Controller argues that the audit was commenced April 8, 2009, by some preliminary contact and by the audit initiation letter dated the same day.</p> <p>The Final Audit Report is dated April 8, 2011. But the claimant did not receive the Final Audit Report until April 18, 2011, ten days after the two-year completion deadline. Because of this, the claimant suggests that the audit was not completed within the two-year deadline.</p> <p>The Controller argues that it timely completed the audit on April 8, 2011, and that the audit is complete when the audit report is approved and signed, and not when the audit report is mailed or received by the claimant.</p>	<p><i>Government Code section 17558.5., so the audit findings are void.</i></p> <p>Because, based on the evidence in the record, staff finds that the audit in this case was commenced within the meaning of Government Code section 17558.5(a) on April 8, 2009, (the date of the entrance conference letter, it would have to be completed by April 8, 2011, to be timely. The report is dated April 8, 2011, but there is no evidence in the record of the date the Final Audit Report was mailed or served to the claimant. Thus, there is no presumption of timely notice on the date of mailing. Accordingly, the Commission cannot find that the audit was timely completed on April 8, 2011, as urged by the Controller.</p> <p>Moreover, some courts (starting with <i>Johnson v. Barreiro</i> (1943) 59 Cal.App.2d 213) have held that in the absence of a statute authorizing the service of a notice by mail, a mailed notice is not effective unless and until it is received.¹⁸ Thus, based on the <i>Johnson</i> line of cases, the audit was not complete until the claimant received the notice of reductions in the Final Audit Report on April 18, 2011.</p>
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¹⁸ *Johnson v. Barreiro* (1943) 59 Cal.App.2d 213-219; *Hoschler v. Sacramento City Unified School Dist.* (2007) 149 Cal.App.4th 258, 264.

Staff Analysis

There Is No Evidence in the Record that the Audit Was Completed Within the Two-Year Deadline in Government Code Section 17558.5, and thus the Audit Findings Are Void.

The claimant argues that the Controller did not timely complete the audit in accordance with the deadlines in Government Code section 17558.5(a), so the audit is void.

Government Code section 17558.5(a) establishes the time limit for the Controller to complete an audit “not later than two years after the date that the audit is commenced.” Failure to timely complete an audit within the statutory deadline is a jurisdictional bar to any of the Controller’s reductions.¹⁹ Therefore, the Commission must determine the date the audit was initiated in order to decide whether the Controller timely completed the audit “not later than two years after the date that the audit is commenced.”

- A. There is no evidence in the record that the Controller initiated the audit within the meaning of Government Code section 17558.5(a) before the April 8, 2009 entrance conference letter.

The Legislature has not specifically defined the event that initiates the audit and, unlike other auditing agencies that have adopted formal regulations to clarify when the audit begins, (which can be viewed as the controlling interpretation of a statute),²⁰ the Controller has not adopted a regulation for the audits of state-mandate reimbursement claims. Because section 17558.5 is silent as to the act or event that initiates an audit, the issue must be determined based on the evidence in the record.

The initiation of an audit requires a unilateral act of the Controller. In this respect, the audit initiation provision of Government Code section 17558.5 acts as a statute of repose by providing a period during which an audit or review has been commenced, and after which the claimant may enjoy repose, dispose of any evidence or documentation to support their claims, and assert a defense that the audit is not timely. Additionally, the parameters and guidelines require claimants to retain their documentation “during the period subject to audit” including extending the retention period until the “ultimate resolution of any audit findings.”

Because 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 imposed. The Controller has the burden of proof to 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 not dispose of any evidence or documentation to support its claim for reimbursement.

¹⁹ Courts have ruled that when a deadline is for the protection of a person or class of persons, and the language of the statute as a whole indicates the Legislature’s intent to enforce the deadline, the deadline is mandatory. (*People v. McGee* (1977) 19 Cal.3d 948, 962, citing *Morris v. County of Marin* (18 Cal.3d 901, 909-910)). Because the deadlines in Government Code section 17558.5 are mandatory and not directory, the requirement to meet the statutory deadline is jurisdictional.

²⁰ 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”).

In past IRCs, the dispute on this issue centered on whether the entrance conference letter or the entrance conference itself represented the start of the audit. The entrance conference is scheduled based on the availability of the parties and the date does not represent a unilateral act of the Controller. The Commission has found, however, that the entrance conference letter, to the extent it can be shown the letter was sent to the claimant for purposes of notice, represents a unilateral act by the Controller to exercise its audit authority before the statutory deadline and provides sufficient, verifiable, notice to a claimant to retain supporting documentation for the claim during the audit.²¹

Here, however, neither party is arguing that the entrance conference, which occurred on April 21, 2009, initiated the audit. Nor are the parties disputing the Controller's assertion that the entrance conference letter, which is on the Controller's official letterhead and is dated April 8, 2009, is also the date the Controller issued the letter to the claimant.²²

The claimant, however, asserts that it was notified of the audit in March 2009, *before* the April 8, 2009, entrance conference letter, and argues that the audit was initiated at that time. In support, the claimant submits an email dated March 16, 2009, from its mandate consultant to the claimant (nbailey@gavilan.edu) to support this contention. The email states in pertinent part: "Had the entrance conference at Contra Costa this morning *for the same program you are scheduled to be audited for next month, Enrollment Fee Collection and Waiver.*"²³

The contents of this email, even if admissible, do not provide any evidence to support the assertion that *the Controller notified the claimant* in March 2009 that an audit was being initiated.²⁴ The email is from the claimant's consultant and there is no evidence in the record that the Controller provided any notice to the claimant in March 2009 that it was intending to audit these reimbursement claims. Thus, based on this record, the Commission cannot find that the Controller initiated the audit in March 2009. Nor is there any evidence in the record from the Controller's Office to verify that the audit was initiated earlier than the April 8, 2009, entrance conference letter.

Accordingly, based on this record, staff finds that the Controller initiated the audit within the meaning of Government Code section 17558.5(a) on April 8, 2009.

- B. There is no evidence in the record that the audit was timely completed, and thus, the audit is void.

²¹ This analysis is consistent with the *Health Fee Elimination* IRC, 05-4206-I-06, adopted March 27, 2015.

²² Exhibit A, IRC, page 203.

²³ Exhibit A, IRC, page 206 (emphasis added).

²⁴ Hearsay is an out-of-court statement (both oral and written) that is offered for the truth of the matter asserted and is generally inadmissible in court proceedings. (Evid. Code, § 1200.) The Commission's regulations provide that hearsay evidence may be used for purposes of supplementing or explaining other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (Cal. Code Regs., tit.2, § 1187.5(a).)

Government Code section 17558.5(a) requires that “an audit shall be completed not later than two years after the date that the audit is commenced.” Because the audit in this case was commenced on April 8, 2009, (the date of the entrance conference letter), a timely completion must occur no later than April 8, 2011.

