

**ITEM 4**  
**TEST CLAIM**  
**PROPOSED STATEMENT OF DECISION**

Education Code Sections 68044, 68051, 68074, 68075, 68075.5, 68076, 68077, 68078,  
68082, 68083, 68084, 68121, 68130.5, 76140

Statutes 1975, Chapter 78 (SB 82); Statutes 1976, Chapter 990 (AB 4289); Statutes 1977,  
Chapters 36 and 242 (AB 447 and AB 645); Statutes 1979, Chapter 797 (AB 1549);  
Statutes 1980, Chapters 580 and 789 (AB 2567 and AB 2825); Statutes 1981, Chapter 102  
(AB 251); Statutes 1982, Chapter 1070 (AB 2627); Statutes 1983, Chapter 317 (SB 646);  
Statutes 1988, Chapter 753 (AB 3958); Statutes 1989, Chapters 424, 900, and 985 (AB 1237,  
AB 259, and SB 716); Statutes 1990, Chapter 1372 (SB 1854); Statutes 1991, Chapter 455  
(AB 1745); Statutes 1992, Chapters 170 and 1236 (AB 3058 and SB 2000); Statutes 1993,  
Chapter 8 (AB 46); Statutes 1995, Chapters 389 and 758 (AB 723 and AB 446); Statutes 1997,  
Chapter 438 (AB 1317); Statutes 1998, Chapter 952 (AB 639); Statutes 2000, Chapters 571  
and 949 (AB 1346 and AB 632); Statutes 2001, Chapter 814 (AB 540); and  
Statutes 2002, Chapter 450 (AB 1746)

California Code of Regulations, Title 5, Sections 54002, 54010, 54012, 54020, 54022,  
54024, 54030, 54032, 54041, 54042, 54045, 54045.5, 54046, 54050, 54060, 54070

Register 77, No. 45 (Nov. 5, 1977); Register 82, No. 48 (Nov. 27, 1982); Register 83,  
No. 24 (Jun. 11, 1983) Register 86, No. 10 (Mar. 8, 1986); Register 91, No. 23  
(April 5, 1991); Register 92, No. 4 (Jan. 24, 1992); Register 92, No. 12 (Mar. 27, 1992);  
Register 92, No. 18 (Feb. 18, 1992); Register 95, No. 19 (May 19, 1995); Register 99,  
No. 20 (May 14, 1999); Register 02, No. 25 (Jun. 21, 2002)

Revised Guidelines and Information, "Exemption from Nonresident Tuition" Chancellor of  
the California Community Colleges, May 2002

*Tuition Fee Waivers*  
02-TC-21

Contra Costa Community College District, Claimant

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**EXECUTIVE SUMMARY**

The sole issue before the Commission is whether the Proposed Statement of Decision accurately reflects any decision made by the Commission at the March 27, 2009 hearing on the above named test claim.<sup>1</sup>

**Recommendation**

Staff recommends that the Commission adopt the Proposed Statement of Decision that accurately reflects the staff recommendation on the test claim. Minor changes, including those to reflect the

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<sup>1</sup> California Code of Regulations, title 2, section 1188.1, subdivision (a).

hearing testimony and the vote count will be included when issuing the final Statement of Decision.

However, if the Commission's vote on Item 3 modifies the staff analysis, staff recommends that the motion on adopting the Proposed Statement of Decision reflect those changes, which would be made before issuing the final Statement of Decision. In the alternative, if the changes are significant, it is recommended that adoption of a Proposed Statement of Decision be continued to the May 2009 Commission hearing.

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 68044, 68051, 68074, 68075, 68075.5, 68076, 68077, 68078, 68082, 68083, 68084, 68121, 68130.5, 76140

Statutes 1975, Chapter 78 (SB 82); Statutes 1976, Chapter 990 (AB 4289); Statutes 1977, Chapters 36 and 242 (AB 447 and AB 645); Statutes 1979, Chapter 797 (AB 1549); Statutes 1980, Chapters 580 and 789 (AB 2567 and AB 2825); Statutes 1981, Chapter 102 (AB 251); Statutes 1982, Chapter 1070 (AB 2627); Statutes 1983, Chapter 317 (SB 646); Statutes 1988, Chapter 753 (AB 3958); Statutes 1989, Chapters 424, 900, and 985 (AB 1237, AB 259, and SB 716); Statutes 1990, Chapter 1372 (SB 1854); Statutes 1991, Chapter 455 (AB 1745); Statutes 1992, Chapters 170 and 1236 (AB 3058 and SB 2000); Statutes 1993, Chapter 8 (AB 46); Statutes 1995, Chapters 389 and 758 (AB 723 and AB 446); Statutes 1997, Chapter 438 (AB 1317); Statutes 1998, Chapter 952 (AB 639); Statutes 2000, Chapters 571 and 949 (AB 1346 and AB 632); Statutes 2001, Chapter 814 (AB 540); and Statutes 2002, Chapter 450 (AB 1746)

California Code of Regulations, Title 5, Sections 54002, 54010, 54012, 54020, 54022, 54024, 54030, 54032, 54041, 54042, 54045, 54045.5, 54046, 54050, 54060, 54070

Register 77, No. 45 (Nov. 5, 1977); Register 82, No. 48 (Nov. 27, 1982); Register 83, No. 24 (Jun. 11, 1983) Register 86, No. 10 (Mar. 8, 1986); Register 91, No. 23 (April 5, 1991); Register 92, No. 4 (Jan. 24, 1992); Register 92, No. 12 (Mar. 27, 1992); Register 92, No. 18 (Feb. 18, 1992); Register 95, No. 19 (May 19, 1995); Register

Case Nos.: 02-TC-21

*Tuition Fee Waivers*

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

*(Proposed for adoption March 27, 2009)*

99, No. 20 (May 14, 1999); Register 02, No. 25 (Jun. 21, 2002)

Revised Guidelines and Information,  
"Exemption from Nonresident Tuition"  
Chancellor of the California Community  
Colleges, May 2002

Filed on May 23, 2003 by  
Contra Costa Community College District,  
Claimant

### STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on March 27, 2009. [Witness list will be included in the final Statement of 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 staff analysis to [approve/deny] the test claim at the hearing by a vote of [vote count will be included in the final Statement of Decision].

## Summary of Findings

For the reasons discussed below, the Commission finds that the test claim statutes, regulations, and executive order impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for community college districts to be reimbursed for the following:

### District Governing Board Rules and Regulations on Nonresident Tuition

- Adopt rules and regulations relating to the method of calculation of the amount of nonresident tuition, the method of payment, and the method and amount of refund (Ed. Code, § 68051, Stats. 1990, ch. 1372).

### Determining Residence Classification

- Require student applicant to supply, and district to weigh, the residence determination factors: Require student applicants to supply, and for the district to weigh, the following information to determine the student's residence classification (Cal. Code Regs., tit. 5, § 54024, subd. (e)).<sup>2</sup>
  - Ownership of residential property
  - Registering to vote in California
  - Active membership in service or social clubs.
  - Being the petitioner for a divorce in California.

Require a student to supply, and for the district to weigh, information regarding whether the student or the parents of a minor student who relinquished California residence after moving from the state has reestablished residence by one full year of physical presence coupled with demonstrated intent to be a California resident. (Cal. Code Regs., tit. 5, § 54030, Register 82, No. 48 (Nov. 27, 1982) p. 637.)

- Residence classification questionnaires: To revise the residence questionnaire based on a sample residence questionnaire provided by the Chancellor's Office (a one-time activity).

To require the student to supply, and for the district to weigh, the following information in a residence questionnaire to determine the student's residence classification:

- Where the student has maintained his or her home for the last two years and whether the student has engaged in any activity listed in subdivision (f) of section 54024 of the title 5 regulations, i.e., has maintained voter registration in another state and voted in another state; was a petitioner for a divorce in another state, as attended an out-of-state institution as a resident of that other state; has declared nonresidence for state income tax purposes.
- For each student under 19 years of age, consideration of where the parent has lived for the last two years and where the parent has engaged in any activity listed in subsection (f) of section 54024 of the title 5 regulations.

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<sup>2</sup> Register 82, No. 48 (Nov. 27, 1982), Register 91, No. 23 (April 5, 1991) p. 334, Register 95, No. 19 (May 19, 1995) p. 333; Register 99, No. 20 (May 14, 1999) p. 333.

- If the student, or the student's parent if the student is under age 19, has either maintained a home outside of California at any time during the last two years, or has engaged in any activity listed in subsection (f) of section 54024 of the title 5 regulations, the student shall be asked for additional evidence of intent to reside in California such as that identified in subsection (e) of section 54024.<sup>3</sup> (Cal.Code Regs., tit. 5, § 54012, subds. (b), (c) & (d).)<sup>4</sup>
- Financial independence: Determine whether the student is financially independent or dependent, in accordance with Education Code section 68044, when a student is seeking reclassification as a resident who was classified as a nonresident in the preceding term. (Cal. Code Regs., tit. 5, § 54032, subd (a).)<sup>5</sup>

Determine whether the student seeking reclassification as a resident who was classified as a nonresident in the preceding term is financially dependent or independent, by requiring the student to supply, and the district to weigh, information on whether the student (1) has not and will not be claimed as an exemption for state and federal tax purposes by his or her parent in the calendar year the reclassification application is made and in any of the three calendar years prior to the reclassification application, (2) has not and will not receive more than seven hundred fifty dollars (\$750) per year in financial assistance from his or her parent in the calendar year the reclassification application is made and in any of the three calendar years prior to the reclassification application, and (3) has not lived and will not live for more than six weeks in the home of his or her parent during the calendar year the reclassification application is made and in any of the three calendar years prior to the reclassification application. (Ed. Code, § 68044, subds. (a), (b) & (c); Stats. 1981, ch. 102, Stats. 1982, ch. 1070.)

#### **Nonresident Tuition Fee**

- Provide nonresident students with notice of nonresident tuition fee charges during the spring term before the fall term in which the change will take effect, and to consider nonresident tuition fees of public community colleges in other states in determining nonresident tuition

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<sup>3</sup> Section 54024, subdivision (e), of the title 5 regulations states: "Objective manifestations of intent to establish California residence include but are not limited to: (1) Ownership of residential property or continuous occupancy of rented or leased property in California. (2) Registering to vote and voting in California. (3) Licensing from California for professional practice. (4) Active membership in service or social clubs. (5) Presence of spouse, children or other close relatives in the state. (6) Showing California as home address on federal income tax form. (7) Payment of California state income tax as a resident. (8) Possessing California motor vehicle license plates. (9) Possessing a California driver's license. (10) Maintaining permanent military address or home of record in California while in armed forces. (11) Establishing and maintaining active California bank accounts. (12) Being the petitioner for a divorce in California."

<sup>4</sup> Register 82, No. 48 (Nov. 27, 1982) pp. 635-636; Register 91, No. 23 (April 5, 1991) p. 334; Register 95, No. 19 (May 19, 1995) p. 333.

<sup>5</sup> Register 82, No. 48 (Nov. 27, 1982) p. 637; Register 91, No. 23 (April 5, 1991) p. 335; Register 95, No. 19 (May 19, 1995) p. 334.

fees, and to make nonresident tuition fee increases gradual, moderate, and predictable. (Ed. Code, § 76140, subd. (d), Stats. 1989, ch. 985.)

### Exceptions to Determination of Nonresidence

The following are entitled to resident tuition or are exempted from paying nonresident tuition:

- Dependent of member of armed forces: Classify as residents for the purpose of determining the amount of tuition and fees those dependents (defined as a natural or adopted child, stepchild, or spouse who is a dependent of a member of the armed forces) of military personnel who retire from active duty after the residence determination date until the student dependent has resided in the state the minimum time necessary to become a resident. (Ed. Code, § 68074, Stats. 1980, ch. 580, Stats. 1989, ch. 900, Stats. 2000, ch. 571.)

Require applicants claiming residence status pursuant to section 68074 of the Education Code (dependent member of the armed forces) to supply, and for the district to weigh, the following documentation in determining the applicant's residence:

- A statement from the military person's commanding officer or personnel officer that: (1) the military person's duty station is in California on active duty as of the residence determination date; or (2) that the military person is outside of California on active duty after having been transferred immediately and directly from a California duty station after the residence determination date; or (3) that the military person has, after the residence determination date, retired as an active member of the armed forces of the United States.
- A statement that the student who qualifies for resident classification as a natural or adopted child or stepchild is a dependent of the military person for an exemption on federal taxes (Cal.Code. Regs., tit. 5, § 54041).<sup>6</sup>
- Member of armed forces after discharge: Classify as a resident a student who was a member of the armed forces of the United States stationed in California on active duty for more than one year immediately prior to being discharged from the armed forces, for the length of time he or she lives in California after being discharged up to the minimum time necessary to become a resident (Ed. Code, § 68075.5, Stats. 1995, ch. 389).
- Dependent of California resident for more than one year: Classify as a resident a student who (a) has not been an adult resident of California for more than one year and (b) is either the dependent child of a California resident who has had residence in California for more than one year prior to the residence determination date, or has a parent who has both contributed court-ordered support for the student on a continuous basis and has been a California resident for a minimum of one year. This exception shall continue until the student has resided in the state the minimum time necessary to become a resident, so long as continuous attendance is maintained at a community college (Ed. Code, § 68076, Stats. 1988, ch. 753, Stats. 1991, ch. 455, Stats. 1993, ch. 8).
- Graduate of Bureau of Indian Affairs school: Classify a student as a resident if he or she has graduated from any school located in California that is operated by the United States Bureau

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<sup>6</sup> Register 82, No. 48 (Nov. 27, 1982) p. 638; Register 83, No. 24 (Jun. 11, 1983) p. 638. Register 91, No. 23 (April 5, 1991) p. 336; Register 95, No. 19 (May 19, 1995) p. 335.

of Indian Affairs, so long as continuous attendance is maintained by the student at a community college (Ed. Code, § 68077, Stats. 1989, ch. 424, Stats. 1993, ch. 8).

- Student holding emergency permit or public school credential: Classify as a resident a student who holds a valid emergency permit authorizing service in the public schools of this state, who is employed by a school district in a full-time position requiring certification qualifications for the academic year in which the student enrolls at an institution in courses necessary to fulfill teacher credential requirements. This classification is only for the purposes of determining the amount of tuition and fees for no more than one year. (Ed. Code, § 68078, subd. (b), Stats. 2000, ch. 949).

For students claiming residency status pursuant to section 68078 of the Education Code, require the student to supply, and for the district to weigh, the following:

- A statement from the employer showing employment by a public school in a full-time position requiring certification qualifications for the college year in which the student enrolls. (Cal. Code Regs., tit. 5, § 54046; Register 82, No. 48 (Nov. 27, 1982) p. 638.1; Register 91, No. 23 (April 5, 1991) p. 337; Register 95, No. 19 (May 19, 1995) p. 335.) This section is state-mandated new program or higher level of service for students claiming residence under subdivision (a) of section 68078,<sup>7</sup> as well as subdivision (b) (student holding a valid emergency permit, as specified).
- Any teaching credential (except a provisional credential). Require the student to show he or she will enroll in courses necessary to obtain another type of credential authorizing service in the public schools, or holds a credential issued by the Board of Governors and is enrolled in courses necessary to fulfill credential requirements. (Former Cal. Code

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<sup>7</sup> Subdivision (a) of section 68078 provides:

(a) A student holding a valid credential authorizing service in the public schools of this state who is employed by a school district in a full-time position requiring certification qualifications for the college year in which the student enrolls in an institution is entitled to resident classification if that student meets any of the following requirements:

(1) He or she holds a provisional credential and is enrolled at an institution in courses necessary to obtain another type of credential authorizing service in the public schools.

(2) He or she holds a credential issued pursuant to Section 44250 and is enrolled at an institution in courses necessary to fulfill credential requirements [§ 44250 states that the commission (on teacher credentialing) issues only the following two types of credentials: "(a) A teaching credential. (b) A services credential. The commission may issue an internship teaching or services credential.]

(3) He or she is enrolled at an institution in courses necessary to fulfill the requirements for a fifth year of education prescribed by subdivision (b) of Section 44259. [§ 44259, subd. (b), specifies the minimum requirements for the preliminary multiple or single subject teaching credential.]



Regs., tit. 5, § 54036; Register 77, No. 45 (Nov. 5, 1977) p. 638.2. Cal. Code Regs., tit. 5, § 54046.)<sup>8</sup>

- Native American student: Classify as a resident a Native American student who attends a school administered by the Bureau of Indian Affairs located within the community college district (Ed. Code, §68082, Stats. 1977, ch. 36).
- Amateur student athlete in training at U.S. Olympic Training Center: Classify as a resident for tuition purposes any amateur student athlete (as defined in Ed. Code, § 68083, subd. (b))<sup>9</sup> in training at the United States Olympic Training Center in Chula Vista, until he or she has resided in the state the minimum time necessary to become a resident (Ed. Code, § 68083, Stats. 1997, ch. 438).
- Federal civil service employee in state due to military mission realignment: Classify as a state resident a federal civil service employee and his or her natural or adopted dependent children if the parent has moved to this state as a result of a military mission realignment action that involves the relocation of at least 100 employees, until the student is entitled to be classified as a resident pursuant to Section 68017, so long as the student continuously attends an institution of public higher education (Ed. Code, § 68084, Stats. 1998, ch. 952).
- Nonresident California high school graduates: Exempt a student (other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of title 8 of the United States Code) from paying nonresident tuition if he or she meets the following criteria: (1) high school attendance in California for three or more years; (2) graduation from a California high school or attainment of the equivalent thereof; (3) registers for or is enrolled in a course offered by any college in the district for any term commencing on or after January 1, 2002; (4) in the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so; and (5) completion of a questionnaire form prescribed by the Chancellor and furnished by the district of enrollment verifying eligibility for this nonresident tuition exemption. (Ed. Code, § 68130.5, Stats. 2001, ch. 814, & Cal.Code Regs., tit. 5, § 54045.5, subd. (b); Register 02, No. 25 (Jun. 21, 2002) p. 335.)<sup>10</sup> For these students:

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<sup>8</sup> Register 82, No. 48 (Nov. 27, 1982) p. 638.1; Register 91, No. 23 (April 5, 1991) p. 337; Register 95, No. 19 (May 19, 1995) p. 335.