The Final Audit Report is dated April 8, 2011. The claimant states, however, that the Final Audit Report was not received until April 18, 2011, ten days after the two year limitation period, as evidenced by the claimant’s date-received stamp on the first page of the Final Audit Report. The claimant suggests that the audit was not complete until the Final Audit Report was received, and that the ten day difference between the date of the report and the date of receipt “exceeds the normal mailing period in the United States mail.”²⁵

The Controller argues that it timely completed the audit on April 8, 2011, and that the audit is complete when the audit report is approved and signed, and not when the audit report is mailed or received by the claimant.²⁶

Staff finds there is no evidence in the record that the audit was timely completed.

The completion of the audit under Government Code section 17558.5(a), like the initiation, requires a unilateral act of the Controller. The statute provides a period during which the Controller is authorized to audit and, once commenced, must complete the audit within two years, after which the claimants may enjoy repose, dispose of any evidence or documentation to support their claims for reimbursement. Because the Controller’s authority to audit must be exercised within a specified time, it is within the Controller’s exclusive control to meet or fail to meet the statutory two-year deadline. The Controller has the burden of proof to show with evidence in the record that the claimant was notified that the audit was completed by the statutory deadline to ensure that the claimant not dispose of any evidence or documentation before “the ultimate resolution of any audit findings.”

In addition, Government Code section 17558.5(c) expressly provides that if any audit adjustments are made, the Controller is required to notify the claimant in writing explaining the adjustments, and “specify the claim components adjusted, the amounts adjusted . . . and the reason for the adjustment.” The audit is complete when the claimant is notified of completion by this written notice of adjustment, and not when an audit report is approved and signed by an authorized employee of the Controller’s Office as the Controller asserts. For the notice to be timely, notice must be given “not later than two years after the date that the audit is commenced.”

In this IRC, the Controller adjusted the reimbursement claims and notified the claimant in writing, explaining the adjustments in the Final Audit Report dated April 8, 2011. Claimant received notice of the Final Audit Report when it was received *by mail* on April 18, 2011, ten days past the deadline. Although the Controller’s practice has been to send Final Audit Reports by mail, there is nothing in the Government Code, and the Controller has not adopted regulations, that authorizes or requires the service of the written notice by mail, or imputes to the claimant notice as of the service date. Unlike the mandates statutes, Code of Civil Procedure

²⁵ Exhibit A, IRC, pages 8-9.

²⁶ Exhibit B, Controller’s Late Comments on the IRC, page 14.

section 1013(a) authorizes service by mail in civil proceedings pending in court. Under this statute, a proof of service that the notice was properly mailed creates the presumption under the law that the notice was complete at the time of the deposit in the mailbox and was received in the ordinary course of mail absent evidence to the contrary.²⁷ Code of Civil Procedure section 1013(a) further makes allowances for the uncertainties of mail delivery by giving recipients of mailed notices an additional *five* calendar days to respond or exercise their rights that flow from the notice if the place of mailing is within the State of California.

There is no evidence, however, of the date the Final Audit Report was mailed or served, so there is no presumption of timely notice. The Final Audit Report was received on April 8, 2011, *ten* calendar days after the date of the report, which suggests that it was not mailed or served on the date of the report. Thus, staff cannot find that the audit was timely completed on April 8, 2011, as urged by the Controller.

Moreover, some courts (starting with *Johnson v. Barreiro* (1943) 59 Cal.App.2d 213) have held that in the absence of a statute authorizing the service of a notice by mail, a mailed notice is not effective unless and until it is received.²⁸ Thus, based on the *Johnson* line of cases, the audit was not complete until the claimant received the notice of reductions (in the Final Audit Report) on April 18, 2011, ten days past the two-year audit completion deadline.

Conclusion

Because there is no evidence in the record that the Controller completed the audit by the April 8, 2011 deadline, staff finds that the audit findings are void.

Staff Recommendation

Staff recommends that the Commission approve this IRC and request the Controller to reinstate all claimed costs that were reduced, totaling \$3,766,932, in accordance with Government Code section 17551(d) and section 1185.9 of the Commission regulations and authorize staff to make any technical, non-substantive changes following the hearing.

²⁷ Code of Civil Procedure sections 1013(a) and 1013a; Evidence Code section 641; *Bear Creek Master Ass'n. v. Edwards* (2005) 130 Cal.App.4th 1470, 1486.

²⁸ *Johnson v. Barreiro* (1943) 59 Cal.App.2d 213-219. *Hoschler v. Sacramento City Unified School Dist.* (2007) 149 Cal.App.4th 258, 264.

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, and
2007-2008

Gavilan Community College District, Claimant

Case No.: 13-9913-I-01

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 July 22, 2016)

DECISION

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on July 22, 2016. [Witness list will be included in the adopted decision.]

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

The Commission [adopted/modified] the Proposed Decision to [approve/partially approve/deny] the IRC by a vote of [vote count will appear in the Decision] as follows:

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

Summary of the Findings

This IRC challenges the State Controller’s (Controller’s) finding that the Gavilan Community College District (claimant) claimed unallowable costs of \$3,766,932 for the *Enrollment Fee Collection and Waivers* program for fiscal years 1998-1999 through 2007-2008. The Controller found unsupported and ineligible salaries and benefits and contract services claimed, overstated indirect cost rates, and overstated offsetting savings and reimbursements. The claimant disputes the merits of these audit findings, and argues that the audit was not completed within the two-year deadline in Government Code section 17558.5 and is therefore void.

The Commission finds there is no evidence in the record that the audit was completed within the two-year deadline in Government Code section 17558.5 and, thus, the audit findings are void.

In late comments on the Draft Proposed Decision, the Controller states it is not challenging the proposed conclusion and recommendation, and has pulled the audit report off of its website and notified the claimant of its withdrawal. According to the Controller, “The State will pay the district for the withdrawn audit findings upon availability of funds.”²⁹ However, because the IRC has not been withdrawn by the claimant, the Commission must still render a decision.

Therefore, the Commission approves this IRC and requests that the Controller reinstate all costs reduced totaling \$3,766,932, in accordance with Government Code section 17551(d) and section 1185.9 of the Commission regulations.

COMMISSION FINDINGS

I. Chronology

07/11/2006 Claimant signed the reimbursement claim forms for fiscal years 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004 and 2004-2005.³⁰

²⁹ Exhibit D, Controller’s Late Comments on the Draft Proposed Decision, page 1.

³⁰ Exhibit A, IRC, pages 212, 248, 297, 345, 397, 451, 506, (dated reimbursement claims). It is unclear from page 212 whether the 1998-1999 was signed on July 1, 2006, or July 11, 2006.