<sup>9</sup> “‘Amateur student athlete,’ for purposes of this section, means any student athlete who meets the eligibility standards established by the national governing body for the sport in which the athlete competes.” (§ 68083, subd. (b).)

<sup>10</sup> On September 15, 2008, California’s Third District Court of Appeal issued an opinion on section 68130.5 (Stats. 2001, ch. 814). The opinion reverses a lower court’s decision to grant a demurrer, and holds that plaintiffs stated a viable claim that section 68130.5 conflicts with and is preempted by federal title 8 U.S.C. sections 1623 and 1621. (*Martinez v. Regents of the University of California* (2008) 166 Cal.App.4th 1121.) The case was remanded back to the trial court. If the court ultimately finds that section 68130.5 is invalid, the statute would become

- Retain indefinitely, as Class I permanent records, the original certified affidavit and other materials utilized by a district in meeting the certification requirements; or, copying or reproducing by photograph, microphotograph or reproduced on film or electronically the original certified affidavit and other materials utilized by a district in meeting the certification requirements (Chancellor of the California Community Colleges, "Revised Guidelines and Information on AB 540 Exemption From Nonresident Tuition" May 2002, p. 4, par. 20).
- Refund the student's nonresident tuition if the student is determined eligible for the exemption after he or she has paid nonresident tuition (*Id.*, p. 2, par. 8).
- Discard and replace old questionnaire forms with the newly prescribed Chancellor's form in printed materials for Summer or Fall 2002, unless the district's form is part of a major preprinted document such as a Schedule of Classes. This is a one-time activity (*Id.* at p. 3, par. 14).
- Alien students: Require a student alien to supply, and for the district to weigh, information on whether the student is precluded from establishing domicile. An alien is precluded from establishing domicile in the United States if the alien: (1) entered the United States illegally; (2) entered the United States under a visa requiring that the alien have a residence outside the United States; or (3) entered the United States under a visa that permits entry solely for some temporary purpose. And for the community college district to determine, for an alien who is precluded from establishing domicile in the United States pursuant to subdivision (b) of section 54045 of the title 5 regulations, whether that alien has (1) taken appropriate steps to obtain a change of status with the Immigration and Naturalization Service<sup>11</sup> to a classification which does not preclude establishing domicile, and (2) met the residence requirements of sections 54020-54024<sup>12</sup> of the title 5 regulations related to physical presence and the intent to

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void. At that point, reimbursement for activities under section 68130.5 would end on the date the court's decision becomes final.

<sup>11</sup> The current name of this government agency is U.S. Citizenship and Immigration Services. See < <http://www.uscis.gov> > as of May 8, 2008.

<sup>12</sup> Section 54020 of the title 5 regulations requires "to establish a residence, it is necessary that there be a union of act and intent. To establish residence, a person capable of establishing residence in California must couple his or her physical presence in California with objective evidence that the physical presence is with the intent to make California the home for other than a temporary purpose."

Section 54022 of the title 5 regulations states:

(a) A person capable of establishing residence in California must be physically present in California for one year prior to the residence determination date to be classified as a resident student.

(b) A temporary absence for business, education or pleasure will not result in loss of California residence if, during the absence, the person always intended to return to California and did nothing inconsistent with that intent.

make California home for other than a temporary purpose. (Cal. Code Regs., tit. 5, § 54045, subds. (b) & (c).)<sup>13</sup>

### **Tuition and Fee Waivers for Dependents of Victims of the 9/11 Terrorist Attacks**

- Surviving dependents of victims of 9/11 terrorist attacks: Waive mandatory systemwide fees or tuition of any kind for a student in an undergraduate program who is the surviving dependent (as defined)<sup>14</sup> of any individual killed in the September 11, 2001, terrorist attacks on the World Trade Center in New York City, the Pentagon building in Washington, D.C., or the crash of United Airlines Flight 93 in southwestern Pennsylvania, if the student is determined eligible by the California Victim Compensation and Government Claims Board. The waiver lasts until January 1, 2013, unless the dependent is the surviving child, natural or adopted, of an individual killed in the terrorist attacks of September 11, 2001, in which case

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(c) Physical presence within the state solely for educational purposes does not constitute establishing California residence regardless of the length of that presence.”

Section 54024 of the title 5 regulations states:

(a) Intent to make California the home for other than a temporary purpose may be manifested in many ways. No one factor is controlling.

(b) A student who is 19 years of age or over, and who has maintained a home in California continuously for the last two years shall be presumed to have the intent to make California the home for other than a temporary purpose unless the student has engaged in any of the activities listed in subdivision (f).

(c) A student who is under 19 years of age shall be presumed to have the intent to make California the home for other than a temporary purpose if both the student and his or her parent have maintained a home in California continuously for the last two years unless the student has evidenced a contrary intent by having engaged in any of the activities listed in subdivision (f).

(d) A student who does not meet the requirements of subdivision (b) or subdivision (c) shall be required to provide evidence of intent to make California the home for other than a temporary purpose as specified in subdivision (e).

[Subdivision (e) lists 12 objective manifestations of intent to establish California residence. Subdivision (f) lists 4 acts of conduct inconsistent with a claim of California residence.]

<sup>13</sup> Register 86, No. 10 (Mar. 8, 1986) p. 638.1, Register 91, No. 23 (April 5, 1991) p. 336; Register 92, No. 4 (Jan. 24, 1992) p. 336, Register 95, Nos. 19-20 (May 19, 1995) p. 335.

<sup>14</sup> “‘Dependent,’ for purposes of the section, is a person who, because of his or her relationship to an individual killed as a result of injuries sustained during the terrorist attacks of September 11, 2001, qualifies for compensation under the federal September 11th Victim Compensation Fund of 2001 (Title IV (commencing with Section 401) of Public Law 107-42).” (§ 68121, subd. (d)(1).)

the tuition and fees are waived until the person obtains the age of 30 years (Ed. Code, § 68121, Stats. 2002, ch. 450).

### **Notifying Students of Classification Decision and Appeal Procedure**

- Notification and appeal of classification decision: Notify a student of his or her residence classification not later than fourteen (14) calendar days after the beginning of the session for which the student has applied, or fourteen (14) calendar days after the student's application for admission, whichever is later. (Cal. Code Regs., tit. 5, § 54060, subd. (a); Register 82, No. 48 (Nov. 27, 1982) p. 638.2.)

Establish procedures for appeals of residence classifications (Cal Code Regs., tit. 5, § 54060, subd. (b).)<sup>15</sup>

The Commission also finds that all other statutes, regulations, and executive orders in the test claim do not constitute a reimbursable state-mandated program.

### **BACKGROUND**

The test claim alleges various activities in the Education Code,<sup>16</sup> title 5 of the California Code of Regulations, and in one publication of the Chancellor's Office of the California Community Colleges, that involve classifying students<sup>17</sup> as residents or nonresidents and related activities at community colleges.

Education Code section 68040 requires students to be classified as either residents or nonresidents at community colleges and other segments of California public higher education. A resident is defined as a student who has residence in the state for more than one year immediately preceding the residence determination date (§ 68017). Conversely, a nonresident is a student who does not have residence in the state for more than one year immediately preceding the residence determination date<sup>18</sup> (§ 68018). The community college classifies a student as either a resident or nonresident after the student fills out a residence questionnaire (Cal. Code Regs., tit. 5, § 54012).

Although residence determination is normally governed by the student's physical presence and intent requirements,<sup>19</sup> the Legislature has granted residence status to certain categories of students who do not meet these requirements, such as members of the armed forces (§ 68075), members of the armed forces after discharge (§ 68075.5), military dependents (§ 68074),

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<sup>15</sup> Register 82, No. 48 (Nov. 27, 1982) p. 638.2); Register 91, No. 23 (April 5, 1991) p. 336; Register 95, No. 19 (May 19, 1995) p. 336.

<sup>16</sup> All references are to the Education Code unless otherwise indicated.

<sup>17</sup> "'Student' means a person enrolled in or applying for admission to an institution" (§ 68015). The definition of an "institution" includes a community college (§ 68011).

<sup>18</sup> The residence determination date is "a date or day established by the...district governing boards, as appropriate for each semester, quarter, or term to determine a student's residence" (§ 68023).

<sup>19</sup> Education Code section 68060 et seq.; California Code of Regulations, title 5, sections 54022 and 54024.

dependents of California residents who have been in California for more than one year (§ 68076), aliens (Cal.Code Regs., tit. 5, § 54045), graduates of Bureau of Indian Affairs schools (§ 68077), public school employees holding a valid credential (§ 68078), Native Americans (§ 68082), amateur student athletes at the Olympic Training Center (§ 68083), federal civil service employees and dependents in California due to military mission realignments (§ 68084), or nonresident California high school graduates (§ 68130.5). Students claiming to fall within one of these categories must provide proof of eligibility (Cal.Code Regs., tit. 5, §§ 54010 and 54026).

Nonresident students are required to pay nonresident tuition that resident students do not pay (§ 68050).

Community college students who are dependents of victims of the September 11, 2001 terrorist attacks and who meet certain qualifications are exempt from all fees and tuition (§ 68121).

Community colleges are also required to notify students regarding their resident classification (Cal.Code Regs., tit. 5, §§ 54060) and regarding the amount of nonresident tuition (§ 76140), and are required to refund any fees collected in error or as a result of the student's reduction in units (Cal.Code Regs., tit. 5, § 54070). Students may appeal their residence classification (Cal.Code Regs., tit. 5, § 54060).

#### **Claimant's Position**

Claimant alleges that the test claim statutes, regulations, and alleged executive order impose a reimbursable mandate under article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities:

- A Establishing and implementing policies and procedures, and periodically revising and updating those policies and procedures, to provide for the classification of students as residents or nonresidents, pursuant to Education Code section 68044.
  - (1) Residence classification, or reclassification, for each student at the time applications for admissions are accepted and whenever a student has not been in attendance for more than one semester or quarter, pursuant to title 5, California Code of Regulations, Section 54010, subdivision (a).
  - (2) Receiving and reviewing evidence supplied by students showing physical presence in California and intent to make California their home for other than a temporary purpose and, if the student was classified as a nonresident in the preceding term, evidence of financial independence, pursuant to title 5, California Code of Regulations, Section 54010, subdivision (b).
  - (3) Weighing the information received from each student and making a determination whether the student has clearly established that he or she has been a resident for one year prior to the residence determination date, pursuant to title 5, California Code of Regulations, Section 54010, subdivision (d).
  - (4) Verifying that the residence questionnaires that have been submitted by the student under oath or penalty of perjury, pursuant to title 5, California Code of Regulations, Section 54010, subdivision (e).
  - (5) Verifying that the student has been physically present in California for one year prior to the residence determination date, pursuant to title 5, California Code of Regulations, Section 54022.

- (6) For those students who are unable to establish a presumption of residence pursuant to either subdivision (b) or (c), requiring them to provide evidence of residence, such as: ownership of residential property or continuous occupancy of rented or leased property in California; registering to vote and voting in California; professional licensing in California; active membership in service or social clubs; presence of spouse, children or other close relatives in the state; showing a California address on a federal tax return; paying California income tax as a resident; possessing California motor vehicle license plates; possessing a California driver's license; maintaining a permanent military address; establishing and maintaining active California bank accounts; and/or being the petitioner for a divorce in California, pursuant to title 5, California Code of Regulations, Section 54024, subdivision (d).
  - (7) If a student, or the parents of a minor student, relinquishes California residence, requiring evidence of one full year of physical presence coupled with one full year of demonstrated intent, pursuant to title 5, California Code of Regulations, Section 54030.
  - (8) If a student previously classified as a nonresident seeks reclassification as a resident, requiring and verifying the student's financial independence, pursuant to title 5, California Code of Regulations, Section 54032.
  - (9) Notifying each student of his or her resident classification not later than 14 calendar days after the beginning of the session for which the student had applied, or 14 calendar days after the student's application for admission, whichever is later, pursuant to title 5, California Code of Regulations, Section 54060, subdivision (a).
- B Using residence questionnaires in making residence classifications pursuant to title 5, California Code of Regulations, Section 54012, subdivision (a). The questionnaire shall ask each student:
- (1) Where the student has maintained his or her home for the past two years and whether the student has maintained voter registration or voted in another state, has been a petitioner for a divorce in another state, attended an out-of-state institution as a resident of that other state and whether he or she has declared nonresidence for state income tax purposes, pursuant to title 5, California Code of Regulations, Section 54012, subdivision (b).
  - (2) If the student is under age 19, where his or her parent has lived for the past two years and whether the parent has maintained voter registration or voted in another state, has been a petitioner for a divorce in another state, attended an out-of-state institution as a resident of that other state and whether he or she has declared nonresidence for state income tax purposes, pursuant to title 5, California Code of Regulations, Section 54012, subdivision (c).
  - (3) When the student is under age 19, if the student or the parent has either maintained a home outside of California at any time during the past two years or maintained voter registration or voted in another state, or has been a petitioner for a divorce in another state, or attended an out-of-state institution as a resident of that other state, or whether he or she has declared nonresidence for state income tax purposes, the student shall be asked to supply additional evidence of intent to reside in California, such as ownership of residential property or continuous occupancy of rented or leased property in California; registering to vote and voting in California; professional licensing in California; active membership in service or social clubs; presence of

spouse, children or other close relatives in the state; showing a California address on a federal tax return; paying California income tax as a resident; possession of California motor vehicle license plates; possession of a California driver's license; maintaining a permanent military address; establishing and maintaining active California bank accounts; and/or being the petitioner for a divorce in California, pursuant to title 5, California Code of Regulations, Section 54012, subdivision (d).

- C Granting or limiting residence classification for tuition purposes;
- (1) For no more than one academic year for undergraduate students who are dependent children or spouses of a member of the armed forces of the United States stationed in California on active duty when thereafter transferred on military orders to place outside of California, or thereafter retires from the armed forces, pursuant to Education Code section 68074, and
    - a) Requiring from those seeking an exemption as provided in paragraph (1), to obtain a statement from the military person's commanding officer or personnel officer that the military person's duty station is in California, pursuant to title 5, California Code of Regulations, section 54041.
    - b) Obtaining from those seeking an exemption, as provided in paragraph (1), proof that they are still in their first year of current physical presence in California, pursuant to title 5, California Code of Regulations, section 54050.
  - (2) Limiting residence classification for tuition purposes for members of the armed forces of the United States stationed in this state on active duty for other than educational purposes to only undergraduates and for no more than one academic year, pursuant to Education Code Section 68075.
    - a) Requiring from those seeking an exemption pursuant to paragraph (2), to obtain a statement from the student's commanding officer or personnel officer that the assignment to California is not for educational purposes and evidence of the date of assignment to California, pursuant to title 5, California Code of Regulations, Section 54042.
    - b) Obtaining from those seeking an exemption, as provided in paragraph (2), proof that they are still in their first year of current physical presence in California, pursuant to title 5, California Code of Regulations, section 54050.
  - (3) Students who were members of the armed forces of the United States stationed in California on active duty for more than one year immediately prior to being discharged, pursuant to Education Code section 68075.5.
  - (4) For students who have not been adult residents of California for more than one year and are either a dependent child of a California resident for more than one year prior to residence determination, or a student who has a parent who is a California resident for a minimum of one year and who has contributed court-ordered support for the student on a continuous basis, pursuant to Education Code Section 68076.
  - (5) For students who are graduates of any school located in California and operated by the United States Bureau of Indian Affairs including, but not limited to, the Sherman Indian High School, pursuant to Education Code Section 68077.
  - (6) For no more than one year to students holding valid emergency permits authorizing service in California public schools who are employed by a school district in a full-time position requiring certification qualifications to full teacher credential requirements, pursuant to Education Code Section 68078, subdivision (b).

- a) For those students applying for resident status pursuant to paragraph (6) obtaining a statement from the student's employer showing fulltime employment in a public school, pursuant to title 5, California Code of Regulations, section 54046, and
  - b) Obtaining evidence that the student holds a credential and will enroll in courses necessary to obtain another type of credential, pursuant to title 5, California Code of Regulations, section 54046.
  - c) Obtaining evidence that the student holds a credential issued by the Board of Governors and is enrolled in courses necessary to fulfill credential requirements, pursuant to title 5, California Code of Regulations, section 54046.
- (7) For students who are native Americans if also attending a school administered by the Bureau of Indian Affairs located within the community college district, pursuant to Education Code Section 68082.
  - (8) For students who are amateur athletes in training at the United States Olympic Training Center in Chula Vista, pursuant to Education Code Section 68083.
  - (9) For students, and their dependent children, who are federal civil service employees if transferred to California as a result of a military mission realignment action that involves the relocation of at least 100 employees, pursuant to Education Code Section 68084.
  - (10) For alien students claiming they are not precluded from establishing domicile in the United States are required to show that they did not enter the United States illegally, that they did not enter under a visa which requires residence outside of the United States, and that they did not enter the United States under a visa which permits entry solely for some temporary purpose, pursuant to title 5, California Code of Regulations, section 54045, subdivision (b).
  - (11) For an alien precluded from establishing domicile in the United States, requiring evidence that he or she has taken appropriate steps to obtain a change of status from the Immigration and Naturalization Service, pursuant to title 5, California Code of Regulations, section 54045, subdivision (c).
- D Exempting from the payment of nonresident tuition, students, other than nonimmigrant aliens, who meet the following requirements, pursuant to Education Code Section 68130.5, subdivision (a), title 5, California Code of Regulations, section 54045.5, subdivision (a) and Chancellor's Revised Guidelines and Information dated May 2002, paragraph 3:<sup>20</sup>
- (1) High school attendance in California for three or more years,
  - (2) Graduation from a California high school or attainment of the equivalent thereof,
  - (3) Registration as an entering student at, or current enrollment at, the community college not earlier than the fall semester or quarter of the 2001-2002 academic year, and
  - (4) In case of a person without lawful immigration status, the filing of an affidavit with the community college stating that the student has filed an application to legalize his

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<sup>20</sup> Claimant designated this paragraph as "C" in the test claim (p. 10) so this outline is one letter ahead of that in the test claim from letter "C" forward.



or her immigration status, or will file an application as soon as he or she is eligible to do so.

- (5) Obtaining, from students applying for an exemption from the requirement to pay nonresident tuition, a completed questionnaire, on a form prescribed by the Chancellor, verifying their eligibility for the exemption, pursuant to title 5, California Code of Regulations, Section 54045.5, subdivision (b) and the Chancellor's Revised Guidelines and Information dated May 2002, paragraphs 12, 13 and 14 and attachment four.
  - (6) Obtaining, from students applying for an exemption from the requirement to pay nonresident tuition, additional documentation or evidence, as necessary or when the district is in possession of conflicting information, to verify eligibility for the exemption, pursuant to title 5, California Code of Regulations, Section 54045.5, subdivision (b) and Chancellor's Revised Guidelines and Information dated May 2002, paragraph 17.
  - (7) Obtaining, from students without lawful immigration status applying for an exemption from the requirement to pay nonresident tuition, an affirmation by the student that he or she has filed an application to legalize his or her immigration status, pursuant to title 5, California Code of Regulations, Section 54045.5, subdivision (c).
- E Exempting from the payment of all fees and tuition, undergraduate students who meet the following requirements, pursuant to Education Code Section 68121, subdivision (b)(2):
- (1) They meet the financial need requirements of the Cal Grant A Program, and
  - (2) Until January 1, 2013, he or she is a dependent surviving spouse of an individual killed in the September 11, 2001, terrorist attacks and either he or she, or the individual killed, was a resident of California on September 11, 2001, or
  - (3) Until he or she obtains the age of 30 years, for a dependent child of an individual killed in the September 11, 2001, terrorist attacks and either he or she, or the individual killed, was a resident of California on September 11, 2001, and
  - (4) When necessary verifying an individual's eligibility from the California Victim Compensation and Government Claims Board on a case-by-case basis.
- F Establishing and implementing policies and procedures, and from time to time revising and updating those policies and procedures, for the calculation of the amount of nonresident tuition, the method of payment of nonresident tuition, and the method and amount of refunds of nonresident tuition, pursuant to Education Code Section 68051. This includes:
- (1) Providing advance notice of nonresident tuition charges during the spring term before the fall term in which the charges will take effect, pursuant to Education Code Section 76140, subdivision (d).
  - (2) Adopting and implementing rules for refunds of fees collected in error, fees refundable due to a reduction of the education program, and/or fees refundable as a result of the student's reduction in units, pursuant to title 5, California Code of Regulations, Section 54070. However, no refund of nonresident tuition paid for any term prior to January 1, 2002 is authorized, pursuant to title 5, California Code of Regulations, Section 54045.5, subdivision (f).
  - (3) Refunding nonresident tuition collected when the student is subsequently determined to be eligible for the exemption, pursuant to the Chancellor's Revised Guidelines and Information dated May 2002, paragraph 8.

- (4) Seeking reimbursement from students for nonresident fees that have been waived when the original certification is subsequently determined to be false, pursuant to the Chancellor's Revised Guidelines and Information dated May 2002, paragraph 38.
- G Considering the student's original certified affidavit and other materials used by the district as Class1, Permanent Records, and retaining them indefinitely, unless copied or reproduced as specified, pursuant to the Chancellor's Revised Guidelines and Information dated May 2002, paragraph 20.
- H Participating in surveys conducted by the Chancellor's office concerning students receiving exemptions for nonresident tuition, when requested, pursuant to the Chancellor's Revised Guidelines and Information dated May 2002, paragraph 40.
- I The loss of nonresident tuition fees when students are classified as residents for tuition purposes, pursuant to Education Code Sections 58074, 68075.5, 68076, 68077, 68078(b), 68082, 68083, 68084, and California Code of Regulations, Section 54045, subdivisions (b) and (c).
- J The loss of nonresident tuition fees when nonresident students are exempted from the payment of nonresident tuition pursuant to Education Code Section 68130.5 and California Code of Regulations 54045.5.

The claimant's declaration estimates costs of \$1000 or more in excess of any funding provided from July 1, 2001 through June 30, 2002 to implement these new duties.

Claimant submitted comments on the draft staff analysis in February 2009, disagreeing with portions of the analysis. The specific comments are discussed below.

#### **State Agency Positions**

No state agencies have commented on the test claim or on the draft staff analysis.

### **SUMMARY OF FINDINGS**

The courts have found that article XIII B, section 6 of the California Constitution<sup>21</sup> recognizes the state constitutional restrictions on the powers of local government to tax and spend.<sup>22</sup> "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial

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<sup>21</sup> Article XIII B, section 6, subdivision (a), (as amended in Nov. 2004) provides:

(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

<sup>22</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”<sup>23</sup> A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.<sup>24</sup>

In addition, the required activity or task must be new, constituting a “new program,” or it must create a “higher level of service” over the previously required level of service.<sup>25</sup>

The courts have defined a “program” subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.<sup>26</sup> To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.<sup>27</sup> A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public.”<sup>28</sup>

Finally, the newly required activity or increased level of service must impose costs mandated by the state.<sup>29</sup>

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.<sup>30</sup> 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>31</sup>

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<sup>23</sup> *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

<sup>24</sup> *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

<sup>25</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

<sup>26</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra*, 44 Cal.3d 830, 835.)

<sup>27</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

<sup>28</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878.

<sup>29</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

<sup>30</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>31</sup> *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Each test claim statute or executive order is discussed to determine whether it is a state-mandated new program or higher level of service, and whether it imposes costs mandated by the state within the meaning of Government Code section 17514.

**I. Do the test claim statutes, regulations, and executive order impose a state-mandated new program or higher level of service within the meaning of article XIII B, section 6?**

At the outset, the Commission finds that the test claim statutes, regulations, and the executive order constitute a "program" within the meaning of article XIII B, section 6. The statutes and executive orders carry out the governmental function of providing a service to the public<sup>32</sup> by classifying community college students as residents or nonresidents for tuition fee purposes and determining nonresident tuition. In addition, these activities are unique to school districts, defined to include community colleges (Gov. Code, § 17519). Thus, the analysis continues to determine whether the statutes and executive orders impose a state-mandated new program or higher level of service on community college districts.

**A. District Governing Board Rules and Regulations on Residence Classification and Nonresident Tuition**

Residence classification rules (§ 68044): The last sentence of section 68044 (amended by Stats. 1981, ch. 102, Stats. 1982, ch. 1070) states that a "district governing board may adopt rules and regulations which are not inconsistent with those adopted by the Board of Governors of the California Community Colleges." "District Governing Board" is defined in section 68012, subdivision (b), as "the governing board of a district maintaining one or more community colleges." Because this section uses "may" and is therefore permissive<sup>33</sup> as to community college districts, the Commission finds that section 68044 (Stats. 1981, ch. 102, Stats. 1982, ch. 1070) does not impose a state mandate to adopt rules and regulations regarding student classification.

Refund rules (Cal.Code Regs., tit. 5, § 54070): Section 54070 of the title 5 regulations states as follows:

The governing board of each community college district shall adopt rules providing for refund of the following nonresident tuition fees:

- (a) Those collected in error.
- (b) Those refundable as a result of a reduction of the educational program at the community college for which the fees have been paid.
- (c) Those refundable as a result of the student's reduction in units or the student's withdrawal from an education program at the community college for which fees have been paid, where reduction or withdrawal is for reasons deemed sufficient by the governing board.

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<sup>32</sup> *County of Los Angeles, supra*, 43 Cal.3d 46, 56.

<sup>33</sup> Education Code section 75: "'Shall' is mandatory and 'may' is permissive."

This regulation was in place prior to 1975. Section 54070 of the title 5 regulations reads almost identically to the 1973 version (Register 73, No. 26 (Jun. 30, 1973) p. 638.1).<sup>34</sup>

The Legislature may, but need not, reimburse state mandates if they were enacted prior to 1975 (Cal. Const., art. XIII B, § 6). Because section 54070 was a requirement prior to 1975, the Commission finds that section 54070 of the title 5 regulations<sup>35</sup> is not a state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Nonresident tuition rules (§ 68051): Enacted by Statutes 1976, chapter 1010,<sup>36</sup> section 68051 was amended in 1990 (Stats. 1990, ch. 1372) to add the underlined text as follows:

Unless otherwise provided by law, the governing board or district governing board shall adopt rules and regulations relating to the method of calculation of the amount of nonresident tuition, the method of payment, and the method and amount of refund.

Former Education Code section 22841 (Stats. 1972, ch. 1100) stated: "Unless otherwise provided by law, the governing board shall adopt rules and regulations relating to the method of calculation of the amount of nonresident tuition, the method of payment, and the method and amount of refund." As used in this section, "governing board" referred to the Board of Governors of the California Community Colleges (former Ed. Code, § 22807).

Prior to 1975, section 54001 of title 5 of the California Code of Regulations (Register 73, No. 26 (Jun. 30, 1973) p. 635) stated:

A student classified as a nonresident shall be required, except as otherwise provided herein, to pay nonresident tuition. The amount of tuition shall be determined by the district governing board pursuant to the provisions of Education Code Section 25505.8."<sup>37</sup>

Although it was the responsibility of the district governing board to "determine" the amount of nonresident tuition before 1975, it was not required to "adopt rules and regulations" regarding the nonresident tuition, which was the responsibility of the state Board of Governors.<sup>38</sup> So between the time it was enacted in 1972 (as former § 22841) and when it was amended in 1990,

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<sup>34</sup> In subdivision (c), "the student's reduction in units or the student's withdrawal" was changed from 1973's "the student's reduction of units or his withdrawal" a nonsubstantive change.

<sup>35</sup> Register 77, No.45 (Nov. 5, 1977) p.638.3; Register 82, No. 48 (Nov. 27, 1982) p. 638.2; Register 91, No. 23 (Jun. 7, 1991) p. 337; and Register 95, No. 19 (May 19, 1995) p. 336.

<sup>36</sup> Statutes 1976, chapter 1010 was not pled by claimant, so the Commission makes no finding on it.

<sup>37</sup> Former section 25505.8 (Stats. 1973, ch. 209) was similar to section 76140. The former provision stated in part: "A community college district may admit and shall charge a tuition fee to nonresident students."

<sup>38</sup> Former section 22841 (Stats. 1972, ch. 1100).

section 68051 only applied to the Board of Governors of the California Community Colleges, a state agency.

In interpreting this 1990 amendment to section 68051, the Commission, like a court, uses rules of statutory construction. One of those rules is that the plain and ordinary meaning of the word “or” in a statute is to mark an alternative such as “either this or that.”<sup>39</sup> Using this rule, the plain language of the 1990 amendment to section 68051 indicates that either the state governing board or the district governing board must adopt rules and regulations, but both need not do so. And the requirement for the state to adopt these rules and regulations had been in place since 1972 (Ed. Code, § 22841, Stats. 1972, ch. 1100).

There is no evidence in the record, however, of the existence of the governing board’s adoption of regulations regarding “the method of calculation of the amount of nonresident tuition [or] the method of payment.” Education Code section 76140, subdivisions (d) and (e), contain information regarding the method of calculation of payment, but not the method of payment. And section 54070 of the title 5 regulations, discussed above, does not relate to “the method and amount of refund.” It merely specifies instances in which the requirement to issue a refund of nonresident tuition fees would be triggered. The lack of state-issued regulations in compliance with section 68051 means that the 1990 amendment (Stats. 1990, ch. 1372) requires the districts to adopt them. The Commission also finds that this adoption is a new program or higher level of service.

Therefore, the Commission finds that section 68051 (Stats. 1990, ch. 1372) is a state-mandated new program or higher level of service for the district governing board to adopt rules and regulations relating to the method of calculation of the amount of nonresident tuition, the method of payment, and the method and amount of refund.

## **B. Determining Residence Classification**

Generally, community college districts are required by Education Code section 68040<sup>40</sup> to classify students as either residents or nonresidents. A resident is defined as a student who has residence in the state for more than one year immediately preceding the residence determination date (§ 68017). Conversely, a nonresident is a student who does not have residence in the state for more than one year immediately preceding the residence determination date (§ 68018).<sup>41</sup>

Every person is presumed to have a residence (§ 68060) and section 68062 establishes rules for determining the place of residence. One of those rules is that “residence can be changed only by the union of act and intent.” (§ 68062, subd. (d).) Other rules include: “The residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of the unmarried minor child” (§ 68062, subd. (f)), and “The residence of an unmarried minor

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<sup>39</sup> *Fiorentino v. City of Fresno* (2007) 150 Cal.App.4th 596, 603; *Houge v. Ford* (1955) 44 Cal.2d 706, 712.

<sup>40</sup> Section 68040 was not pled by claimant, so the Commission makes no finding on it.

<sup>41</sup> The residence determination date is “that day immediately preceding the opening day of instruction of the quarter, semester, or other session as set by the district governing board, during which the student proposes to attend a college.” (Cal.Code Regs., tit. 5, § 54002.)

who has a parent living cannot be changed by his or her own act, by the appointment of a legal guardian, or by relinquishment of a parent's right of control." (§ 68062, subd. (g).)

Nonresident students are required to pay nonresident tuition that resident students do not pay (§ 68050).

The various regulations and statutes for determining residence classification that claimant pled are discussed below.

Residence classification determination (Cal.Code Regs., tit. 5, §§ 54002 & 54010, subd. (a)): Section 54010, subdivision (a), of the title 5 regulations<sup>42</sup> requires a determination of residence classification as follows:

Residence classification shall be made for each student at the time applications for admission are accepted and whenever a student has not been in attendance for more than one semester or quarter. A student previously classified as a nonresident may be reclassified as of any residence determination date.

The Commission finds, based on the plain permissive language used, that the second sentence is not a state mandate to reclassify a student previously classified as a nonresident. The Commission also finds, based on the plain language in the first sentence of the regulation, that section 54010, subdivision (a), is a state mandate for community colleges to make a residence classification for each student at the time applications for admission are accepted, and whenever the student has not been in attendance for more than one semester or quarter. The issue is whether doing so is a new program or higher level of service.

Former section 22835 of the Education Code (Stats. 1972, ch. 1100) stated: "Each student shall be classified as ... a district resident, nondistrict resident or nonresident at a California community college." Similarly, the 1973 version of section 54000 (Register 73, No. 26 (Jun. 30, 1973) p. 635) of the title 5 regulations stated "Each student shall be classified by the college of enrollment as a district resident, nondistrict resident, or a nonresident." And the 1973 version of section 54010 (Register 73, No. 26 (Jun. 30, 1973) pp. 636-637) in the regulations stated in part: "Residence classification of all students shall be made for each term at each college starting at the time processing is commenced on applications for admission, readmission, or registration." [Emphasis added.]

According to former section 22835 of the Education Code and former sections 54000 and 54010 of the title 5 regulations, residence classification was required prior to 1975.

There is nothing to indicate that the minor difference in prior and current law regarding timing constitutes a new program or higher level of service. In other words, classifying students "at the time applications for admissions are accepted" (as required under current law) is not a higher level of service than (or different from) classifying students "at the time processing is commenced on applications for admission, readmission or registration" as required under the 1973 version of section 54010 (Register 73, No. 26 (Jun. 30, 1973) pp. 636-637).

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<sup>42</sup> Section 54010 was added and amended by Register 82, No. 48 (Nov. 27, 1982) p. 635; Register 91, No. 23 (Jun. 7, 1991) p. 334; and Register 95, No. 19 (May 19, 1995) p. 333.

Nor does the phrase requiring residence classification “whenever a student has not been in attendance for more than one semester or quarter” (§ 54010, subd. (a)) create a new program or higher level of service. The pre-1975 version of section 54010 was very broad in requiring classification “of all students” “for each term at each college” at the time application processing is commenced for “admission [or] readmission, or registration.” This would have included students who had not been in attendance for more than one semester or quarter, so classifying them was also required before 1975.

The Legislature may, but need not, reimburse state mandates if they were enacted prior to 1975 (Cal. Const., art. XIII B, § 6, subd. (a)(3)). Therefore, the Commission finds that residence classification for student admission or readmission (Cal. Code Regs., tit. 5, § 54010, subd. (a))<sup>43</sup> is not a state-mandated new program or higher level of service within the meaning of article XIII B, section 6.

Section 54002<sup>44</sup> defines residence determination date as “that day immediately preceding the opening day of instruction of the quarter, semester, or other session as set by the district governing board, during which the student proposes to attend a college.” This definition, by itself, does not mandate a community college activity, so the Commission finds that it is not a state mandate subject to article XIII B, section 6 of the California Constitution.<sup>45</sup>

Although student residence classification itself is not new, the methods and factors required to determine it may be. These are discussed below.

Require applicant to supply, and district to weigh, residence classification information (§ 54010, subds. (b)-(d)): Subdivision (b) of section 54010 requires students to submit evidence supporting their residence classification, including “physical presence in California, intent to make the California home for other than a temporary purpose, and if the student was classified as a nonresident in the preceding term, financial independence.”

Subdivision (c) requires community college districts to “require applicants to supply information as specified in this subchapter [Subchapter 1 – Student Residence Classification, in §§ 54000-54072 of title 5] and may require additional information as deemed necessary.”

Subdivision (d) requires the district to “weigh the information provided by the student and determine whether the student has clearly established that he or she has been a resident of California for one year prior to the residence determination date.”

The issue is whether these activities in subdivision (b), (c) and (d) are state mandates. The Commission finds that they are, based on the mandatory language used. Thus, the issue becomes whether they constitute a new program or higher level of service.

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<sup>43</sup> Register 82, No. 48 (Nov. 27, 1982) p. 635; Register 91, No. 23 (Jun. 7, 1991) p. 334; Register 95, No. 19 (May 19, 1995) p. 333; Register 99, No. 20 (May 14, 1999) p. 333.

<sup>44</sup> Register 77, No. 45 (Nov. 5, 1977) p. 636; Register 82, No. 48 (Nov. 27, 1982) p. 635; Register 91, No. 23 (Jun. 7, 1991) p. 334; and Register 95, No. 19 (May 19, 1995) p. 333. Register 99, No. 20 (May 14, 1999) p. 333.

<sup>45</sup> Moreover, section 54002 is nearly identical to section 54005.9 in the 1973 regulations (Register 73, No. 26 (Jun. 30, 1973) p. 636).



Former section 22836 of the Education Code (Stats. 1972, ch. 1100) stated: "Each student enrolled or applying for admission to an institution shall provide such information and evidence of residence as deemed necessary by the [state] governing board to determine his classification."