01/08/2007	Claimant signed the reimbursement claim form for fiscal year 2005-2006. ³¹
01/21/2008	Claimant signed the reimbursement claim form for fiscal year 2006-2007. ³²
02/12/2009	Claimant signed the reimbursement claim form for fiscal year 2007-2008. ³³
04/08/2009	The Controller sent the claimant an entrance conference letter dated April 8, 2009. ³⁴
04/08/2011	The date of the Final Audit Report cover letter. ³⁵
04/18/2011	Claimant received the Final Audit Report. ³⁶
03/26/2014	Claimant filed the IRC. ³⁷
01/15/2016	Controller filed late comments on the IRC. ³⁸
05/20/2016	Commission staff issued the Draft Proposed Decision. ³⁹
06/14/2016	Controller filed late comments on the Draft Proposed Decision. ⁴⁰

II. Background

Before 1984, community colleges were authorized but not required to impose student fees for various services, including health services, parking services, transportation services, program

³¹ Exhibit A, IRC, page 571.

³² Exhibit A, IRC, page 636.

³³ Exhibit A, IRC, page 684.

³⁴ Exhibit A, IRC, page 203 (audit confirmation letter). Exhibit B, Controller's Late Comments on the IRC, page 14. Claimant asserts that the audit was initiated by some preliminary communication on or before March 16, 2009, see Exhibit A, IRC, pages 7-10.

³⁵ Exhibit A, IRC, page 32 (Final Audit Report cover letter).

³⁶ Exhibit A, IRC, pages 8-9, 200-201.

³⁷ Exhibit A, IRC.

³⁸ Exhibit B, Controller's Late Comments on the IRC. 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, since the Controller's comments were received prior to the preparation of the analysis, they have been included in the proposed decision.

³⁹ Exhibit C, Draft Proposed Decision.

⁴⁰ Exhibit D, Controller's Late Comments on the Draft Proposed Decision, page 1.

changes, late applications, and physical education courses using nondistrict facilities.⁴¹

The test claim statutes and regulations require community colleges to implement enrollment fees and adopt regulations for their collection.⁴² Community colleges retain two percent of the enrollment fees collected;⁴³ a percentage that has remained constant even though the amount of the enrollment fee has been amended various times. The Los Rios Community College District filed the *Enrollment Fee Collection* Test Claim, 99-TC-13, in June 2000, seeking reimbursement for the activities required to collect the enrollment fee.

In May 2001, the Glendale Community College District filed the *Enrollment Fee Waivers*, 00-TC-15, Test Claim, seeking reimbursement for the fee-waiver statutes and regulations⁴⁴ that specify the groups of students for which fees are waived or exempted, and for whom Board of Governors Grants (BOG grants) are available. A BOG grant is an instrument used by a community college district to process financial assistance to a low-income student.⁴⁵ In 1993, the Legislature changed the BOG grant program from a fee-offset grant program to a fee-waiver program (BOG fee waivers).⁴⁶ The regulations governing the program were left intact, and were part of the Test Claim.⁴⁷

In August 2002, the test claims were consolidated. On April 24, 2003, the Commission determined that the *Enrollment Fee Collection and Waiver* program imposed a partially-reimbursable state-mandated program on community college districts. On January 26, 2006, the Commission adopted the Parameters and Guidelines with the reimbursement period beginning

⁴¹ Fees are authorized under former Education Code section 72246 and current Education Code section 76355 (health services), former Education Code section 72247 and current Education Code section 76360 (parking), former Education Code section 72248 and current Education Code section 76361 (transportation), former Education Code sections 72250 – 72250.5 and current California Code of Regulations, title 5, section 58507 (program changes), former Education Code section 72251 (late applications), and former Education Code section 72245 and current Education Code section 76395 (physical education courses using nondistrict facilities).

⁴² 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 – 58508, 58611 – 58613, 58620 and 58630.

⁴³ Education Code Section 76300 (c). This is called a “revenue credit” by the Community College Chancellor’s Office.

⁴⁴ Education Code section 76300; California Code of Regulations, title 5, Sections 58600, 58601, 58610 – 58613, 58620, 58630.

⁴⁵ California Code of Regulations, title 5, section 58601.

⁴⁶ Statutes 1993, chapter 1124 (AB 1561).

⁴⁷ California Code of Regulations, title 5, sections 58600 to 58630.

either July 1, 1998 (for enrollment fee collection) or July 1, 1999 (for enrollment fee waivers), for the following activities:

- Adopting policies and procedures for collecting enrollment fees (one-time activity) and related staff training (one-time per employee).
- Calculating and collecting the student enrollment fee for each student enrolled, except for nonresidents and special part-time students as specified.
- Adopting policies and procedures for determining which students are eligible for waiver of the enrollment fees (one-time activity), and related staff training (one-time per employee).
- Adopting procedures that will document all financial assistance provided.
- Recording and maintaining records that document all of the financial assistance for the waiver of enrollment fees.
- 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.⁴⁸

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. Section VI. of the Parameters and Guidelines also requires claimants to keep documentation during the period subject to audit, or until the resolution of any audit findings.⁴⁹ Section VII. of the Parameters and Guidelines governs offsetting savings and reimbursements, requiring claimants to offset their claims by any savings experienced in the same program, or 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 include: two percent of the revenue received from the enrollment fees collected, and two percent of the enrollment fees waived for specified categories of students; and after July 5, 2000, \$.91 per credit unit waived for certain categories of students. Offsetting savings also include any budget augmentation received under the Board Financial Assistance Program Administrative Allowance, or any other state budget augmentation received for administering the fee waiver.⁵⁰

The Controller's Audit and Summary of the Issues

In a letter dated April 8, 2009, the Controller confirmed that it was initiating a field audit on claimant's fiscal year 1998-1999 through 2007-2008 reimbursement claims, that the entrance conference would take place on April 21, 2009, and that several types of records were requested for the auditor's review.⁵¹

⁴⁸ Exhibit A, IRC, pages 95-97 (Parameters and Guidelines, adopted Jan. 26, 2006).

⁴⁹ Exhibit A, IRC, pages 94 and 98 (Parameters and Guidelines, adopted Jan. 26, 2006).

⁵⁰ Exhibit A, IRC, pages 99-100 (Parameters and Guidelines, adopted Jan. 26, 2006).

⁵¹ Exhibit A, IRC, pages 203-205 (entrance conference letter).

The Controller issued a Final Audit Report dated April 8, 2011, which concludes that \$90,288 is allowable and \$3,766,932 is unallowable.⁵² The evidence in the record indicates that the claimant received the Final Audit Report on April 18, 2011.⁵³

The Final Audit Report consists of five findings, concluding that the district claimed unsupported and ineligible salaries and benefits and contract services, overstated indirect cost rates, and overstated offsetting savings and reimbursements as described below.⁵⁴

A. Finding 1

The unallowable costs include \$652,279 for salaries and benefits for one-time activities for which the claimant did not provide documentation (\$116,550) and for errors in the claimant's time allowances developed from employee surveys that estimated the time taken to perform the ongoing activities (\$535,729).

The one-time activities include \$50,824 claimed for preparing district policies and procedures, of which the Controller found that \$43,388 is unallowable and \$7,436 allowable. The allowable costs were claimed for the first fiscal year for enrollment fee collections (fiscal year 1998-1999) and enrollment fee waivers (fiscal year 1999-2000). For the remaining years, the Controller found that the costs claimed for preparing policies and procedures were not supported with documentation of actual costs incurred, and were the result of discretionary district policy.