The 1973 version of section 54002 (Register 73, No. 26 (Jun. 30, 1973) p. 635) in the title 5 regulations stated: "In order to be classified as a resident for tuition purposes, a student must have been a legal resident of California for more than one year immediately preceding the residence determination date for the term during which he proposes to attend a California Community College. Additionally, former section 54010 (Register 73, No. 26 (Jun. 30, 1973) pp. 636-637) in the title 5 regulations stated:

Classifications shall be based on evidence presented in, and supporting, the applicant's answers to residence questionnaires and supplemental residence questionnaires authorized by the district governing board, such further evidence of residence deemed necessary by the institution, and such further evidence of residence as the applicant wishes to submit. Applicants answering their residence questionnaires and supplemental residence questionnaires shall be required to certify them under penalty of perjury or certify them under oath before an employee of the institution authorized by the district governing board at each institution to administer such oaths, or to certify them under oath before a person authorized to administer oaths under the laws of the political entity where the oath is to be administered.

The 1973 version of section 54020 (Register 73, No.26 (Jun. 30, 1973) p. 637) of the title 5 regulations specifies what evidence is necessary to establish legal residence in California.

Read together with the former requirements to "classify" the student, former Education Code section 22836 and former sections 54002, 54010 and 54020 of the 1973 title 5 regulations (Register 73, No. 26 (Jun. 30, 1973) pp. 635-637) cited above indicate that the following activities were state-mandated before 1975: (1) receiving and reviewing the evidence supplied by students showing physical presence in California and showing intent to make California their home for other than a temporary purpose (§ 54010, subd. (b)); (2) weighing the information received and making a determination whether the student has clearly established that he or she has been a resident for one year prior to the residence determination date (§ 54010, subd. (d)). Therefore, the Commission finds that performing these activities (as required by Cal. Code Regs., tit. 5, § 54010, subds. (b) & (d))<sup>46</sup> is not a state-mandated new program or higher level of service within the meaning of article XIII B, section 6, for student residence information required before 1975.<sup>47</sup>

These activities in section 54010, subdivisions (b) through (d), may be new, however, for new (i.e., post-1975) evidence or information that the college must require the student to submit to

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<sup>46</sup> Register 82, No. 48 (Nov. 27, 1982) p. 635; Register 91, No. 23 (Jun. 7, 1991) p. 334; Register 95, No. 19 (May 19, 1995) p. 333; Register 99, No. 20 (May 14, 1999) p. 333.

<sup>47</sup> This finding does not apply to the portion of section 54010, subdivision (b), regarding receiving and reviewing evidence of the student's financial independence, which is discussed separately below.

support his or her residence classification (Cal.Code Regs., tit. 5 § 54010, subd. (b)). This is also true for information that the college must “weigh” that was not required to be submitted before 1975 (Cal.Code Regs., tit. 5 § 54010, subd. (d)). The regulations to which these subdivisions apply are discussed below.

Subdivision (f) of section 54010, added in 1999 (Register 99, No. 20 (May 14, 1999) p. 333) states that “the district may authorize any information required by this section to be submitted electronically using encrypted digital signatures, as specified in Section 54300.” Since this section uses “may” and is therefore permissive as to the community college’s activity, the Commission finds that it is not a state mandate within the meaning of article XIII B, section 6.

Require applicant to supply, and district to weigh, residence determination factors (§§ 54020, 54022, 54024 & 54030): Claimant also pled sections 54020, 54022, 54024 and 54030<sup>48</sup> of the title 5 regulations regarding residence determination. Section 54020 lays out the general regulatory intent:

In order to establish a residence, it is necessary that there be a union of act and intent. To establish residence, a person capable of establishing residence in California must couple his or her physical presence in California with objective evidence that the physical presence is with the intent to make California the home for other than a temporary purpose.

Section 54022 states that the person “must be physically present in California for one year prior to the residence determination date to be classified as a resident student.” It also states, in subdivision (b), that temporary absences do not result in losing California residence “if, during the absence, the person always intended to return to California and did nothing inconsistent with that intent.” And subdivision (c) states that physical presence “solely for educational purposes does not constitute establishing California residence regardless of the length of that presence.”

Section 54024 lists the factors that demonstrate intent “to make California the home for other than a temporary purpose ....” Students who have maintained a home continuously for two years in California (or if under 19, both the student and his or her parent) are presumed “to have the intent to make California the home for other than a temporary purpose unless the student has evidenced a contrary intent” by engaging in specified activities. According to subdivision (d), a student who has not maintained a home continuously for two years “shall be required to provide evidence of intent to make California the home for other than a temporary purpose. Twelve “objective manifestations of intent” are listed in subdivision (e) of section 54024, such as ownership or continuous occupancy of property, registering to vote and voting in California, licensing from California for professional practice, active membership in service or social clubs, presence of spouse, children or other close relatives, showing a California home address on a federal income tax form, paying California state income tax as a resident, possessing California vehicle license plates, possessing a California driver’s license, maintaining permanent military address or home of record in California while in the armed forces, establishing and maintaining active California bank accounts, and being the petitioner for a divorce in California.

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<sup>48</sup> All these regulations were added or amended by Register 82, No. 48 (Nov. 27, 1982) p. 636; Register 91, No. 23 (Jun. 7, 1991) p. 335; Register 95, No. 19 (May 19, 1995) p. 333.

Section 54030 outlines the requirements to reestablish residency after relinquishing it by moving from the state.

The issue is whether these regulations (§§54020, 54022, 54024 & 54030) impose a state-mandated new program or higher level of service. The Commission, like a court, does not examine these regulations in isolation, but in context of the entire scheme of law of which they are a part so that the whole may be harmonized and retain effectiveness.<sup>49</sup> Although these regulations do not mandate an activity themselves, they do when read in conjunction with the requirement (in § 54010, subds. (b) & (c)) for applicants to supply, and the district to weigh, evidence or information when making a residence classification. Thus, the Commission finds that requiring applicants to supply information on, and for the district to weigh, the factors in these regulations is a state mandate.

The Commission finds, however, that sections 54020, 54022, 54030, and most of section 54024 of the title 5 regulations are not a new program or higher level of service. Former Education Code section 22847, subdivision (d), also stated: "The residence can be changed only by the union of act and intent." Former section 54020 of the regulations (Register 73, No. 26 (Jun. 30, 1973) p. 637) provided:

In order to establish a residence, it is necessary that there be a union of act and intent. The act necessary to establish legal residence is physical presence in California. Relevant indications of intent to make California one's residence include, but are not limited to: voting in elections in California and not in any other state; satisfying California personal income tax obligations; establishing an abode in the state where one's belongings are kept, licensing from the state for professional practice; maintaining active resident memberships in California professional organizations; maintaining California vehicle license plates and/or operator's license; maintaining active savings and checking accounts in California banks; maintaining permanent military address or home of record in California in the armed forces; engagement in litigation for which residence is required; showing California as home address on federal income tax forms; and absence of any of these indications in other states during any period for which residence in California is asserted. Documentary evidence, including but not limited to the foregoing, [sic] may be required. No single factor is controlling or decisive.

Section 54022 defines physical presence in California for purposes of residence determination. The Commission finds that it is substantively the same activity as the residence determination under section 54010, subdivision (d), as discussed above.

Subdivision (a) of section 54022 is also substantially similar to the 1973 version of section 54002. The 1977 version (Register 77, No. 45 (Nov. 5, 1977) p. 636) reads as follows with ~~strikeout~~ text for the 1973 version, compared to the underlined text in the current version:

In order to be classified as a resident for tuition purposes, a student must ~~have been a legal resident of~~ be physically present in California for ~~more than~~ one year ~~immediately preceding~~ prior to the residence determination date ~~for the term~~

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<sup>49</sup> *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 280.

during which he proposes to attend a California Community College to be classified as a resident student.

And the 1973 version of section 54020 (Register 73, No. 26 (Jun. 30, 1973) p. 637) included: "The act necessary to establish legal residence is physical presence in California."

Therefore, because it does not mandate a new activity on a community college that is different from the pre-1975 regulation, the Commission finds that section 54022 of the title 5 regulations<sup>50</sup> does not constitute a state-mandated new program or higher level of service within the meaning of article XIII B, section 6.

Section 54024 defines expression of intent to make California a home for other than a temporary purpose. Most of the factors that establish this intent are the same as those in the 1973 version of section 54020 (Register 73, No. 26 (Jun. 30, 1973) p. 637). The information regarding these factors establishing intent is obtained through a questionnaire (Cal. Code Regs., tit. 5, § 54012), which is discussed separately below.

The 1973 version of section 54024 (Register 73, No. 26 (Jun. 30, 1973) p. 637) stated that "Documentary evidence, including but not limited to the foregoing [sic] may be required [to establish residence]." The "foregoing" refers to the 11 factors that establish intent to make California one's residence. This is read together with former section 54010 requiring "residence classification of all students" to be made "for each term at each college ...." Thus, consideration of most of the factors regarding residence classification was required prior to 1975 (under former §§ 54010 & 54024).

One factor merits mention. The 1973 regulation required weighing "voting in elections in California and not in any other state." The current regulation requires weighing "registering to vote and voting in California." Since these require submission and consideration of different facts, the Commission finds that weighing "registering to vote in California" is a new program or higher level of service on a community college. Requiring submission of, and weighing, information on "voting in California" is not a new program or higher level of service, however, because it was required before 1975.

Requiring information on and weighing the following factors was not required under prior law. These were added in 1982 (Register 82, No. 48 (Nov. 27, 1982) p. 637) and are required under current section 54024, subdivision (e), of the title 5 regulations:

- Ownership of residential property (former § 54020 only stated "establishing an abode in the state where one's belongings are kept.")
- Registering to vote in California.
- Active membership in service or social clubs.
- Being the petitioner for a divorce in California.

Therefore, the Commission finds that it is a state-mandated new program or higher level of service for a community college to require applicants to supply the four points of information

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<sup>50</sup> As added or amended by Register 82, No. 48 (Nov. 27, 1982) p. 636; Register 91, No. 23 (Jun. 7, 1991) p. 335; Register 95, No. 19 (May 19, 1995) p. 333.

listed above, and for the district to weigh them, in order to determine the student's residence classification (Cal. Code Regs., tit. 5, §§ 54024<sup>51</sup>).

Section 54030 (added by Register 82, No. 48 (Nov. 27, 1982) p. 637) states that if a student or parents of a minor student "relinquish California residence after moving from the state, one full year of physical presence, coupled with one full year of demonstrated intent to be a California resident, is required to reestablish residence for tuition purposes, except as provided in Education Code section 68070."<sup>52</sup>

It is mandatory for the community college districts to require applicants to supply information regarding reestablishing residence, and for the district to weigh it to determine the student's residence (Cal. Code Regs., tit. 5, § 54010, subds. (c) & (d)). And this determination, for a student or parents of a minor student who relinquished residence, was not required before the 1982 regulation. Therefore, the Commission finds that it is a state-mandate for a community college district to require a student to supply information, and for the district to weigh it, regarding whether the student or the parents of a minor student who relinquished California residence after moving from the state has reestablished residence by one full year of physical presence coupled with demonstrated intent to be a California resident. (Cal. Code Regs., tit. 5, §§ 54030 (Register 82, No. 48 (Nov. 27, 1982) p. 637.)) The Commission also finds that this is a new program or higher level of service, since it was not required before the 1982 regulation.

Residence classification questionnaires (Cal. Code Regs., tit. 5, §§ 54010 (e) & 54012): Section 54010, subdivision (e) of the title 5 regulations states: "Applicants shall certify their answers on residence questionnaires under oath or penalty of perjury."

Claimant also pled section 54012, subdivision (a) (added by Register 82, No. 48 (Nov. 27, 1982) pp. 635-636) of the title 5 regulations, which states: "Each community college district shall use a residence questionnaire in making residence classifications." Subdivisions (b) through (d) identify what the residence questionnaire must ask. Subdivision (e) states: "The Chancellor shall provide a sample residence questionnaire which districts may use in complying with this requirement."

Based on the mandatory language in sections 54012 and 54010, subdivision (e), the Commission finds that it is a state mandate for community colleges to use residence questionnaires, and to require applicants to certify their answers on them under oath or penalty of perjury.

As to whether these activities are a new program or higher level of service, however, the 1973 title 5 regulations, section 54010 (Register 73, No. 26 (Jun. 30, 1973) p. 635) stated:

Residence classifications of all students shall be made for each term at each college starting at the time processing is commenced on applications for admission, readmission, or registration. Classifications shall be based on evidence presented in, and supporting, the applicant's answers to residence questionnaires and supplemental residence questionnaires authorized by the

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<sup>51</sup> Register 82, No. 48 (Nov. 27, 1982) p. 637; Register 91, No. 23 (Jun. 7, 1991) p. 334; Register 95, No. 19 (May 19, 1995) p. 333.

<sup>52</sup> Education Code section 68070 involves a student who remains in California after his or her parents move elsewhere.

district governing board, such further evidence of residence deemed necessary by the institution, and such further evidence of residence as the applicant wishes to submit. Applicants answering their residence questionnaires and supplemental residence questionnaires shall be required to certify them under penalty of perjury or certify them under oath before an employee of the institution authorized by the district governing board at each institution to administer such oaths, or to certify them under oath before a person authorized to administer oaths under the laws of the political entity where the oath is to be administered. [Emphasis added.]

This 1973 version of section 54010 indicates that residence questionnaires were used before 1975. Since residence classification was required under prior law (as discussed above), and it was based on the residence questionnaires, then using residence questionnaires was required under the 1973 version of section 54010, and it is not a new program or higher level of service.

Moreover, under current law the Chancellor's office provides a sample residence questionnaire (§ 54012, subd (e)). Under prior law, the "residence questionnaires and supplemental residence questionnaires [were] authorized by the district governing board." (Former § 54010.) Thus, developing the questionnaires is also not a new program or higher level of service.

The Commission finds, therefore, that sections 54012, subdivision (a), and 54010, subdivision (e) of the title 5 regulations are not a state-mandated new program or higher level of service. The requirement to use questionnaires, and requiring applicants to certify their answers under oath or penalty of perjury, were both required under the 1973 version of section 54010, as quoted above.

Although the questionnaires are not new, the 1973 regulations did not list their contents, which is now listed in section 54012, subdivisions (b) through (d) (added by Register 82, No. 48 (Nov. 27, 1982) pp. 635-636) as follows:

- (b) The residence questionnaire shall ask each student where the student has maintained his or her home for the last two years and whether the student has engaged in any activity listed in subdivision (f) of section 54024.<sup>53</sup>
- (c) The questionnaire shall ask each student under 19 years of age where the parent has lived for the last two years and where the parent has engaged in any activity listed in subsection (f) of section 54024.
- (e) If the student, or the student's parent if the student is under age 19, has either maintained a home outside of California at any time during the last two years, or has engaged in any activity listed in subsection (f) of section 54024, the student

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<sup>53</sup> Section 54024 of the title 5 regulations, subdivision (f), states: "Conduct inconsistent with a claim of California residence includes but is not limited to: (1) maintaining voter registration and voting in another state. (2) Being a petitioner for a divorce in another state. (3) Attending an out-of-state institution as a resident of that other state. (4) Declaring nonresidence for state income tax purposes."

shall be asked for additional evidence of intent to reside in California such as that identified in subsection (e) of section 54024.<sup>54</sup>

This expanded information in the questionnaire requires the community college to revise the questionnaire based on the sample provided by the Chancellor's Office (a one-time activity) and to "weigh the information provided by the student and determine whether the student has clearly established that he or she has been a resident of California for one year prior to the residence determination date." (Cal. Code Regs., tit. 5, § 54010, subd. (e), Register 82, No. 48 (Nov. 27, 1982) p. 635; Register 91, No. 23 (April 5, 1991) p. 334; Register 95, No. 19 (May 19, 1995) p. 333; Register 99, No. 20 (May 14, 1999) p. 333.)

Therefore, the Commission finds that section 54012, subdivisions (b), (c) and (d),<sup>55</sup> and section 54010, subdivision (e),<sup>56</sup> of the title 5 regulations constitutes a state-mandated new program or higher level of service within the meaning of article XIII B, section 6, for the community college district to revise its questionnaire based on the sample provided by the Chancellor's Office (a one-time activity), and to require the student to supply "under oath or penalty of perjury," (§ 54010, subd. (e)) and for the district to weigh, the following information in residence questionnaires to determine the student's residence classification:

- Where the student has maintained his or her home for the last two years and whether the student has engaged in any activity listed in subdivision (f) of section 54024 of the title 5 regulations, i.e., has maintained voter registration in another state and voted in another state; was a petitioner for a divorce in another state, has attended an out-of-state institution as a resident of that other state; has declared nonresidence for state income tax purposes.
- For each student under 19 years of age, consideration of where the parent has lived for the last two years and where the parent has engaged in any activity listed in subsection (f) of section 54024 of the title 5 regulations.
- If the student, or the student's parent if the student is under age 19, has either maintained a home outside of California at any time during the last two years, or has engaged in any

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<sup>54</sup> Section 54024 of the title 5 regulations, subdivision (e), states: "Objective manifestations of intent to establish California residence include but are not limited to: (1) Ownership of residential property or continuous occupancy of rented or leased property in California. (2) Registering to vote and voting in California. (3) Licensing from California for professional practice. (4) Active membership in service or social clubs. (5) Presence of spouse, children or other close relatives in the state. (6) Showing California as home address on federal income tax form. (7) Payment of California state income tax as a resident. (8) Possessing California motor vehicle license plates. (9) Possessing a California driver's license. (10) Maintaining permanent military address or home of record in California while in armed forces. (11) Establishing and maintaining active California bank accounts. (12) Being the petitioner for a divorce in California."

<sup>55</sup> Register 82, No. 48 (Nov. 27, 1982) pp. 635-636; Register 91, No. 23 (April 5, 1991) p. 334; Register 95, No. 19 (May 19, 1995) p. 333.

<sup>56</sup> Register 82, No. 48 (Nov. 27, 1982) p. 635; Register 91, No. 23 (April 5, 1991) p. 334; Register 95, No. 19 (May 19, 1995) p. 333; Register 99, No. 20 (May 14, 1999) p. 333.

activity listed in subsection (f) of section 54024 of the title 5 regulations, the student shall be asked for additional evidence of intent to reside in California such as that identified in subsection (e) of section 54024 of the title 5 regulations.