The Controller also reduced costs claimed for training, for which \$93,136 was claimed but only \$19,974 was found allowable, primarily for the first fiscal year for which staff members were claimed. The Parameters and Guidelines authorize training costs of one time per employee, but the Controller found costs for some employees were claimed more than once. For 2007-2008, district staff received training from a software vendor for implementing its new Banner system, but the Controller determined that \$63,675, of \$82,358 claimed, was unrelated to the mandate based on district-provided documentation.

Finding 1 also reduced costs claimed for salaries and benefits for 12 on-going activities, supported by the estimated average time in minutes it took an employee to complete the activities per student per year, based on surveys developed by the claimant's mandate consultant. The Controller found that the district estimated the time using the wrong number of students, so the Controller recalculated the costs and found that enrollment fee collection costs were overstated by \$544,326 and enrollment fee waivers were understated by \$8,597, for a net \$535,729 in unallowable costs.⁵⁵

B. Finding 2

⁵² Exhibit A, IRC, page 27 (Final Audit Report).

⁵³ Exhibit A, IRC, page 200 (showing the first page of the Final Audit Report with a date stamp of "APR 18, 2011"), and page 201 (an email dated April 18, 2011, from the claimant to its mandate consultant stating that "[w]e received the state's EFCW audit report today.")

⁵⁴ Exhibit A, IRC, page 32 (Final Audit Report); Exhibit B, Controller's Late Comments on the IRC, page 7.

⁵⁵ Exhibit A, IRC, pages 42-43, 49 (Final Audit Report). Exhibit B, Controller's Late Comments on the IRC, page 18.

The Controller found \$2,097,258 in unallowable costs claimed for salaries and benefits for employees to calculate and collect enrollment fees under Section IV.A(2)(a)(i-iv) of the Parameters and Guidelines. The costs claimed were based on surveys completed by claimant's employees that estimated the average annual time to perform the fee calculation and collection activities per student: 43.1 minutes annually per student for fiscal years 1998-1999 through 2005-2006; 14.5 minutes annually per student for fiscal year 2006-2007; and 31.3 minutes per student for fiscal year 2007-2008.⁵⁶ The Controller found that the estimated time allowances and costs claimed did not comply with the documentation requirements of the Parameters and Guidelines and were unsupported for the following reasons:

1. The claimant did not explain or support why average time allowances claimed were significantly greater than the time allowances based on the results of the Controller's inquiries and observations.
2. The time allowances recorded by the claimant in fiscal year 2006-2007 were based on estimated time from two employees from the Gilroy Business Office. Gilroy's Admissions and Records Office employees did not complete any survey forms for fiscal year 2006-2007. However, the claimant indicated that most of the fiscal year 2006-2007 collections occurred at the Gilroy office.
3. Based on the minutes recorded by the two employees surveyed at Gilroy's Business Office, the estimated time to perform the activities did not change from fiscal year 1998-1999 through fiscal year 2006-2007.
4. The claimant had an automated telephone registration process, in operation since 2003, and an automated online registration and payment system in operation since May 2006 that were used for the payment of enrollment fees without the assistance of district employees. However, the claimant did not exclude students who paid online when claiming reimbursable costs.
5. The surveys were not developed with sufficient instructions to clarify reimbursable activities.
6. The claimant did not independently verify the uniform time allowances with physical observation and inquiries to ensure that time allowances applied to students were accurate and reasonable.
7. The claimant did not show that the methodology it used in developing time allowances produced a result that was representative of employees' time spent performing the reimbursable activities.⁵⁷

⁵⁶ The costs were claimed for: (1) referencing student accounts and printing a list of enrolled courses; (2) calculating the fees, processing the payment, and preparing a payment receipt; (3) answering student questions or referring them to the appropriate person for an answer; (4) updating student records for the enrollment fee information, providing a copy to the student, and copying/filing enrollment fee documentation; (5) collecting delinquent fees; and (6) processing fee refunds for students who establish fee waiver. Exhibit A, IRC, pages 50-54.

⁵⁷ Exhibit A, IRC, page 54.

C. Finding 3

The Controller further determined that \$73,011 is unallowable, of \$91,273 claimed, for contract services provided by a software vendor that provided training on a new automated Banner system for fiscal year 2007-2008 because the invoices for the claimed costs did not entirely relate to the mandated procedures for collecting enrollment fees or determining which students are eligible for enrollment-fee waivers. The Controller's allocation of eligible costs was based on its review of the individual invoices, and information and discussion with the claimant's staff.⁵⁸

D. Finding 4

The Controller also found that \$1,002,702, of \$1,091,434 claimed, for overstated indirect costs is unallowable. Of this amount, \$26,102 was due to errors in the calculation of indirect cost rates and \$976,600 was due to the related unallowable direct salary and benefit costs reduced in findings 1 and 2. Claimant used the FAM-29C to calculate indirect costs as authorized by the Parameters and Guidelines, but did not correctly compute the FAM-29C rates in part because the claimant used capital costs to calculate indirect costs, even though the claiming instructions excludes them from the calculation, and because claimant did not include depreciation expenses or use allowances for building and equipment in its calculation of indirect costs.⁵⁹

E. Finding 5

The Controller found that the claimant overstated offsetting savings and reimbursements by \$58,318, (\$74,854 for understated enrollment fee collection and \$16,536 for overstated enrollment fee waivers). Claimant did not accurately report the offsetting two percent of enrollment fee revenue, or the amount waived for enrollment fee waivers. Claimant also reported revenues received that exceeded allowable costs.⁶⁰

III. Positions of the Parties

A. Gavilan Community College District

The claimant asserts that the two-year statute of limitations in Government Code section 17558.5(a) to complete the audit expired on April 8, 2011, the date on the Final Audit Report, but that the claimant did not receive the audit report until April 18, 2011 which, "exceeds a normal mailing period in the United States mail. Therefore, the April 8, 2011, date may not be the date the final report actually left the Controller's office."⁶¹ The claimant also asserts that it was on notice that an audit was scheduled for the district on March 16, 2009, or about three weeks before the Controller's audit initiation letter of April 8, 2009. Claimant argues that an audit is initiated when the Controller initially contacts the auditee.⁶² Because the claimant was

⁵⁸ Exhibit A, IRC, page 61 (Final Audit Report).

⁵⁹ Exhibit B, Controller's Late Comments on the IRC, pages 28-29.

⁶⁰ Exhibit A, IRC, pages 65-66 (Final Audit Report).

⁶¹ Exhibit A, IRC, page 9. See also the audit report date-stamped April 18, 2011, on page 200.

⁶² Exhibit A, IRC, page 202 (email from Jim Spano to Nancy Patton, Nov. 22, 2011). See also Exhibit E, State Controller's Office Frequently Asked Questions Related to Mandated-Cost Programs, No. 15: "15. Is there a timeline or deadline for the SCO to complete an audit?"

on notice of the audit earlier than April 8, 2009, the claimant states that the audit completion deadline was earlier than April 8, 2011, so that the Final Audit Report was issued more than two years after the date the audit commenced.⁶³

The claimant also disputes the audit reductions on several grounds. First, claimant asserts that the Controller uses the wrong audit standards because it conducted a performance audit and used generally accepted government auditing standards (GAGAS), when it should have used the standard in Government Code section 17561(d)(2), which authorizes the Controller to reduce claims only if the costs claimed are excessive or unreasonable.

Claimant argues that the Controller's audit findings inconsistently applied the documentation standards stated in the Parameters and Guidelines. Because the Parameters and Guidelines were adopted and the first claiming instructions were issued seven years after the first fiscal year in the audit period, the claimants were not on notice of the activities approved for reimbursement that should be documented until the eighth year of the eligibility period. Thus, claimant argues that it "would seem patently unreasonable to require contemporaneous documentation of daily staff time for the retroactive initial fiscal years."⁶⁴ According to the claimant, where its reported time and workload statistics were accepted by the auditor for some activities, the Controller is validating the claimant's good faith method and the mandate consultant's forms as an acceptable method for estimating average time. The claimant also argues that audit report does not document the qualitative criteria for the disallowances and, thus, an independent review of invoices by the Commission will be necessary.

The claimant makes various arguments against audit findings 1, 2, and 3, and also asserts that the reduction of indirect costs is incorrect. The Controller found the claimant overstated its indirect costs because it did not correctly compute the FAM-29C indirect cost rates. The claimant argues that the claiming instructions are not enforceable because they were not adopted in accordance with an administrative rulemaking process. Claimant also argues that in using the FAM-29C, it complied with the Parameters and Guidelines and any differences between its calculation and the Controller's calculation are minor, and that the large differences before fiscal year 2004-2005 are due to the claimant using capital costs and the Controller excluding capital costs from the calculation. Claimant argues that the Controller's requirement to exclude capital costs is unenforceable, so the standard that should be used is the excessive or unreasonable standard in Government Code section 17561(d)(2).

The claimant also contends that reductions relating to offsetting savings and revenues are incorrect. Since the audit report does not include the source documentation for the amounts reduced, the claimant says there is no way to evaluate the source documentation supporting the Controller's findings. The claimant also "disputes the application of these program revenues to

Pursuant to Government Code section 17558.5, the SCO must complete the audit within two years of the audit start date. The SCO considers the initial telephone contact date with the auditee to be the audit start date." http://www.sco.ca.gov/Files-ARD-Local/mancost_faqsmandates.pdf (Accessed June 22, 2016.)

⁶³ Exhibit A, IRC, page 9.

⁶⁴ Exhibit A, IRC, page 15.

claimed costs for the preparation of policies and procedures and staff training. These costs are not within the scope of costs for which the program funds are applicable.”⁶⁵

Claimant did not file comments on the Draft Proposed Decision.

B. State Controller’s Office

It is the Controller’s position that the audit was completed within the two-year deadline. An audit is completed, according to the Controller, when the audit report is approved and signed by a representative of the Controller. The Controller argues that the date of mailing or receipt by the auditee are not relevant to the completion date, and there is no legal requirement for the audit report to be mailed or received within two years of the audit commencement date. Because the claimant was contacted on April 8, 2009, and the engagement letter was sent the same day, and the final report was dated April 8, 2011, the audit was completed within two years of its commencement.⁶⁶

Originally, the Controller maintained that the audit findings were correct and urged the Commission to deny the IRC.⁶⁷ However, in comments on the Draft Proposed Decision, the Controller states it is not challenging the proposed conclusion and recommendation to approve the IRC, and has pulled the audit report off of its website and notified the claimant of its withdrawal. According to the Controller, “The State will pay the district for the withdrawn audit findings upon availability of funds.”⁶⁸

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 6.⁶⁹ 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

⁶⁵ Exhibit A, IRC, page 25.

⁶⁶ Exhibit B, Controller’s Late Comments on the IRC, page 14.

⁶⁷ Exhibit B, Controller’s Late Comments on the IRC, pages 17.

⁶⁸ Exhibit D, Controller’s Late Comments on the Draft Proposed Decision, page 1.

⁶⁹ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

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.”⁷⁰

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.⁷¹ 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.’ ”⁷²

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.⁷³ 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.⁷⁴

There Is No Evidence in the Record that the Audit Was Completed Within the Two-Year Deadline Required by Government Code Section 17558.5, and thus the Audit Findings Are Void.

The claimant argues that the Controller did not timely complete the audit within the deadlines required by Government Code section 17558.5(a), so the audit is void.

⁷⁰ *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.

⁷¹ *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, supra*, 162 Cal.App.4th 534, 547.

⁷² *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

⁷³ *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

⁷⁴ 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.

Government Code section 17558.5(a) establishes time limits for the Controller to initiate and to complete an audit “not later than two years after the date the audit is commenced” 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.*⁷⁵

Failure to timely initiate or complete an audit within these statutory deadlines is a jurisdictional bar to the Controller’s reductions.⁷⁶

Although the parties dispute the date the Controller initiated the audit, there is no dispute that the audit was timely initiated within three years after the date the initial reimbursement claims were filed. The claimant submitted the initial reimbursement claims in July 2006, and according to the parties, the audit was initiated in either March or April 2009, by contact prior to the April 8, 2009 entrance conference letter.

The Commission, however, must determine the date the audit was initiated in order to decide whether the Controller timely completed the audit “not later than two years after the date that the audit is commenced.”

- A. There is no evidence in the record that the Controller initiated the audit within the meaning of Government Code section 17558.5(a) before the April 8, 2009 entrance conference letter.

The Legislature has not specifically defined the event that initiates the audit and, unlike other auditing agencies that have adopted formal regulations to clarify when the audit begins (which can be viewed as the controlling interpretation of a statute),⁷⁷ the Controller has not adopted a regulation for the audits of state-mandate reimbursement claims. Because section 17558.5 is silent as to the act or event that initiates an audit, the Commission cannot, as a matter of law, state what the act or event is in all cases, but must determine when the audit was initiated based on the evidence in the record.

The initiation of an audit requires a unilateral act of the Controller. In this respect, the audit initiation provision of Government Code section 17558.5 is better characterized as a statute of

⁷⁵ Statutes 2004, chapter 890, emphasis added.

⁷⁶ Courts have ruled that when a deadline is for the protection of a person or class of persons, and the language of the statute as a whole indicates the Legislature’s intent to enforce the deadline, the deadline is mandatory. (*People v. McGee* (1977) 19 Cal.3d 948, 962, citing *Morris v. County of Marin* (18 Cal.3d 901, 909-910)). Because the deadlines in Government Code section 17558.5 are mandatory and not directory, the requirement to meet the statutory deadline is jurisdictional.

⁷⁷ 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”).

repose, rather than a statute of limitations. The statute provides a period during which an audit or review has been commenced, and after which the claimant may enjoy repose, dispose of any evidence or documentation to support their claims, and assert a defense that the audit is not timely and therefore void.