Financial independence (§ 68044, Cal.Code Regs., tit. 5, §§ 54010 & 54032): Education Code section 68044 (Stats. 1981, ch. 102) requires the state-adopted rules and regulations to “include provisions requiring that the financial independence of a student classified as a nonresident seeking reclassification as a resident shall be included among the factors to be considered in the determination of residency.” Later in section 68044, it defines a financially independent student as one who meets all of the following criteria:

(a) has not and will not be claimed as an exemption for state and federal tax purposes by his or her parent in the calendar year the reclassification application is made and in any of the three calendar years prior to the reclassification application, (b) has not and will not receive more than seven hundred fifty dollars (\$750) per year in financial assistance from his or her parent in the calendar year the reclassification application is made and in any of the three calendar years prior to the reclassification application, and (c) has not lived and will not live for more than six weeks in the home of his or her parent during the calendar year the reclassification application is made and in any of the three calendar years prior to the reclassification application.

Section 54010, subdivision (b), of the title 5 regulations (added by Register 82, No. 48 (Nov. 27, 1982) p. 635) states: “The student shall be required to present evidence of physical presence in California, intent to make California the home for other than a temporary purpose and, if the student was classified as a nonresident the preceding term, financial independence.” [Emphasis added.]

Section 54032 of the title 5 regulations (added by Register 82, No. 48 (Nov. 27, 1982) p. 637) also concerns financial independence. Subdivision (a) of section 54032 requires students seeking reclassification as residents, if they were classified as nonresidents in the preceding term, to be “determined financially independent or dependent in accordance with Education Code section 68044.” A financially independent student “may be reclassified as a resident if the student has met the requirements of section 54020<sup>57</sup> for one year prior to the residence determination date.” (§ 54032, subd. (b).) Section 54032’s remaining subdivisions specify how financial independence affects the residence classification as follows:

(c) In determining whether the student has objectively manifested intent to establish California residence, financial independence shall weigh in favor of finding California residence, and financial dependence shall weigh against finding California residence.

(d) Financial dependence in the current or preceding calendar year shall weigh more heavily against finding California residence than shall financial dependence

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<sup>57</sup> Section 54020: “In order to establish a residence, it is necessary that there be a union of act and intent. To establish residence, a person capable of establishing residence in California must couple his or her physical presence in California with objective evidence that the physical presence is with the intent to make California the home for other than a temporary purpose.”



in earlier calendar years. Financial dependence in the current or preceding calendar year shall be overcome only if: (1) the parent on whom the student is dependent is a California resident, or (2) there is no evidence of the student's continuing residence in another state.

The Commission finds that determining the student's financial dependence or independence, if he or she was classified as a nonresident in the preceding term, is a state mandate. As stated in subdivision (a) of section 54032: "A student seeking reclassification as a resident, who was classified as a nonresident in the preceding term, shall be determined financially independent or dependent in accordance with Education Code section 68044." [Emphasis added.] Subdivisions (c) and (d) of section 54032 expound on the weight financial independence is given in determining California residence. These subdivisions, in addition to the definition of financial independence in section 68044 of the Education Code, define the scope of the mandate to determine financial independence.

Subdivision (b) of section 54010 in title 5 (Register 82, No. 48 (Nov. 27, 1982) p. 635) similarly requires the student to "present evidence of physical presence in California, intent to make California the home for other than a temporary purpose and, if the student was classified as a nonresident in the preceding term, financial independence." This section contains the same requirement as in section 54032, subdivision (a), but emphasizes the student's responsibility in presenting the evidence of financial independence. And subdivision (c) of section 54010 emphasizes the community college district's responsibility to "require applicants to supply information as specified ..." regarding student financial independence, among other things.

The next issue is whether this determination is a new program or higher level of service. Prior to 1975, former Education Code section 22851 (Stats. 1972, ch. 1100) stated:

A student who is a minor and who provides evidence that he has been entirely self-supporting and actually present in California for more than one year immediately preceding the residence determination date shall be entitled to establish his own residence if he meets the other requirements of this chapter.

Former section 54031 of the title 5 regulations stated:

Any minor student claiming application of the self-supporting exception pursuant to Education Code Section 22851 shall provide evidence to the admissions officer such as: documentation showing earnings for the year immediately preceding the residence determination date for the quarter, semester or term of attendance, a statement that the student has actually been present in California for said year (short durational stays away from the state will not preclude the accumulation of time), and a statement showing all expenses of the student for said year.<sup>58</sup>

Thus, although a self-supporting exception existed under prior law, the current definition of financial independence does not resemble pre-1975 law in that the current definition consists in the factors in subdivisions (a) through (c) of Education Code section 68044. Those factors require that the student not be claimed as a tax exemption by his or her parents, not receive more

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<sup>58</sup> Former California Code of Regulations, title 5, section 54031; Register 73-26 (Jun. 30, 1973) pages 636-637.

than \$750 in financial assistance from them, and not live in the parents' home for more than six weeks during the calendar year.

Therefore, the Commission finds that determining financial dependence or independence, for a student classified as a nonresident in the preceding term, is a new program or higher level of service, since it was not required before the 1982 adoption of sections 54010 or 54032 of the regulations. Specifically, the Commission finds that it is a state-mandated new program or higher level of service for the community college district to require the student to submit, and for the district to weigh, information on whether the student (1) has not and will not be claimed as an exemption for state and federal tax purposes by his or her parent in the calendar year the reclassification application is made and in any of the three calendar years prior to the reclassification application, (2) has not and will not receive more than seven hundred fifty dollars (\$750) per year in financial assistance from his or her parent in the calendar year the reclassification application is made and in any of the three calendar years prior to the reclassification application, and (3) has not lived and will not live for more than six weeks in the home of his or her parent during the calendar year the reclassification application is made and in any of the three calendar years prior to the reclassification application. (Ed. Code, § 68044, subds. (a), (b) & (c), Stats. 1981, ch. 102, Stats. 1982, ch. 1070; Cal.Code Regs, tit. 5, § 54010, subd. (b), Register 82, No. 48 (Nov. 27, 1982) p. 635; Register 91, No. 23 (April 5, 1991) p. 334; Register 95, No. 19 (May 19, 1995) p. 333; Register 99, No. 20 (May 14, 1999) p. 333.)

### **C. Nonresident Tuition Fee**

Education Code section 68050 states: "A student classified as a nonresident shall be required, except as otherwise provided in this part, to pay, in addition to other fees required by the institution, nonresident tuition."

Education Code section 76140 requires community college districts to charge a tuition fee to nonresident students, and authorizes the colleges to exempt all or parts of the fee for nonresidents who (1) enroll for six or fewer units, or (2) nonresidents who are citizens and residents of foreign countries if they demonstrate a financial need for the exemption. Subdivision (b) authorizes the community college district to contract with other governments (state, county contiguous to California, federal, or foreign) for payment of nonresident student's tuition fee. Subdivision (c) prohibits nonresident students from being reported as full-time equivalent students for purposes of apportionment, with exceptions. Subdivision (d) requires the community college district to set the nonresident tuition fee not later than February 1 of each year for the succeeding fiscal year, and requires notice to the nonresident students of tuition fee charges. Subdivisions (e) and (f) provide formulas for setting tuition rates for nonresidents.

The first issue is over which amendments to section 76140 does the Commission have jurisdiction. In addition to more recent amendments, claimant pled section 76140 as amended by Statutes 1975, chapter 78 and Statutes 1976, chapter 990, both of which only amended former Education Code section 25505.8 (a precursor to section 76140, renumbered as such in Stats. 1976, ch. 1010<sup>59</sup>). But since former section 25505.8 was not pled as a test claim statute, the

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<sup>59</sup> The amendment to section 76140, renumbering former section 25505.8, by Statutes 1976, chapter 1010, was not pled by claimant.

Commission makes no findings on Statutes 1975, chapter 78,<sup>60</sup> and Statutes 1976, chapter 990.<sup>61</sup> The Commission has jurisdiction over all the amendments to section 76140 from 1977 to 1995.<sup>62</sup> The Commission finds, however, that none of these amendments<sup>63</sup> impose a state mandate on community college districts except for Statutes 1989, chapter 985, as discussed below.

Subdivision (g), as added by Statutes 1989, chapter 985, states "In adopting a tuition fee for nonresident students, the governing board of each community college district shall consider nonresident tuition fees of public community colleges in other states." Also added by Statutes 1989, chapter 985 was the following now in subdivision (d):

The governing board of each community college district shall provide nonresident students with notice of nonresident tuition fee charges during the spring term before the fall term in which the change will take effect. Nonresident tuition fee increases shall be gradual, moderate, and predictable.

Based on the plain language of the provision, the Commission finds that subdivision (d) of Education Code section 76140 (Stats. 1989, ch. 986) is a state mandate to notify the nonresident student of nonresident tuition fee charges during the spring term before the fall term in which the change will take effect. For the same reason, the Commission also finds that section 76140, subdivision (g), (Stats. 1989, ch. 985) is a state mandate for community college district governing boards to consider nonresident tuition fees of public community colleges in other

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<sup>60</sup> This 1975 amendment altered the calculation for the per-unit tuition fee for colleges operating on a quarter system (the 1973 version only considered dividing the fee by 30 units, which was amended to add "for colleges operating on the semester system and 45 (units) for colleges operating on the quarter system." It also changed the criteria for the exception to the mandatory fee for nonresidents.

<sup>61</sup> The 1976 amendment required the citizen and resident of a foreign country for which a community college district may exempt from the nonresident tuition fee to demonstrate a financial need for the exemption, and capped the exemption at not more than 10 percent of the nonresident foreign students attending. It also changed the method for calculating the nonresident tuition.

<sup>62</sup> Statutes 1977, chapter 36 and Statutes 1977, chapter 242 replaced references to grades 13 and 14 with "a community college" and made other nonsubstantive changes. Statutes 1979, chapter 797 removed a requirement to report to the Board of Governors. Statutes 1980, chapter 789, changed the provision regarding reporting nonresident attendance, set a deadline of February 1 for the district governing board to set nonresident tuition rates, made permissive the former requirement for the fee to be paid in equal installments, and altered the tuition setting formula. Statutes 1983, chapter 317, amended the nonresident tuition formula. Statutes 1992, chapter 170 also amended the nonresident tuition formula. Statutes 1992, chapter 1236 added subdivisions (i), (j), and (k), which authorize certain smaller districts to exempt certain students from the mandatory fee, under certain circumstances, and describes how those students are reported for apportionment purposes. Statutes 1995, chapter 758, made nonsubstantive changes.

<sup>63</sup> The amendment of Statutes 2005, chapter 654, was not pled so the Commission makes no finding on it.

states in determining nonresident tuition fees, and to make the tuition fee increases gradual, moderate, and predictable.

The Commission also finds that these activities in amended subdivisions (d) and (g) are a new program or higher level of service, since they did not exist before Statutes 1989, chapter 986.

#### **D. Exceptions to Determination of Nonresidence**

The Legislature has granted specified groups of students the right to resident classification who would not otherwise qualify for residence, entitling those students to resident tuition.

In determining whether the following regulations constitute a state-mandated new program or higher level of service for the individual categories of students discussed below, the following regulation (Cal.Code Regs., tit. 5, § 54010)<sup>64</sup> applies to the regulations discussed in this section of the analysis:

(c) Community college districts shall require applicants to supply information as specified in this subchapter [Subchapter 1 – Student Residence Classification] and may require additional information as deemed necessary.

And for those activities that require determining California residence, the following title 5 regulation (also in § 54010) also applies:

(d) The district shall weigh the information provided by the student and determine whether the student has clearly established that he or she has been a resident of California for one year prior to the residence determination date.

The Commission, like a court, does not examine the following regulations and statutes in isolation, but in context of the entire scheme of law of which they are a part, including subdivisions (c) and (d) above, so that the whole may be harmonized and retain effectiveness.<sup>65</sup> This means that when the statutes discussed below (Ed. Code, §§ 68074, 68075.5, 68076, 68077, 68082, 68083, 68084, 68130.5) entitle the student to classification as a California resident, the statutes are interpreted in light of the community college's duty to classify the student as a resident (Ed. Code § 68040, even though this section was not pled and the Commission makes no finding on it). It also means that when a student is required to provide documentation in compliance with the regulations discussed below, it triggers the community college district's duty to require an applicant to supply, and the district to weigh, the specified documentation to determine the student's residence status (Cal.Code Regs., tit. 5, § 54010, subds. (c) & (d)).

Dependent of member of armed forces (Ed. Code, § 68074; Cal.Code Regs., tit. 5, §§ 54041 & 54050): Section 68074 of the Education Code concerns "a natural or adopted child, stepchild, or spouse who is a dependent of a member of the armed forces" ("military dependent") stationed in California on active duty. Military dependents are entitled to resident classification for purposes of tuition and fees (§ 68074, subd. (a)(1)). For military dependents whose spouse or parent is transferred out of state or retires from active duty, the student dependent does not lose

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<sup>64</sup> Register 82, No. 48 (Nov. 27, 1982) p. 635; Register 91, No. 23 (April 5, 1991) p. 34; Register 95, No. 19 (May 19, 1995) p. 333; Register 99, No. 20 (May 14, 1999) p. 333.

<sup>65</sup> *Hartwell Corp. v. Superior Court*, *supra*, 27 Cal.4th 256, 280.

resident classification until "he or she has resided in the state the minimum time necessary to become a resident" (§ 68074, subd. (b)).

The issue is whether section 68074 is a state-mandated new program or higher level of service. Former section 22853 of the Education Code (Stats. 1974, ch. 388) entitles a military dependent to resident classification "until he has resided in the state the minimum time necessary to become a resident." If the member of the armed forces is transferred "to a place outside the continental United States where the member continues to serve in the armed forces ... the student shall not lose his resident classification until he has resided in the state the minimum time necessary to become a resident, so long as continuous attendance is maintained."

A comparison of the pre-1975 statute (former § 22853) and the current one (§ 68074) indicates that classifying as residents the dependents of transferred active-duty personnel was required before 1975, so the Commission finds that doing so is not a state-mandated new program or higher level of service.

Classifying as residents the dependents of *retired* military personnel, however, was not a part of the pre-1975 statutes. Therefore, the Commission finds that Education Code section 68074 (Stats. 1980, ch. 580) is a state mandate on the community college to classify as residents those students who are dependents (as defined) of military personnel who retire from active duty after the residence determination date. The Commission also finds that doing so is a new program or higher level of service.

Section 54050 of the title 5 regulations indicates the duration of the exception from payment of nonresident tuition:

Those exceptions from payment of nonresident tuition provided by Education Code sections 68074 (military dependents) ... apply for so long as the student qualifies under the terms of either section 68074 or 68075. Resident classification for purposes of determining the amount of tuition and fees includes eligibility for Board of Governor's fee waivers.

The 1973 title 5 regulations, in former section 54040, stated as follows (changed to § 54050 by Register 82, No. 48 (Nov. 27, 1982) p. 638.2):

Those exceptions from payment of nonresident tuition provided by Education Code Sections ... 22853 (military dependents), and 22854 (military members) apply only so long as the student has not been in California long enough to have one year of California residence.

The Commission finds that section 54050 in the title 5 regulations is not a state-mandated new program or higher level of service. Before 1975, the exception for military dependents was limited to one year before obtaining California residence.<sup>66</sup> The current regulation states that the exception from payment of nonresident tuition applies for so long as the resident qualifies under the terms of Education Code section 68074, which states that the student dependent does not lose resident classification until "he or she has resided in the state the minimum time necessary to

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<sup>66</sup> Former California Code of Regulations, title 5, section 54040; Register 73, No. 26 (Jun. 30, 1973) page 638.

become a resident."<sup>67</sup> According to section 68017, that minimum time is one year. Since the current section 54050 regulation is essentially the same as section 54040 in the 1973 title 5 regulations,<sup>68</sup> the Commission finds that, as it applies to Education Code section 68074, section 54040 not a state-mandated new program or higher level of service (Register 82, No. 48 (Nov. 27, 1982) p. 638.2; Register 91, No. 23 (April 5, 1991) p. 336; Register 95, No. 19 (May 19, 1995) p. 336.)

Section 54041 of the title 5 regulations requires the military dependent claiming residence status to do the following. The 1983 amendments are marked in underline and strikeout (Register 82, No. 48 (Nov. 27, 1982) p. 638; Register 83, No. 24 (Jun. 11, 1983) p. 638):

[P]rovide ... a statement from the military person's commanding officer or personnel officer that the military person's duty station is in California on active duty as of the residence determination date ~~or is outside the continental United States on active duty after having been transferred immediately and directly from a California duty station.~~ or that the military person is outside of California on active duty after having been transferred immediately and directly from a California duty station after the residence determination date; or that the military person has, after the residence determination date, retired as an active member of the armed forces of the United States. A statement that the student who qualifies for resident classification as a natural or adopted child or stepchild is a dependent of the military person for an exemption on federal taxes shall also be provided.

In both versions of section 54041, in order to obtain resident classification, the student must submit the documentation listed. This requirement is read in conjunction with section 54010, subdivision (c) and (d)'s requirement for the community college district to require applicants to supply information, and for the district to weigh it. Thus, the Commission finds that requiring a student to supply a statement from the military person's commanding officer or personnel officer, as specified, and a statement regarding the student's tax status as a dependent, and for the district to weigh this information, is a state mandate (Cal.Code Regs, tit. 5, § 54041). This requirement would apply to both current as well as retired military personnel.

The Commission also finds that requiring submission of these documents is a new program or higher level of service. The 1973 title 5 regulations, in former section 54032, stated as follows (changed to § 54041 by Register 82, No. 48 (Nov. 27, 1982) p. 638):

A dependent or natural or adopted child, stepchild or spouse of a member of the armed forces of the United States claiming residence status pursuant to Section 22853 of the Education Code *should* provide the college admissions officer with a statement from the military person's commanding officer or personnel officer that the military person's duty station is in California on active duty as of the opening of the semester, quarter or term, or is outside the continental United States on

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<sup>67</sup> Education Code section 68074, subdivision (b).

<sup>68</sup> Former California Code of Regulations, title 5, section 54040; Register 73, No.26 (Jun. 30, 1973) page 638.

active duty after having been transferred immediately and directly from a California duty station. A statement that the student is a dependent of the military person for an exemption on federal taxes *should* also be provided. [Emphasis added.]

The 1973 and 1977 versions of the title 5 regulation (former § 54032, Register 73, No. 26 (Jun. 30, 1973) pp. 637-638; Register 77, No. 45 (Nov. 5, 1977) p. 638.1) stated that the student *should* provide the admissions officer with a statement from the student that he or she is a dependent of the military person for exemption on federal income taxes, and *should* provide the admissions officer with the following:

[A] statement from the military person's commanding officer or personnel officer that the military person's duty station is in California on active duty as of the opening of the semester, quarter or term, or is outside the continental United States on active duty after having been transferred immediately and directly from a California duty station.