The court in *Giest v. Sequoia Ventures, Inc.*, described a statute of repose as follows:

Unlike an ordinary statute of limitations which begins running upon accrual of the claim, [the] period contained in a statute of repose begins when a *specific event occurs*, regardless of whether a cause of action has accrued or whether any injury has resulted.” [citations] A statute of repose thus is harsher than a statute of limitations in that it cuts off a right of action after a specified period of time, irrespective of accrual or even notice that a legal right has been invaded.⁷⁸

Described by another court in *Inco Development Corp. v. Superior Court*,⁷⁹ the characteristics of a statute of repose include that it is “not dependent upon traditional concepts of accrual of a claim, but is tied to an independent, objectively determined and verifiable event...” In addition, the California Supreme Court has said:

[S]tatutes of repose are in fact favored in the law, ‘designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.’⁸⁰

The Parameters and Guidelines for this program further provide that:

All documents used to support the reimbursable activities, as described in Section IV., must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.⁸¹

Like a statute of limitations to file a civil action, the act or event that must occur before the expiration of the statutory period must be one that can be completed by the affected party alone, without the consent or cooperation of the auditee. This view is consistent with the plain language of section 17558.5 that clearly authorizes the Controller to initiate the audit within the

⁷⁸ *Giest v. Sequoia Ventures, Inc.* (2000) 83 Cal.App.4th 300, 305. Emphasis added.

⁷⁹ *Inco Development Corp. v. Superior Court* (2005), 131 Cal.App.4th 1014.

⁸⁰ *Adams v. Paul* (1995) 11 Cal.4th 583, 592.

⁸¹ Exhibit A, IRC, page 111 (Parameters and Guidelines, adopted Jan. 26, 2006).

statutory time period, and does not expressly require the action or cooperation of any other party.⁸²

However, whether analyzed as a statute of repose, or a statute of limitations, the unilateral act that must occur before the expiration of the statutory period may be interpreted similarly. That is, the filing of a civil action may be interpreted analogously to the initiation of an audit, to the extent that the initiation of the audit, like the commencement of a civil action, terminates the running of the statutory period, and vests authority in the party to proceed.⁸³ However, unlike a plaintiff filing a complaint in court within a statutory time period to protect against a statute of limitations defense barring the matter, Government Code section 17558.5 does not require the Controller to lodge a document to *prove* it timely initiated an audit. Nevertheless, because 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 imposed. 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 not dispose of any evidence or documentation to support its claim for reimbursement.

In past IRCs, the dispute on this issue centered on whether the entrance conference letter or the entrance conference itself represented the start of the audit. In *Health Fee Elimination*, 05-4206-I-06, the Commission agreed with the Controller that, in that case, the goals of finality and predictability in the operation of a statute of limitations were best served by applying section 17558.5 to the Controller's entrance conference letter and not to the date of an entrance conference itself. The entrance conference is scheduled based on the availability of the parties and the date does not represent a unilateral act by the Controller. The entrance conference letter, to the extent that it can be shown the letter was sent to the claimant for purposes of notice, represents a unilateral act by the Controller to exercise its audit authority before the statutory deadline and provides sufficient, verifiable, notice to a claimant to retain supporting documentation for the claim during the audit.⁸⁴

Here, however, neither party is arguing that the entrance conference, which occurred on April 21, 2009, initiated the audit. Nor are the parties disputing the Controller's assertion that the entrance conference letter, dated April 8, 2009, is also the date the Controller issued the letter to the claimant.⁸⁵ The entrance conference letter is on the Controller's official letterhead, is

⁸² This analysis is consistent with the Commission's IRC Decision in *Collective Bargaining and Collective Bargaining Agreement Disclosure*, 09-4225-I-17 and 10-4425-I-18, adopted March 27, 2015.

⁸³ *Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 773 ["A party does not have a vested right in the time for the commencement of an action [and nor] does he have a vested right in the running of the statute of limitations prior to its expiration." (citing *Kerchoff-Cuzner Mill and Lumber Company v. Olmstead* (1890) 85 Cal. 80; *Mudd v. McColgan* (1947) 30 Cal.2d 463, 468)].

⁸⁴ *Health Fee Elimination* IRC (05-4206-I-06), adopted March 27, 2015.

⁸⁵ Exhibit B, Controller's Late Comments on the IRC, page 14.

signed by the Controller's audit manager for the Mandated Cost Audit Bureau, and states in relevant part:

This letter confirms that Curt Chiesa has scheduled an audit of the Gavilan Community College District's legislatively mandated Enrollment Fee Collection and Waiver Program cost claims filed for fiscal year (FY) 1998-99 through FY 2007-08. Government Code sections 12410, 17558.5, and 17561 provide the authority for this audit. The entrance conference is scheduled for Tuesday, April 21, 2009, at 11:30 a.m. We will begin audit fieldwork after the entrance conference.⁸⁶

The letter also requests the claimant to provide documentation to support the costs claimed.⁸⁷

The claimant, however, asserts that it was notified of the audit in March 2009, *before* the April 8, 2009 entrance conference letter, and argues that the audit was initiated at that time.⁸⁸ The claimant states that the plain language of the entrance conference letter indicates that the Controller contacted the claimant *before* drafting the letter to confirm the audit, and submits an email dated March 16, 2009, from its mandate consultant (Keith Petersen) to the claimant (nbailey@gavilan.edu) about an audit for the program "next month."⁸⁹

Had the entrance conference at Contra Costa this morning *for the same program you are scheduled to be audited for next month, Enrollment Fee Collection and Waiver*. It will probably be the same auditor. This is the first audit of this program, so they weren't able to tell me much about what they will be looking at. They did say that they wanted to interview the Financial Aid director about the BOG waiver process.

Next week I will send you the notes for your entrance conference and Mr. Keeler can then get back to me with his questions.⁹⁰

⁸⁶ Exhibit A, IRC, page 203.

⁸⁷ Exhibit A, IRC, pages 203-205.

⁸⁸ The claimant supports this contention (that telephonic contact from the Controller to the claimant commences an audit) with an email from the Controller's Office staff to Commission staff, dated November 22, 2011, that states the following:

We consider the event that initiates an audit pursuant to Government Code section 17558.5 to be the date of the initial contact by the SCO to the auditee (generally a telephone contact) to inform them and put them on notice of the SCO's intention to perform the audit. In addition, we consider this same date as the event that commences the two-year period to complete an audit pursuant to Government Code section 17558.5. (Exhibit A, IRC, page 208.)

⁸⁹ Exhibit A, IRC, pages 9 and 206.

⁹⁰ Exhibit A, IRC, page 206 (emphasis added). The claimant also filed an email from the Controller's Office staff to Commission staff, dated November 22, 2011, that states that initial contact, generally by telephone, is enough to put the claimant on notice of the audit initiation:

The contents of this email, even if admissible, do not provide any evidence to support the assertion that *the Controller notified the claimant* in March 2009 that an audit was being initiated.⁹¹ The email is from the claimant's own consultant and there is no evidence in the record that the Controller provided any notice to the claimant in March 2009 that it was intending to audit these reimbursement claims. Thus, based on this record, the Commission cannot find that the Controller initiated the audit in March 2009.