The Commission finds that former section 54032 of the title 5 regulations (Register 73, No. 26 (Jun. 30, 1973) pp. 637-638; Register 77, No. 45 (Nov. 5, 1977) p. 638.1) does not mandate an activity.

By contrast, current section 54041 (added by Register 82, No. 48 (Nov. 27, 1982) p. 638) states that those statements "shall" be provided regarding active duty status, or "that the military person has, after the residence determination date, retired as an active member of the armed forces of the United States." Therefore, the Commission finds that section 54041 of the title 5 regulations (as added by Register 82, No. 48 (Nov. 27, 1982) p. 638) is a state-mandated new program or higher level of service on community colleges to require the student to supply the documentation specified.

In summary, the Commission finds that Education Code section 68074, in the context of the community college's duty to classify a student as a resident or nonresident (§ 68040), imposes a state-mandated new program or higher level of service on community colleges to:

- Classify as residents for the purpose of determining the amount of tuition and fees those dependents (defined as a natural or adopted child, stepchild, or spouse who is a dependent of a member of the armed forces) of military personnel who retire from active duty after the residence determination date until the student dependent has resided in the state the minimum time necessary to become a resident. (Ed. Code, § 68074, Stats. 1980, ch. 580, Stats. 1989, ch. 900, Stats. 2000, ch. 571.)

The Commission also finds that section 54041 of the title 5 regulations is a state-mandated new program or higher level of service for a community college district to require applicants claiming residence status pursuant to section 68074 of the Education Code (for current or retired military personnel) to supply, and for the district to weigh, the following in determining the applicant's residence:

- A statement from the military person's commanding officer or personnel officer that: (1) the military person's duty station is in California on active duty as of the residence determination date; or (2) that the military person is outside of California on active duty after having been transferred immediately and directly from a California duty station after

the residence determination date; or (3) that the military person has, after the residence determination date, retired as an active member of the armed forces of the United States.

- A statement that the student who qualifies for resident classification as a natural or adopted child or stepchild is a dependent of the military person for an exemption on federal taxes. (Cal.Code. Regs., tit. 5, § 54041; Register 82, No. 48 (Nov. 27, 1982) p. 638; Register 83, No. 24 (Jun. 11, 1983) p. 638. Register 91, No. 23 (April 5, 1991) p. 336; Register 95, No. 19 (May 19, 1995) p. 335.)

Member of armed forces (Ed. Code, § 68075; Cal.Code Regs., tit. 5, §§ 54042 & 54050): Section 68075, subdivision (a), of the Education Code (Stats. 2000, ch. 571) states:

An undergraduate student who is a member of the armed forces of the United States stationed in this state on active duty, except a member of the armed forces assigned for educational purposes to a state-supported institution of higher education, is entitled to resident classification only for the purpose of determining the amount of tuition and fees.

Subdivision (b) of section 68075 concerns students seeking a graduate degree and is therefore not applicable to community colleges. Claimant pled versions of section 68075 starting with Statutes 1989, chapter 900.

The issue is whether section 68075 is a state-mandated new program or higher level of service. Former Education Code section 22854 (Stats. 1972, ch. 1100) stated:

A student who is a member of the armed forces of the United States stationed in this state on active duty, except a member of the armed forces assigned for educational purposes to state-supported institutions of higher education, shall be entitled to resident classification until he has resided in the state the minimum time necessary to become a resident.

Because there is no substantive difference between section 68075, subdivision (a), and former section 22854, the pre-1975 statute (or former § 68075, Stats. 1976, ch. 1010), the Commission finds that section 68075 does not impose a state-mandated new program or higher level of service on community colleges within the meaning of article XIII B, section 6.

Section 54050 of the title 5 regulations (Register 82, No. 48 (Nov. 27, 1982) p. 638.2) indicates the duration of the exception from payment of nonresident tuition, as follows:

Those exceptions from payment of nonresident tuition provided by Education Code ... 68075 (military members) apply for so long as the student qualifies under the terms of either section 68074 or 68075. Resident classification for purposes of determining the amount of tuition and fees includes eligibility for Board of Governor's fee waivers.

Former section 54040 (Register 73, No. 26 (Jun. 30, 1973) p. 638) of the title 5 regulations states: "Those exceptions from payment of nonresident tuition provided by Education Code ... 22854 (military members) apply for so long as the student has not been in California long enough to have one year of California residence."

The current version of section 54050 excepts members of the military from nonresident tuition, "for so long as the student qualifies under the terms of either section 68074 or 68075." Section



68075 entitles the undergraduate student to resident classification “only for the purpose of determining the amount of tuition and fees” but does not specify a maximum length of time. Thus, while it may be possible for an active duty member of the military to obtain California residence after one year of active duty military service in the state, the member is not required to do so under the current version of section 54040 in order to be classified as a resident.

Under both the 1973 version of former section 54040 and current section 54050, the student who is a military member on active duty is entitled to resident classification for the purpose of determining the amount of tuition and fees. But the exemption from nonresident tuition is indefinite under the current regulation for undergraduates. If the student were never reclassified as a resident, it would be a lower level of service than under prior law. Therefore, the Commission finds that section 54050 of the title 5 regulations (Register 82, No. 48 (Nov. 27, 1982) p. 638.2), as applied to Education Code section 68075, is not a state-mandated new program or higher level of service.

Section 54042 of the title 5 regulations (Register 82, No. 48 (Nov. 27, 1982) p. 638) requires providing documentation, as follows:

A student claiming application of section 68075 of the Education Code must provide a statement from the student’s commanding officer or personnel officer that the assignment to active duty in this state is not for educational purposes.

The student should also produce evidence of the date of assignment to California.

Section 54042 (Register 82, No. 48 (Nov. 27, 1982) p. 638.2) is identically worded to the 1973 version of section 54033 of the title 5 regulations (Register 73, No. 26 (Jun. 30, 1973) p. 638.1). Both require the student to supply (and the community college to require submission of and weigh, § 54010, subds. (c) & (d)) “a statement from the student’s commanding officer or personnel office that the assignment to active duty in this state is not for educational purposes.” Moreover, plain language of the section, by stating the student “should” produce evidence, indicates that producing evidence of the date of assignment to California is not required. Thus, the Commission finds that section 54042 is not a state-mandated new program or higher level of service within the meaning of article XIII B, section 6 (Register 82, No. 48 (Nov. 27, 1982) p. 638.2); Register 91, No. 23 (April 5, 1991) p. 336; Register 95, No. 19 (May 19, 1995) p. 335).

Claimant, in its February 2009 comments on the draft staff analysis, states that section 54042 requires a student to provide a statement from the student’s commanding officer or personnel officer with the word “must” and the second sentence using the word “should” is, according to claimant, “an additional requirement arising from the first requirement in which the student needs to have a written statement.” The primary reason for the Commission’s finding, however, is that section 54042 is the same as the 1973 version of section 54033. Thus, the Commission finds that section 54042 is not a state-mandated new program or higher level of service within the meaning of article XIII B, section 6 (Register 82, No. 48 (Nov. 27, 1982) p. 638.2); Register 91, No. 23 (April 5, 1991) p. 336; Register 95, No. 19 (May 19, 1995) p. 335).

Member of armed forces after discharge (§ 68075.5): Section 68075.5 of the Education Code (Stats. 1995, ch. 389) states:

A student who was a member of the armed forces of the United States stationed in this state on active duty for more than one year immediately prior to being discharged from the armed forces is entitled to resident classification for the

length of time he or she lives in this state after being discharged up to the minimum time necessary to become a resident. [Emphasis added.]

Although by itself section 68075.5 does not mandate a community college activity, making the student "entitled" to resident classification triggers the district's duty in section 68040 to classify students as California residents, or nonresidents if the statutory criteria does not apply.

Therefore, the Commission finds that section 68075.5 (Stats. 1995, ch. 389) imposes a state-mandate on a community college district to classify as a resident a student who was a member of the armed forces of the United States stationed in California on active duty for more than one year immediately prior to being discharged from the armed forces, for the length of time he or she lives in California after being discharged up to the minimum time necessary to become a resident.

The Commission also finds that this activity is a new program or higher level of service, since there was no statute similar to section 68075.5 before it was enacted by Statutes 1995, chapter 389.

Dependent of California resident for more than one year (§ 68076): Section 68076 of the Education Code, enacted by Statutes 1988, chapter 753, and amended in 1991 and 1993, states as follows:

Notwithstanding Section 68062, [regarding determination of place of residence] a student who (a) has not been an adult resident of California for more than one year and (b) is either the dependent child of a California resident who has had residence in California for more than one year prior to the residence determination date, or has a parent who has both contributed court-ordered support for the student on a continuous basis and has been a California resident for a minimum of one year, shall be entitled to resident classification. This exception shall continue until the student has resided in the state the minimum time necessary to become a resident, so long as continuous attendance is maintained at an institution.  
[Emphasis added.]

This statute entitles specified dependent students to California residency status. Read in conjunction with section 68040's duty to classify students as residents or nonresidents, the Commission finds that section 68076 imposes a state mandate to classify students as residents if they meet the qualifications of section 68076. The Commission also finds that this requirement is a new program or higher level of service, since it did not exist before Statutes 1988, chapter 753.

Therefore, the Commission finds that Education Code section 68076 (Stats. 1988, ch. 753, Stats. 1991, ch. 455, Stats. 1993, ch. 8) imposes a state-mandated new program or higher level of service for community colleges to classify as a resident a student who (a) has not been an adult resident of California for more than one year; and (b) is either the dependent child of a California resident who has had residence in California for more than one year prior to the residence determination date, or has a parent who has both contributed court-ordered support for the student on a continuous basis and has been a California resident for a minimum of one year. This exception shall continue until the student has resided in the state the minimum time necessary to become a resident, so long as continuous attendance is maintained at a community college.

Graduate of Bureau of Indian Affairs school (§ 68077): Section 68077 of the Education Code, added by Statutes 1989, chapter 424, states:

Notwithstanding Section 68062, [regarding determination of place of residence] a student who is a graduate of any school located in California that is operated by the United States Bureau of Indian Affairs, including, but not limited to, the Sherman Indian High School, shall be entitled to resident classification. This exception shall continue so long as continuous attendance is maintained by the student at an institution. [Emphasis added.]

By entitling a category of students to resident status, section 68077 (Stats. 1989, ch. 424, Stats. 1993, ch. 8), triggers the district's duty to classify students who meet the criteria as residents. (§ 68040). Therefore, the Commission finds that section 68077 is a state mandate on community colleges to classify as a resident a student who graduated from any school located in California that is operated by the United States Bureau of Indian Affairs, so long as continuous attendance is maintained by the student at a community college.

The Commission also finds that this requirement is a new program or higher level of service, since it did not exist before Statutes 1989, chapter 424.

Student holding emergency permit or public school credential (§ 68078, Cal.Code Regs., tit. 5, § 54046): Section 68078 of the Education Code was amended by Statutes 2000, chapter 949<sup>69</sup> to add subdivision (b), which entitles a student to resident classification for:

[H]olding a valid emergency permit authorizing service in the public schools of this state, who is employed by a school district in a full-time position requiring certification qualifications for the academic year in which the student enrolls at an institution in courses necessary to fulfill teacher credential requirements.

The classification is "only for the purpose of determining the amount of tuition and fees for no more than one year." (*Ibid.*)

Subdivision (c) (also added by Stats. 2000, ch. 949) states that section 68078 "shall not be construed to affect the admissions policies of any teacher preparation program." The Commission finds that subdivision (c) of section 68078 (Stats. 2000, ch. 949, specifying that the section shall not be construed to affect the admissions policies of any teacher preparation program) is not a state mandate because it does not require a community college activity.

Subdivision (b) of section 68078, added by Statutes 2000, chapter 949, entitles a new category of student to residence classification, one "holding a valid emergency permit authorizing service in the public schools of this state, who is employed by a school district in a full-time position requiring certification qualifications for the academic year in which the student enrolls at an institution in courses necessary to fulfill teacher credential requirements."<sup>70</sup> [Emphasis added.]

<sup>69</sup> Section 68078 was enacted in 1976 (Stats. 1976, ch. 1010), the content of which is currently subdivision (a) of that section. Claimant did not plead the 1976 statute, and the Commission makes no finding on it.

<sup>70</sup> There are 17 types of emergency permits. (Cal.Code Regs., tit.5, § 80023.) An application for an emergency permit is submitted by the school district, charter school, county office of education, et cetera, which is termed the "employing agency." (Cal.Code Regs., tit.5, § 80023.1,

The classification is "only for the purpose of determining the amount of tuition and fees for no more than one year."

To qualify under the statute, a student must be seeking a teaching credential. Although eligibility for a credential requires "a baccalaureate or higher degree" (§ 44259, subd. (b)(1)), it is possible for a person with that degree to take courses toward earning a credential at a community college. For example, one of the credential requirements is "satisfactory completion of a program of professional preparation that has been accredited." (*Id.* at subd. (b)(3).) Completion of this requirement may be satisfied through "lower division" courses available at a community college (§ 44259.1, subd. (b)(2)).

By entitling a category of students to resident status, subdivision (b) of section 68078 triggers the district's duty to classify students who meet the criteria as residents (§ 68040). Therefore, the Commission finds that subdivision (b) of section 68078 (Stats. 2000, ch. 949) is a state mandate on a community college to classify as a resident a student who holds a valid emergency permit authorizing service in the public schools of this state, who is employed by a school district in a full-time position requiring certification qualifications for the academic year in which the student enrolls at an institution in courses necessary to fulfill teacher credential requirements. This classification is only for the purposes of determining the amount of tuition and fees for no more than one year.

The Commission also finds that subdivision (b) of section 68078 is a new program or higher level of service that did not exist before Statutes 2000, chapter 949.

Section 54046 of the title 5 regulations (Register 82, No. 48 (Nov. 27, 1982) p. 638.1; Register 91, No. 23 (April 5, 1991) p. 337) states:

A student claiming residence status pursuant to section 68078 of the Education Code shall provide a statement from the employer showing employment by a public school in a full-time position requiring certification qualifications for the college year in which the student enrolls. The student must also show that he or she holds a credential and will enroll in courses necessary to obtain another type of credential authorizing service in the public schools, or that the student holds a credential issued by the Board of Governors and is enrolled in courses necessary to fulfill credential requirements.<sup>71</sup>

The Commission finds that section 54046 of the title 5 regulations is a state mandate on community college districts to require students claiming resident classification as specified to supply the statements and credential as stated in the regulation.

The next issue is whether section 54046 is a new program or higher level of service. Former section 54036 (Register 73, No. 44 (Nov. 3, 1973) pp. 638-638.1) stated as follows:

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subd. (a)(1).) The permits are good for one year, but may be extended for four additional years if issued on or after January 1, 1998. (Cal.Code Regs., tit.5, § 80023.1, subd. (c).)

<sup>71</sup> Prior to AB 1725 (Stats. 1988, ch. 973) the Board of Governors of the Community Colleges issued credentials, and possession of an appropriate credential was required before a person could be hired as a faculty member (including teaching faculty, counselors, librarians, etc.) or an academic administrator.

**Public School Employee Holding Valid Credential.** A student claiming residence status pursuant to Section 22857 of the Education Code<sup>72</sup> should provide the admissions officer with a statement from the employer showing employment by a public school in a full-time position requiring certification qualifications for the college year in which the student enrolls. The student must also show that he or she holds a provisional credential and will enroll in courses necessary to obtain another type of credential authorizing service in the public schools, or that he student holds a credential issued pursuant to Section 13125 of the Education Code and is enrolled in courses necessary to fulfill credential requirements, or is enrolled in courses necessary to fulfill credential requirements of the fifth year of education prescribed by subdivision (b) of Section 13130 of the Education Code.

The 1977 amendment to section 54036 (Register 77, No. 45 (Nov. 5, 1977) p. 638.2) amended the 1973 version as follows:

**Public School Employee Holding Valid Credential.** A student claiming residence status pursuant to Section ~~22857~~ 68078 of the Education Code should provide the admissions officer with a statement from the employer showing employment by a public school in a full-time position requiring certification qualifications for the college year in which the student enrolls. The student must also show that he or she holds a ~~provisional~~ credential and will enroll in courses necessary to obtain another type of credential authorizing service in the public schools, or that the student holds a credential issued pursuant to Section ~~13125~~ 87274 of the Education Code and is enrolled in courses necessary to fulfill credential requirements, ~~or is enrolled in courses necessary to fulfill credential requirements of the fifth year of education prescribed by subdivision (b) of Section 13130 of the Education Code.~~

As to the first sentence, the plain language of both the 1973 and 1977 versions of the regulation (using the word “should”) did not require providing the admissions officer with a statement from the employer showing employment by a public school in a full-time position requiring certification qualifications for the college year in which the student enrolls. This “should” was changed to “shall” in the 1982 version of the regulation, which also changed the section number to 54046.

Therefore, the Commission finds that section 54046 is a state-mandated new program or higher level of service on the district to require the student to supply, and for the district to weigh, a statement from the employer showing employment by a public school in a full-time position requiring certification qualifications for the college year in which the student enrolls. (Cal. Code Regs., tit. 5, § 54046; Register 82, No. 48 (Nov. 27, 1982) p. 638.1; Register 91, No. 23 (April 5, 1991) p. 337).<sup>73</sup> This section is state-mandated new program or higher level of service for students claiming residence under section 68078. This includes those claiming residence under both subdivision (b) of section 68078 (students holding a valid emergency permit, as specified)

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<sup>72</sup> Former Education Code section 22857 was equivalent to subdivision (a) of section 68078.

<sup>73</sup> The 1991 amendment to the first sentence of section 54046 was not substantive. It removed the term “admission’s officer.”

as well as subdivision (a)<sup>74</sup> (student holding a valid credential, as specified, who is seeking another type of credential, or holds a provisional credential seeking another type of credential, is enrolled in courses necessary to fulfill the requirements for a fifth year of education prescribed by subdivision (b) of Section 44259<sup>75</sup>).

As to the second sentence in the regulation, the word "must" is interpreted the same as "shall" which is mandatory.<sup>76</sup> Under former (pre-1975) law the student was only required to supply (and the district was to require) a student's provisional credential, while under the current version the district is required to look at the types of credential in section 68078 (to include an emergency permit after Statutes 2000, chapter 949). Thus, the Commission finds that requiring a student to supply a provisional credential is not a new program or higher level of service for the district.

The Commission also finds, however, that section 54046 of the title 5 regulations is a state-mandated new program or higher level of service on the district to require the student to supply, and for the district to weigh, any teaching credential except a provisional credential. The district also shall require the student to show he or she will either enroll in courses necessary to obtain another type of credential authorizing service in the public schools, or the student holds a credential issued by the Board of Governors and is enrolled in courses necessary to fulfill credential requirements. (Former Cal. Code Regs., tit. 5, § 54036; Register 77, No. 45 (Nov. 5, 1977) p. 638.2. Cal. Code Regs., tit. 5, § 54046; Register 82, No. 48 (Nov. 27, 1982) p. 638.1; Register 91, No. 23 (April 5, 1991) p. 337.)

Native American student (§ 68082): Education Code section 68082 (Stats. 1977, ch. 36) states:

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<sup>74</sup> Subdivision (a) of section 68078 provides:

(a) A student holding a valid credential authorizing service in the public schools of this state who is employed by a school district in a full-time position requiring certification qualifications for the college year in which the student enrolls in an institution is entitled to resident classification if that student meets any of the following requirements:

- (1) He or she holds a provisional credential and is enrolled at an institution in courses necessary to obtain another type of credential authorizing service in the public schools.
- (2) He or she holds a credential issued pursuant to Section 44250 and is enrolled at an institution in courses necessary to fulfill credential requirements [§ 44250 states that the commission (on teacher credentialing) issues only the following two types of credentials: "(a) A teaching credential. (b) A services credential. The commission may issue an internship teaching or services credential.]
- (3) He or she is enrolled at an institution in courses necessary to fulfill the requirements for a fifth year of education prescribed by subdivision (b) of Section 44259. [See fn. 68.]

<sup>75</sup> Section 44259, subdivision (b), specifies the minimum requirements for the preliminary multiple or single subject teaching credential.

<sup>76</sup> *Board of Supervisors v. Simpson* (1951) 36 Cal.2d 671, 675-676. "Rules governing the interpretation of statutes also apply to interpretation of regulations." *Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.* (2007) 148 Cal.App.4th 1023, 1037.

A student who is a native American is entitled to resident classification for attendance at a community college if the student is also attending a school administered by the Bureau of Indian Affairs located within the community college district. As used in this section, "native American" means an American Indian. [Emphasis added.]

Because of the entitlement language in this section, the district's duty to classify Native American students as residents is triggered if they fall within the statutory criteria. Therefore, the Commission finds that section 68082 (Stats. 1977, ch. 36) is a state mandate on community colleges to classify as residents Native American students who attend a school administered by the Bureau of Indian Affairs located with the community college district. The Commission also finds that this requirement is a new program or higher level of service, since it did not exist before Statutes 1977, chapter 36.

Amateur student athlete in training at U.S. Olympic Training Center (§ 68083): Section 68083 of the Education Code (added by Stats. 1997, ch. 438) states:

- (a) Any amateur student athlete in training at the United States Olympic Training Center in Chula Vista is entitled to resident classification for tuition purposes until he or she has resided in the state the minimum time necessary to become a resident. [Emphasis added.]
- (b) "Amateur student athlete," for purposes of this section, means any student athlete who meets the eligibility standards established by the national governing body for the sport in which the athlete competes.

Section 68083 triggers the district's duty to classify an eligible amateur student athlete as a California resident (§ 68040). Therefore, the Commission finds that section 68083 (Stats. 1997, ch. 438) is a state mandate on community colleges to classify a student as a resident if he or she is an amateur student athlete in training at the United States Olympic Training Center in Chula Vista, and meets the definition in subdivision (b) of section 68083. The Commission also finds that this mandate is a new program or higher level of service, since it did not exist before Statutes 1997, chapter 438.

Therefore, the Commission finds that section 68083 (Stats. 1997, ch. 438) is a state-mandated new program or higher level of service for a community college to classify as a resident for tuition purposes any amateur student athlete (as defined in § 68083, subd. (b)) in training at the United States Olympic Training Center in Chula Vista, until he or she has resided in the state the minimum time necessary to become a resident.

Federal civil service employee in state due to military mission realignment (§ 68084): Added by Statutes 1998, chapter 952, Education Code section 68084<sup>77</sup> provides:

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<sup>77</sup> Subdivision (b) of section 68084 was added by Statutes 2004, chapter 225, regarding community colleges, California State University, and University of California certification of qualifying military mission realignment actions (originally, the Trade and Commerce Agency was to certify qualify military mission realignment actions and provide the information to the community colleges and other segments of higher education). The Commission makes no finding on Statutes 2004, chapter 225 because it was not pled by claimant.

(a) A parent who is a federal civil service employee and his or her natural or adopted dependent children are entitled to resident classification at ... a California community college if the parent has moved to this state as a result of a military mission realignment action that involves the relocation of at least 100 employees. This classification shall continue until the student is entitled to be classified as a resident pursuant to Section 68017 [the definition of "resident"], so long as the student continuously attends an institution of public higher education. [Emphasis added.]

By entitling eligible federal civil service employees, as specified, to resident status, section 68084 requires the college to classify those students as residents if they meet the statutory criteria. Therefore, the Commission finds that section 68084 is a state mandate. As a mandate that did not exist before Statutes 1998, chapter 952, the Commission also finds that this section is a new program or higher level of service.

Specifically, the Commission finds that section 68084 (Stats. 1998, ch. 952) is a state-mandated new program or higher level of service for community colleges to classify as a state resident a federal civil service employee and his or her natural or adopted dependent children if the parent has moved to this state as a result of a military mission realignment action that involves the relocation of at least 100 employees, until the student is entitled to be classified as a resident pursuant to section 68017, so long as the student continuously attends a community college.

Nonresident California high school graduates (§ 68130.5 & Cal.Code Regs., tit. 5, § 54045.5 & Chancellor's document): Education Code section 68130.5, enacted by Statutes 2001, chapter 814, exempts specified students from paying nonresident tuition as follows:

Notwithstanding any other provision of law:

(a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of title 8 of the United States Code, who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges:

- (1) High school attendance in California for three or more years.
- (2) Graduation from a California high school or attainment of the equivalent thereof.
- (3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of the 2001-02 academic year.
- (4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

(b) A student exempt from nonresident tuition under this section may be reported by a community college district as a full-time equivalent student for apportionment purposes.

(c) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall prescribe rules and regulations for the implementation of this section.



(d) Student information obtained in the implementation of this section is confidential.

The legislative intent of Statutes 2001, chapter 814 was expressed in the legislative findings and declarations enacted as section 1 of the bill:

- (1) There are high school pupils who have attended elementary and secondary schools in this state for most of their lives and who are likely to remain, but are precluded from obtaining an affordable college education because they are required to pay nonresident tuition rates.
- (2) These pupils have already proven their academic eligibility and merit by being accepted into our state's colleges and universities.
- (3) A fair tuition policy for all high school pupils in California ensures access to our state's colleges and universities, and thereby increases the state's collective productivity and economic growth.
- (4) This act, as enacted during the 2001-02 Regular Session, allows all persons, including undocumented immigrant students who meet the requirements set forth in Section 68130.5 of the Education Code, to be exempt from nonresident tuition in California's colleges and universities.

Section 54045.5 of the title 5 regulations (Register 02, No. 25 (Jun. 21, 2002) p. 335) repeats the criteria for resident tuition in Education Code section 68130.5. Subdivision (b) of section 54045.5 requires students seeking exemptions under this category to "complete a questionnaire form prescribed by the Chancellor and furnished by the district of enrollment, verifying eligibility for this nonresident tuition exemption" and states that the student may be required to provide additional documentation. Subdivision (c) states that any student without lawful immigration status who is seeking this exemption, "shall, in the questionnaire described in subdivision (b), affirm that he or she has filed an application to legalize his or her immigration status, or will file such an application as soon as he or she is eligible to do so." Subdivision (d) states that the student has the burden of providing evidence of compliance with the requirements. The remaining subdivisions clarify that the section does not modify standards for student financial aid, and that a refund is not authorized for tuition paid for terms before January 2002.

Based on the language in the statute, the Commission finds that Education Code section 68130.5 (Stats. 2001, ch. 814) is a state mandate on a community college to exempt a student (other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of title 8 of the United States Code) from paying nonresident tuition if he or she meets the following criteria: (1) High school attendance in California for three or more years; (2) Graduation from a California high school or attainment of the equivalent thereof; (3) Registers for or is enrolled in a course offered by any college in the district not earlier than the fall semester or quarter of the 2001-02 academic year.<sup>78</sup> The Commission also finds that

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<sup>78</sup> The regulation states that the student must register for or be enrolled for any term commencing on or after January 1, 2002. Although the language of the statute controls the terms of the mandate, community colleges would not be eligible for reimbursement before the effective date of the statute, should the Commission approve this mandate.

section 68130.5 imposes a new program or higher level of service, since the mandate did not exist before Statutes 2001, chapter 814.<sup>79</sup>

The Commission further finds that California Code of Regulations, title 5, section 54045.5 (Register 02, No. 25 (Jun. 21, 2002) p. 335), constitutes a state mandate on a district to require the applicant for the exemption to complete a questionnaire, on a form prescribed by the Chancellor and furnished by the district of enrollment, verifying eligibility for this nonresident tuition exemption, in which the student in the questionnaire affirms that he or she has filed an application to legalize his or her immigration status, or will file such an application as soon as he or she is eligible to do so (Cal.Code Regs., tit. 5, § 54045.5, subd. (b)). And it is a state mandate for the district to weigh the information on the questionnaire in determining the student's eligibility for the exemption (Cal.Code Regs., tit. 5, § 54010, subd. (c)). Requiring and weighing the questionnaire information is also a new program or higher level of service for the community college district, since it did not exist prior to the June 2002 regulation.

The Commission finds that the following phrase in subdivision (b) of section 54045.5 is not a state mandate: "Any student seeking an exemption under subdivision (a) ... may be required to provide documentation in addition to the information required by the questionnaire as necessary to verify eligibility for an exemption." Because the regulation does not expressly require the submission of additional documentation, it would be required at the discretion of the community college. Therefore, requiring to be submitted and weighing any additional documentation to verify eligibility for exempting students from nonresident tuition at a community college is not a state mandate within the meaning of article XIII B, section 6 of the California Constitution.

Aside from the statutes and regulations, the Chancellor's Office issued a document, "Revised Guidelines and Information on AB540" in May 2002, which was pled in the test claim (hereafter Chancellor's document). The Commission finds that this document is an "executive order" within the meaning of Government Code section 17516 because it is an "order, plan, requirement, rule, or regulation issued by ... any agency, department, board, or commission of state government." The Chancellor's document explains section 68130.5 of the Education Code and section 54045.5 of the title 5 regulations, and includes the questionnaire cited in section 54045.5. It also imposes the following new requirements not in the statutes or regulations, which are discussed below:

- If a student is determined eligible for this exemption subsequent to the payment of nonresident tuition, the tuition paid must be refunded to the student (p. 2).
- Individually printed old (questionnaire) forms must be discarded and replaced with newly prescribed (Chancellor's) form, in printed materials for Summer 2002 or Fall 2002,

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<sup>79</sup> On September 15, 2008, California's Third District Court of Appeal issued an opinion on section 68130.5 (Stats. 2001, ch. 814). The opinion reverses a lower court's decision to grant a demurrer, and holds that plaintiffs stated a viable claim that section 68130.5 conflicts with and is preempted by federal title 8 U.S.C. sections 1623 and 1621. (*Martinez v. Regents of the University of California* (2008) 166 Cal.App.4th 1121.) The case was remanded back to the trial court. If the court ultimately finds that section 68130.5 is invalid, the statute would become void. At that point, reimbursement for activities under section 68130.5 would end on the date the court's decision becomes final.

unless the district's form is part of a major preprinted document such as a Schedule of Classes (p. 3).

- The original certified affidavit and other materials utilized by a district in meeting the certification requirements, shall be considered Class 1 – Permanent Records, under the provisions of title 5 of Section 59023. The Class 1 records shall be retained indefinitely, unless copied or reproduced by photograph, microphotograph or reproduced on film or electronically (p. 4).

Claimant pled the activity of “obtaining ... additional documentation or evidence, as necessary or when the district is in possession of conflicting information, to verify eligibility for the exemption.” The Commission finds that collecting documentation beyond the information in the questionnaire is not a state mandate. Section 54045.5 of the title 5 regulation states that the student “may be required to provide documentation in addition to the information required by the questionnaire.” The chancellor’s document states that “if the district is in possession of conflicting information regarding any aspect of the student eligibility, the district should pursue additional verification ... to resolve discrepancies prior to granting this exemption.” [p. 3, emphasis added.] Because neither the regulation nor the chancellor’s document on their face requires additional documentation to be provided, the Commission finds that obtaining it is not mandated by the state.

Claimant, in its February 2009 comments, disagrees and argues that the district “is practically compelled to pursue additional verification if it is in possession of conflicting information regarding any aspect of student eligibility.”<sup>80</sup> According to claimant:

If there is conflicting information on a student’s questionnaire that results in the district not being able to determine the eligibility of the student, the district would be unable to comply with the state mandate that requires the district to weigh the questionnaire information properly. The District’s decision to grant or deny eligibility in the face of conflicting information would be arbitrary and a statutory violation. The Chancellor’s Document language reinforces this when it states that the district should pursue additional verification to resolve discrepancies prior to granting this exception.

Neither the plan language of section 54045.5, subdivision (b), of the title 5 regulation, nor the plain language of the Chancellor’s document, requires pursuing additional verification. Claimant would have the Commission interpret the “may be required to provide additional documentation (in § 54045.5, subd. (b)), or the “should pursue additional verification” (in the Chancellor’s document, p. 3) as a new requirement encompassed within the requirement to weigh questionnaire information (§ 54010, subd. (b)). Weighing information in a questionnaire does not include verifying additional information. The Commission cannot read a requirement into an

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<sup>80</sup> The California Supreme Court has described practical compulsion as a state-imposed substantial penalty (independent of the program funds at issue) on any local entity that declined to participate in a given program. *Kern High School Dist., supra*, 30 Cal.4th 727, 731. Claimant describes no state-imposed substantial penalty here, so the Commission cannot find practical compulsion.

executive order that is not on its face.<sup>81</sup> Therefore, the Commission finds that subdivision (b) of section 54045.5 (Register 02, No. 25 (Jun. 21, 2002) p. 335) and the statement on page 3 of the Chancellor's document do not constitute state mandates within the meaning of article XIII B, section 6.

Paragraph 20 on page 4 of the Chancellor's documents states:

The original certified affidavit and other materials utilized by a district in meeting the certification requirements shall be considered Class 1 – Permanent Records, under the provisions of title 5 of Section 59023. The Class 1 records shall be retained indefinitely, unless copied or reproduced by photograph, microphotograph or reproduced on film or electronically. It is suggested, for audit purposes, that the original documents should be maintained for at least five years.

The Commission finds, based on the plain language of this paragraph, that retaining indefinitely (as Class 1 Permanent Records) the original certified affidavit and other materials utilized by a district in meeting the certification requirements *or* copying, reproducing them by photograph, micrograph, or via film or electronically, is a state mandate. The Commission also finds that doing so is a new program or higher level of service, since it was not required before the Chancellor's document was issued. And although there is a list in subdivision (d) of section 59023 of the title 5 regulations of student records comprising Class 1 – Permanent Records, the affidavit and other materials are not included, making paragraph 20 a new program or higher level of service.

The context of the last two sentences in paragraph 20 indicates that "original documents" mean those not copied or reproduced on film or electronically. Thus, the Chancellor suggests the original documents be maintained for at least five years even if photographic or microphotographic reproduction is effected. Retaining these original documents for five years, however, is not a state mandate because doing so is a suggestion, according to the plain language of the Chancellor's document.

Paragraph 8 on page 2 of the Chancellor's document states: "If a student is determined eligible for this exemption subsequent to the payment of nonresident tuition, the tuition paid must be refunded to the student." The Commission finds that, based on the language, this is a state mandate. The Commission also finds that it is a new program or higher level of service to refund the tuition if the student is determined eligible for the exemption after he or she has paid nonresident tuition, since it was not required before issuance of the Chancellor's document.

Paragraph 14 on page 3 of the Chancellor's document states that individually printed old (questionnaire) forms must be discarded and replaced with newly prescribed (Chancellor's) form, in printed materials for Summer 2002 or Fall 2002, unless the district's form is part of a major preprinted document such as a Schedule of Classes. The Commission finds that

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<sup>81</sup> *Gillett-Harris-Duranceau & Associates, Inc. v. Kemple* (1978) 83 Cal.App.3d 214, 219-220. "Rules governing the interpretation of statutes also apply to interpretation of regulations." *Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.* (2007) 148 Cal.App.4th 1023, 1037.

discarding this old form, if necessary, is a state mandated, one-time activity. The Commission also finds that doing so is a new program or higher level of service.

Paragraph 38 on page 6 of the Chancellor's document states as follows:

If a student certifies that all requirements have been met and this certification is subsequently determined to be false, the student shall be liable for the repayment of the nonresident tuition that would have been applicable for all relevant terms of attendance. The student may be subject to disciplinary proceedings per district policy. The student self-certification contains a student acknowledgement of this potential liability.

The language of paragraph 38 in the Chancellor's document only states that the student is liable for the funds, but does not require the community college to collect them. It also states that the student may be subject to disciplinary proceedings per district policy, but does not require the community college to conduct any proceedings. It would be local officials who would decide to incur the costs.<sup>82</sup>

Claimant, in its February 2009 comments on the draft staff analysis, calls the interpretation regarding collecting the funds "contradictory" because "the student's liability is only as good as the district's ability to collect." According to claimant:

If the district is not required to collect the funds, then there is no point in holding the student liable in the first place because it is very unlikely that the student will voluntarily pay the fees without any action on the district's part. The district is practically compelled to implement procedures and conduct disciplinary proceedings for seeking reimbursement of fee waivers when a student's certification is found to be falsified, because otherwise the district would be unable to collect the fees to which it is entitled.