Moreover, there is no evidence in the record from the Controller's Office to verify that the audit was initiated earlier than the April 8, 2009 entrance conference letter. Accordingly, based on this record, the Commission finds that the Controller initiated the audit within the meaning of Government Code section 17558.5(a) on April 8, 2009.

B. There is no evidence in the record that the audit was timely completed, and thus, the audit is void.

Government Code section 17558.5(a) requires that "an audit shall be completed not later than two years after the date that the audit is commenced." Because the audit in this case was commenced within the meaning of Government Code section 17558.5(a) on April 8, 2009, the date of the entrance conference letter, it would have to be completed no later than April 8, 2011, to be timely.

The Final Audit Report is *dated* April 8, 2011. The claimant states, however, that the Final Audit Report was not received until April 18, 2011, ten days after the two year limitation period; as evidenced by the claimant's date-received stamp on the first page of the Final Audit Report.⁹² The claimant suggests that the audit was not complete until the Final Audit Report was received, and that the ten day difference between the date of the report and the date of receipt "exceeds the normal mailing period in the United States mail."⁹³

The Controller argues that it timely completed the audit on April 8, 2011, and that the audit is complete when the audit report is approved and signed, and not when it is mailed or received by the claimant:

We consider the event that initiates an audit pursuant to Government Code section 17558.5 to be the date of the initial contact by the SCO to the auditee (generally a telephone contact) to inform them and put them on notice of the SCO's intention to perform the audit. In addition, we consider this same date as the event that commences the two-year period to complete an audit pursuant to Government Code section 17558.5. (Exhibit A, IRC, page 208.)

⁹¹ Hearsay is an out-of-court statement (both oral and written) that is offered for the truth of the matter asserted and is generally inadmissible in court proceedings. (Evid. Code, § 1200.) The Commission's regulations provide that hearsay evidence may be used for purposes of supplementing or explaining other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (Cal. Code Regs., tit.2, § 1187.5(a).)

⁹² Exhibit A, IRC, pages 8-9, 200-201.

⁹³ Exhibit A, IRC, pages 8-9.

An audit is completed when the final audit report is approved and signed by an authorized SCO representative. The dates that reports are mailed and/or received are irrelevant for determining when an audit is considered to be completed. There is no legal requirement for the SCO to mail an audit report within two years or for claimants to physically receive an audit report within two years of the audit commencement date.⁹⁴

The Commission finds there is no evidence in the record that the audit was timely completed.

The completion of the audit under Government Code section 17558.5(a), like the initiation of the audit, requires the unilateral act of the Controller. The statutory deadline to complete the audit, like the deadline to initiate the audit, acts as a statute of repose that provides a period during which the Controller is authorized to audit and, once commenced, must complete the audit within two years. After the audit period, the claimants may enjoy repose and dispose of any evidence or documentation to support their claims for reimbursement. As stated in the Parameters and Guidelines for this program, all documents used to support the reimbursable activities must be retained “until the ultimate resolution of any audit findings.”⁹⁵ Because the Controller’s authority to audit must be exercised within a specified time, it is within the Controller’s exclusive control to meet or fail to meet the statutory two-year deadline. The Controller has the burden of proof to show with evidence in the record that the claimant was notified that the audit was completed by the statutory deadline to ensure that the claimant not dispose of any evidence or documentation before “the ultimate resolution of any audit findings.”

This conclusion is further supported by Government Code section 17558.5(c), which expressly provides that if any audit adjustments are made, the Controller is required to notify the claimant in writing explaining the adjustments as follows:

The Controller *shall notify* the claimant in writing within 30 days after issuance of a remittance advice of any adjustment to a claim for reimbursement that results from an audit or review. The notification shall specify the claim components adjusted, the amounts adjusted, interest charges on claims adjusted to reduce overall reimbursement to the local agency or school district, and the reason for the adjustment. . . . [Emphasis added.]

Therefore, under the statutory scheme, an audit resulting in adjustments is complete when the Controller notifies the claimant that the audit is complete by this written notice of adjustment, and not when an audit report is simply approved and signed by an authorized employee of the Controller’s Office as asserted by the Controller. For the notice to be timely, it must be given “not later than two years after the date that the audit is commenced.”

The question remains, however, when the Controller provided notice in this case. As stated above, the Controller initiated the audit of the reimbursement claims on April 8, 2009. The Controller adjusted the reimbursement claims and provided written notice to the claimant explaining the adjustments in the Final Audit Report dated April 8, 2011. Claimant received the Final Audit Report *by mail* on April 18, 2011, ten days past the deadline. Although the

⁹⁴ Exhibit B, Controller’s Late Comments on the IRC, page 14.

⁹⁵ Exhibit A, IRC, page 111 (Parameters and Guidelines, adopted Jan. 26, 2006).

Controller's practice has been to send Final Audit Reports by mail, there is nothing in the Government Code, and the Controller has not adopted regulations, that authorize the service of the written notice required by Government Code section 17558.5(c) by mail, or imputes notice to the claimant as of the date of mailing. Government Code section 17558.5(c) simply states that "[t]he Controller *shall notify* the claimant in writing ... of the reasons for the reduction,"

Unlike section 17558.5(c), the Legislature has expressly authorized service of notice by mail in other statutes, and when service of notice is authorized by mail, service is complete at the time the notice is deposited in the mailbox. For example, Code of Civil Procedure section 1013(a), which applies to service of documents in civil proceedings pending in court, states:

In case of service by mail, the notice or other paper shall be deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by mail; otherwise at that party's place of residence. Service is complete at the time of the deposit . . .

If service is authorized by mail, a proof of service that the notice was properly mailed creates the presumption under the law that the notice was complete at the time of the deposit in the mailbox and was received in the ordinary course of mail absent evidence to the contrary.⁹⁶ Code of Civil Procedure section 1013(a) further makes allowances for the uncertainties of mail delivery by giving recipients of mailed notices longer time to act or to exercise their rights that flow from the notice. Thus, if the place of address and the place of mailing are within the State of California, then the time for any response, right, or duty triggered by the notice, and which must be performed within a statutory time period, "shall be extended *five* calendar days."

There is no evidence in this case, however, of the date the Final Audit Report was mailed and, thus, the Commission cannot presume that the notice was timely served. The Final Audit Report was received *ten* calendar days after the date of the report, April 8, 2011, which may suggest that it was not actually deposited in the mail on the date of the report. Thus, the Commission cannot find that the audit was timely completed on April 8, 2011, as urged by the Controller.

Moreover, some courts have held that when the law is silent on how service shall be made, a notice served by mail is not effective unless and until it is received. For example, in *Johnson v. Barreiro*, a personal injury case stemming from an automobile accident, the dispute centered on the determination of the owner of the vehicle that caused the accident.⁹⁷ On December 24, the appellant sold the vehicle with a conditional sales contract to the driver who caused the accident. The driver was in possession of the car at the time of the January 1 accident, but no notice of sale or registration of transfer was filed with or received by the Department of Motor Vehicles (DMV) prior to the accident. The appellant argued that it mailed the notice of transfer to the DMV on December 31. However, there was no proof of service or evidence of mailing, and the notice was not received by the DMV until January 2, after the accident. In addition, the plaintiff

⁹⁶ Code of Civil Procedure sections 1013(a) and 1013a; Evidence Code section 641; *Bear Creek Master Ass'n. v. Edwards* (2005) 130 Cal.App.4th 1470, 1486.

⁹⁷ *Johnson v. Barreiro* (1943) 59 Cal.App.2d 213.

presented evidence that the appellant, with other vehicle sales made on December 31, did not report those sales to DMV until January 4, 7, and 13.⁹⁸ The court held the appellant responsible for the damages, finding that “in the absence of a statute authorizing the service of a notice by mail, a notice so served is ineffective unless and until it is received” as follows:

Upon evidence before it we think that the trial court was justified in concluding that the notice was not transmitted until January 2nd, and that its finding to that effect is sufficiently sustained. Even if mailed on the 31st of December, said papers were not received by the department until the 2nd of January; and there is nothing in the applicable statutes to the effect that the deposit of said papers in the mail on the 31st would impute notice to the department as of that date so as to relieve appellant of liability as owner. Generally speaking, substituted and constructive notices are not favored in law and are countenanced only as a matter of necessity or extreme expediency. (20 Cal.Jur. 243.) And in the absence of a statute authorizing the service of a notice by mail, a notice so served is ineffective unless and until it is received. (39 Am.Jur. 249 . . .) Also proof of service of notice by mail should show compliance with the conditions of its existence, and show that the notice properly addressed, with postage prepaid, was duly deposited in the mail. (39 Am.Jur. 252.) There was no such proof in this case.⁹⁹

The court’s holding in *Johnson* was later applied in *Hoschler v. Sacramento City Unified School District*, where the court interpreted Education Code section 44929.1, which requires a school district to notify a probationary employee in a position requiring certification, on or before March 15 of the employee’s second year of employment with the district, of the district’s decision to reelect or not reelect the employee for the next succeeding school year to the position. In the event that the governing board does not give timely notice, the employee is deemed reelected for the next succeeding school year.¹⁰⁰ The school district mailed a notice of probationary release on March 12, and the employee, who undisputedly did not willfully refuse to pick up his mail, did not receive a copy of the notice until well after the deadline on May 8. The court held that the employee was not timely notified by the March 15 deadline and was allowed to keep his job for the next school year.¹⁰¹ The court stated:

Section 44929.1 is silent as to a method of giving the required notice. Under settled principles of statutory construction, “[a] statute requiring that a notice shall be given, but which is silent as to the manner of giving such notice, contemplates personal service thereof.” [Citations omitted.] As the court noted in *Long*: “It may be broadly stated that where a statute or contract requires the giving of notice, and there is nothing in context, or in the circumstances of the case, to show that any other form of notice was intended, personal notice will be required. [Citation.] This is true because the law always favors a personal notice, and countenances

⁹⁸ *Id.*, pages 214-216.

⁹⁹ *Id.*, pages 218-219.

¹⁰⁰ *Hoschler v. Sacramento City Unified School Dist.* (2007) 149 Cal.App.4th 258, 264.

¹⁰¹ *Id.*, page 272.

substituted and constructive notices as matters of necessity or extreme expediency.” [Citation.]

Since the District claims it sent notice of Hoschler’s nonretention by certified mail, and the evidence is undisputed that he did not receive the notice until well after March 15, the notice of nonrenewal was untimely. (*Johnson, supra*, 59 Cal.App.2d at pp. 218-219 . . . [where statute does not prescribe method of service, notice served by mail not effective until received.].)¹⁰²

These cases can be distinguished from *Matthew v. Civil Service Commission of City and County of San Francisco*, where a city charter was silent as to the manner of giving notice, but the court found that service by mail was contemplated by the charter since the charter made references to “mail” and notice being “sent” as follows:

Ordinarily, ‘As to the matter of notice, it may be said that where a statute requires notice and does not specify how it shall be given, the presumption is that personal service is required’ (*Colyear v. Tobriner*, 7 Cal.2d 735 at page 743, 62 P.2d 741, at page 745, 109 A.L.R. 191). ‘It may be broadly stated that, where a statute or contract requires giving of notice, and there is nothing in the context or circumstances of the case, to show that any other form of notice was intended, personal notice will be required’ (*Stockton Automobile Co. v. Confer*, 154 Cal. 402 at page 408, 97 P. 881, at page 884). While Section 148 of the charter is silent as to the manner of giving notice, Rule 23 in which reference is made to ‘mail’ and notice being ‘sent’ quite obviously contemplates that the notice may be mailed. The context and circumstances of the case as governed by the rules adopted pursuant to the charter and to supplement its provisions in the operation of the civil service system show that a form of notice other than personal was intended. This interpretation is supported by the rule of administrative interpretation over a period of 24 years or so, during all of which time such notices were all sent by ordinary mail.¹⁰³

Unlike the rule in the city charter in the *Matthew* case, Government Code section 17558.5(c) simply requires that the “Controller *shall notify* the claimant in writing” There are no requirements in the statute on how the notice must be served. Thus, based on the *Johnson* line of cases, the audit was not complete until the claimant received the notice of reductions (in the Final Audit Report) on April 18, 2011, ten days past the two-year audit completion deadline.

Because there is no evidence in the record that the Controller timely completed the audit by the April 8, 2011 deadline, the Commission finds that the audit is void.

V. Conclusion

Based on the foregoing, the Commission approves this IRC and requests that the Controller reinstate all costs that were reduced, totaling \$3,766,932, in accordance with Government Code section 17551(d) and section 1185.9 of the Commission regulations.

¹⁰² *Id.*, page 264.

¹⁰³ *Matthew v. Civil Service Commission of City and County of San Francisco* (1958) 158 Cal.App.2d 169, 173-174.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

On July 7, 2016, I served the:

Proposed Decision

Enrollment Fee Collection and Waivers, 13-9913-I-01

Education Code Section 76300

California Code of Regulations, Title 5, Sections

58501-58503, 58611-58613, 58620, and 58630

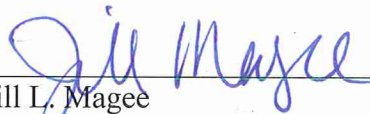
Fiscal Years: 1998-1999, 1999-2000, 2000-2001, 2001-2002,

2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, and 2007-2008

Gavilan Community College District, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 7, 2016 at Sacramento, California.



Jill L. Magee

Commission on State Mandates

980 Ninth Street, Suite 300

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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 6/30/16

Claim Number: 13-9913-I-01

Matter: Enrollment Fee Collection and Waivers

Claimant: Gavilan Joint Community College District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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