Claimant also cites Education Code section 41020, subdivision (a),<sup>83</sup> regarding the district's duty of sound fiscal management, arguing that failure to collect funds would violate these principles. Claimant states "by creating the districts' entitlement to these funds, the Chancellor's Document practically compels the districts to collect them."

The Commission disagrees. As stated above, practical compulsion is "if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."<sup>84</sup> Claimant describes no state-imposed substantial penalty, other than the program funds at issue, for not collecting the funds, so the Commission cannot find practical compulsion to do so.

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<sup>82</sup> *San Diego Unified School Dist, supra*, 33 Cal.4th 859, 880.

<sup>83</sup> Education Code section 41020, subdivision (a), states: "It is the intent of the Legislature to encourage sound fiscal management practices among local educational agencies for the most efficient and effective use of public funds for the education of children in California by strengthening fiscal accountability at the district, county, and state levels."

<sup>84</sup> *Kern High School Dist., supra*, 30 Cal.4th 727, 731.

Therefore, the Commission finds that seeking reimbursement from students when the certification is determined to be false, or conducting disciplinary proceedings, are not mandated by the state. This also means that establishing and implementing policies and procedures regarding seeking reimbursement from students for nonresident fees that have been waived when the original certification is subsequently determined to be false, as stated by claimant, is not mandated by the state.

Claimant also pled the following activities:

- Participating in surveys conducted by the Chancellor's office concerning students receiving exemptions for nonresident tuition, when requested, pursuant to the Chancellor's Revised Guidelines and Information dated May 2002, paragraph 40.
- The loss of nonresident tuition fees when students are classified as residents for tuition purposes, pursuant to Education Code Sections 58074, 68075.5, 68076, 68077, 68078(b), 68082, 68083, 68084, and California Code of Regulations, Section 54045, subdivisions (b) and (c).
- The loss of nonresident tuition fees when nonresident students are exempted from the payment of nonresident tuition pursuant to Education Code Section 68130.5 and California Code of Regulations 54045.5.

The Commission finds that these are not state-mandated activities. Regarding the surveys, the Chancellor's document (p. 6, par. 40) states that, "from time to time districts are asked to participate in such research." The language does not indicate that participating in the survey research is required or that receiving funds is conditional on it, so the Commission finds that survey participation is not a state mandate.

The loss of nonresident tuition fees for either classifying students as residents, or exempting them from paying nonresident tuition, is also not reimbursable. In *County of Sonoma v. Commission on State Mandates* ((2000) 84 Cal.App.4th 1264), the challenged legislation reduced the amount of property tax revenue to be allocated to counties pursuant to a formula, keeping funding for schools stable. The court rejected the county's argument that the reallocation of tax revenues constituted a state-mandated cost of a new program, holding that section 6 subvention is limited to increases in actual costs. As the *County of Sonoma* court stated, "we cannot extend the provisions of section 6 [of article XIII B] to include concepts such as lost revenue ... some actual cost must be demonstrated, and not merely decreases in revenue." (*Id.* at 1285.) Thus, the Commission finds that loss of nonresident tuition fees is not a reimbursable cost within the meaning of article XIII B, section 6.

In its February 2009 comments on the draft staff analysis, claimant asserts that the *County of Sonoma* case is not applicable because "the test claim has nothing to do with the legislature's power to determine budgets and shift funds which was the dispositive issue of that case. Rather than taking away funding previously allocated to the districts, the test claim statutes prohibit the districts from imposing fees they were previously permitted to recover."

Claimant states that districts are required to spend funds to educate the district's students, but are restricted from collecting revenues by the test claim statutes and regulations. According to claimant: "The tuition fee waivers restrict the ability to raise local revenue without giving the ability to turn away these students, therefore the loss of nonresident tuition fees is an increased

cost within the meaning of Article XIII B, section 6.” Claimant also points to Education Code section 76000, which it says “requires admission of qualified residents and permits the admission of nonresidents.” Claimant goes on:

By changing the classification of nonresidents to residents, the test claim statutes take away the district’s right to turn away these students. As a result, the district has an additional burden and obligation to educate these students and must incur costs in addition to the loss of revenue from waiving the tuition fee for reclassified students. The overall educational services must be maintained for nonresidents at a reduced fee.

The Commission disagrees with claimant’s interpretation of the *County of Sonoma* case. The Commission finds that the case applies to the lost revenue in this test claim, and as the court stated, “some actual cost must be demonstrated, and not merely decreases in revenue.” Therefore, the Commission finds that the lost revenue due to nonresident tuition fees is not reimbursable within the meaning of article XIII B, section 6.

Alien students (Cal.Code Regs., tit. 5, § 54045): In 1986, section 54045 of the title 5 regulations (Register 86, No. 10 (Mar. 8, 1986) p. 638.1) was adopted. Subdivision (a) of that section states: “An alien not precluded from establishing domicile in the United States by the Immigration and Nationality Act (8 U.S.C. 1101, et seq.) shall be eligible to establish residence pursuant to the provisions of this subchapter.”

Subdivision (b) of section 54045 provides three scenarios when an alien is precluded from establishing domicile in the United States (entered the US illegally,<sup>85</sup> entered under a visa requiring the alien have a residence outside the US, or entered US under a visa that permits entry solely for some temporary purpose). Subdivision (c)<sup>86</sup> prohibits the alien who is precluded from establishing domicile in the United States from being classified as a resident “unless and until he or she has taken appropriate steps to obtain a change of status from the Immigration and Naturalization Service to a classification which does not preclude establishing domicile, and has met the requirements of Sections 54020 – 54024 related to physical presence and the intent to make California home for other than a temporary purpose.”

Before section 54045 was adopted, Statutes 1983, chapter 680, enacted Education Code section 68062, subdivision (h), (not pled by claimant, so the Commission makes no findings on it), which authorized aliens to establish residence unless precluded by the Immigration and Nationality Act from establishing domicile in the United States (Ed. Code, § 68082, subs. (h) & (i)). The constitutionality of subdivision (h) of section 68082<sup>87</sup> was upheld by the Second District Court of Appeal, which provided the following background:

By law, California's public colleges and universities charge lower tuition for California residents than for nonresidents. (See Ed. Code, §§ 68050-68051.) At

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<sup>85</sup> Entering the U.S. illegally was added by Register 92, No. 4 (Jan. 24, 1992) page 336.

<sup>86</sup> Subdivision (c) was added by Register 95, Nos. 19-20 (May 19, 1995) page 335.

<sup>87</sup> Subdivision (h) of section 68082, states: “An alien, including an unmarried minor alien, may establish his or her residence, unless precluded by the Immigration and Nationality Act (8 U.S.C. 1101, et seq.) from establishing domicile in the United States.”

one time, students who were not United States citizens were classified by statute as nonresidents unless they were "lawfully admitted to the United States for permanent residence in accordance with all applicable laws of the United States." (Former Ed. Code, §§ 68076-68077, repealed 1983.)

In 1982, however, in a suit by alien University of Maryland students whose parents were admitted to this country as employees of official international organizations, the Supreme Court of the United States ruled that when federal immigration law authorizes a particular classification of nonimmigrant aliens to establish domicile in the United States, a state university is precluded, under the supremacy clause, from refusing to regard them as residents. (*Toll v. Moreno* (1982) 458 U.S. 1 [73 L.Ed.2d 563, 102 S.Ct. 2977].)

Accordingly, in 1983 our Legislature amended the Education Code to eliminate the requirement that alien students seeking the benefits of resident tuition must show they were lawfully admitted for permanent residence. (Stats. 1983, ch. 680, § 1, p. 2636.) A new rule was substituted: an alien student may be classified as a resident for tuition purposes "unless precluded by the Immigration and Nationality Act (8 U.S.C. 1101, et seq.) from establishing domicile in the United States." (Ed. Code, § 68062, subd. (h).)

The Chancellor of the California State University asked the Attorney General whether, under this new statute, "undocumented aliens"-i.e., noncitizens who lack valid visas, having entered or remained in the United States in violation of federal immigration law-are precluded from qualifying as California residents for tuition purposes. In June 1984 the Attorney General published his formal opinion that undocumented aliens are, under the statute, considered nonresidents. (67 Ops. Cal.Atty.Gen. 241 (1984).)<sup>88</sup>

In addition to declaring Education Code section 68062, subdivision (h), to be constitutional, the Second District Court of Appeal opinion attached the June 1984 Attorney General opinion, which concluded that this section allowing alien students to be classified as residents for tuition purposes unless precluded from doing so by the Immigration and Nationality Act, "was intended only to implement federal law as declared by the United States Supreme Court in *Toll v. Moreno, supra*, 458 U.S. 1, and was not intended to encompass undocumented or illegal aliens."<sup>89</sup>

The Commission finds that subdivisions (b) and (c) of section 54045 of the title 5 regulations (Register 95, No. 19-20 (May 19, 1995) p. 335) are state mandates. Subdivision (b) provides:

An alien is precluded from establishing domicile in the United States if the alien:  
(1) entered the United States illegally (undocumented aliens); (2) entered the United States under a visa which requires that the alien have a residence outside

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<sup>88</sup> *Regents of the University of California v. Bradford* (1990) 225 Cal.App.3d 972, 975-976.

<sup>89</sup> 67 Opinions of the California Attorney General 241 (1984). The Opinion also concluded that section 68062, subdivision (h), does not permit undocumented or illegal aliens to acquire residence for tuition purposes.



of the United States; or (3) entered the United States under a visa which permits entry solely for some temporary purpose.

Read in conjunction with section 54010, subdivisions (c) and (d), that require the district to require applicants to supply information as specified and for the district to weigh it, the Commission finds that section 54045, subdivision (b), of the title 5 regulations (Register 86, No. 10 (Mar. 8, 1986) p. 638.1) is a state mandate for a community college district to require a student alien to supply information on whether he or she is precluded from establishing domicile, as specified, and for the district to weigh the information.

Subdivision (c) of section 54045 of the title 5 regulations (Register 95, No. 19-20 (May 19, 1995) p. 335) states:

An alien described in paragraph (b) shall not be classified as a resident unless and until he or she has taken appropriate steps to obtain a change of status from the Immigration and Naturalization Service to a classification which does not preclude establishing domicile, and has met the requirements of Sections 54020-54024 related to physical presence and the intent to make California home for other than a temporary purpose.

Based on the plain language of this regulation, the Commission finds that it is a state mandate for a community college district to determine whether a student who is an alien has: (1) taken appropriate steps to obtain a change of status with the Immigration and Naturalization Service to a classification which does not preclude establishing domicile, and (2) met the residence requirements of Sections 54020-54024 related to physical presence and the intent to make California home for other than a temporary purpose.

Both of these sections go beyond federal law or court mandate, both of which would preclude reimbursement under Government Code section 17556. The holding of the United States Supreme Court in *Toll v. Moreno, supra*, 458 U.S. 1, was that when federal immigration law authorizes a particular classification of nonimmigrant aliens to establish domicile in the United States, a state university is precluded, under the supremacy clause, from refusing to regard them as residents.<sup>90</sup> Neither this decision nor federal law requires students to submit information regarding residence or domicile.

The next issue is whether these activities are a new program or higher level of service. Prior law did not preclude an alien from establishing domicile in the United States under specified circumstances. Former Education Code sections 22855 and 22856 (Stats. 1972, ch. 1100) stated:

22855. A student who is an adult alien shall be entitled to resident classification if he has been lawfully admitted to the United States for permanent residence in accordance with all applicable laws of the United States; provided, that he has had residence in the state for more than one year after such admission prior to the residence determination date for the semester, quarter or term for which he proposes to attend an institution.

22856. A student who is a minor alien shall be entitled to resident classification if both he and his parent have been lawfully admitted to the United States for

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<sup>90</sup> *Regents of the University of California v. Bradford, supra*, 225 Cal.App.3d 972, 975.

permanent residence in accordance with all applicable laws of the United States; provided, that he parent has had residence in the state for more than one year after such admission prior to the residence determination date for the semester, quarter or term for which he proposes to attend an institution.

Former sections 54034 and 54035 of the title 5 regulations (Register 73, No. 26 (Jun. 30, 1973) p. 638) stated:

54034. Adult Aliens. An adult alien lawfully admitted to the United States for permanent residence and having residence in this state for more than one year and claiming residence immediately prior to the residence determination date and claiming residence for tuition purposes shall show his or her immigrant visa to the admissions officer at the time of classification.

54035. Minor Aliens. A minor alien claiming residence for tuition purposes shall be required at the time of classification to show his or her immigrant visa, his or her parents' immigrant visa and evidence that the parent has had permanent residence in the state for more than one year after admission of the permanent residence prior to the residence determination date.

Because it was not required under prior law, the Commission finds that section 54045, subdivision (b), of the title 5 regulations (Register 86, No. 10 (Mar. 8, 1986) p. 638.1) is a state-mandated new program or higher level of service for a community college district to require a student alien to supply, and for the district to weigh, information on whether the student is precluded from establishing domicile. An alien is precluded from establishing domicile in the United States if the alien: (1) entered the United States illegally; (2) entered the United States under a visa requiring that the alien have a residence outside the United States; or (3) entered the United States under a visa that permits entry solely for some temporary purpose. (Cal.Code Regs, tit. 5, § 54045, subd. (b).)<sup>91</sup>

The Commission also finds that, because it was not required under prior law, subdivision (c) of section 54045 (Register 86, No. 10 (Mar. 8, 1986) p. 638.1) is a state-mandated new program or higher level of service for a community college district to determine, for an alien who is precluded from establishing domicile in the United States pursuant to subdivision (b) of section 54045 of the title 5 regulations, whether that alien has (1) taken appropriate steps to obtain a change of status with the Immigration and Naturalization Service<sup>92</sup> to a classification which does not preclude establishing domicile, and (2) met the residence requirements of sections 54020-54024<sup>93</sup> of the title 5 regulations related to physical presence and the intent to make California home for other than a temporary purpose. (Cal.Code Regs, tit. 5, § 54045, subd. (c).)<sup>94</sup>

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<sup>91</sup> Register 86, No. 10 (Mar. 8, 1986) p. 638.1.; Register 91, No. 23 (April 5, 1991) p. 336; Register 92, No. 4 (Jan. 24, 1992) p. 336, Register 95, Nos. 19-20 (May 19, 1995) p. 335.

<sup>92</sup> The current name of this government agency is U.S. Citizenship and Immigration Services. See < <http://www.uscis.gov> > as of May 8, 2008.

<sup>93</sup> As described above, section 54020 requires "to establish a residence, it is necessary that there be a union of act and intent. To establish residence, a person capable of establishing residence in California must couple his or her physical presence in California with objective evidence that the

## E. Tuition and Fee Waivers for Dependents of Victims of the 9/11 Terrorist Attacks

Section 68121, added by Statutes 2002, chapter 450, states:

(a) Notwithstanding any other provision of law, no mandatory systemwide fees or tuition of any kind shall be required or collected by the Regents of the University of California or the Trustees of the California State University, from a student who is in an undergraduate program and who is the surviving dependent of any individual killed in the September 11, 2001, terrorist attacks on the World Trade Center in New York City, the Pentagon building in Washington, D.C., or the crash of United Airlines Flight 93 in southwestern Pennsylvania, if he or she

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physical presence is with the intent to make California the home for other than a temporary purpose.”

Section 54022 states:

- (a) A person capable of establishing residence in California must be physically present in California for one year prior to the residence determination date to be classified as a resident student.
- (b) A temporary absence for business, education or pleasure will not result in loss of California residence if, during the absence, the person always intended to return to California and did nothing inconsistent with that intent.
- (c) Physical presence within the state solely for educational purposes does not constitute establishing California residence regardless of the length of that presence.”

Section 54024 states:

- (a) Intent to make California the home for other than a temporary purpose may be manifested in many ways. No one factor is controlling.
- (b) A student who is 19 years of age or over, and who has maintained a home in California continuously for the last two years shall be presumed to have the intent to make California the home for other than a temporary purpose unless the student has engaged in any of the activities listed in subdivision (f).
- (c) A student who is under 19 years of age shall be presumed to have the intent to make California the home for other than a temporary purpose if both the student and his or her parent have maintained a home in California continuously for the last two years unless the student has evidenced a contrary intent by having engaged in any of the activities listed in subdivision (f).
- (d) A student who does not meet the requirements of subdivision (b) or subdivision (c) shall be required to provide evidence of intent to make California the home for other than a temporary purpose as specified in subdivision (e). [Subdivision (e) lists 12 objective manifestations of intent to establish California residence. Subdivision (f) lists 4 acts of conduct inconsistent with a claim of California residence.]

<sup>94</sup> Register 95, Nos. 19-20 (May 19, 1995) p. 335; Register 91, No. 23 (April 5, 1991) p. 336; Register 92, No. 4 (Jan. 24, 1992) p. 336, Register 95, Nos. 19-20 (May 19, 1995) p. 335.

meets the financial need requirements set forth in Section 69432.7 for the Cal Grant A Program and either of the following apply:

(1) The surviving dependent was a resident of California on September 11, 2001.

(2) The individual killed in the attacks was a resident of California on September 11, 2001.

(b) (1) The California Victim Compensation and Government Claims Board shall identify all persons who are eligible for tuition and fee waivers pursuant to this section or subdivision (j) of Section 76300.<sup>95</sup> That board shall notify these

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<sup>95</sup> Section 76300, subdivision (j): The fee requirements of this section shall be waived for any student in an undergraduate program, including a student who has previously graduated from another undergraduate or graduate program, who is the dependent of any individual killed in the September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon or the crash of United Airlines Flight 93 in southwestern Pennsylvania, if that dependent meets the financial need requirements set forth in Section 69432.7 for the Cal Grant A Program and either of the following applies:

(1) The dependent was a resident of California on September 11, 2001.

(2) The individual killed in the attacks was a resident of California on September 11, 2001.

(k) A determination of whether a person is a resident of California on September 11, 2001, for purposes of subdivision (j) shall be based on the criteria set forth in Chapter 1 (commencing with Section 68000) of Part 41 for determining nonresident and resident tuition.

(l) (1) "Dependent," for purposes of subdivision (j), is a person who, because of his or her relationship to an individual killed as a result of injuries sustained during the terrorist attacks of September 11, 2001, qualifies for compensation under the federal September 11th Victim Compensation Fund of 2001 (Title IV (commencing with Section 401) of Public Law 107-42).

(2) A dependent who is the surviving spouse of an individual killed in the terrorist attacks of September 11, 2001, is entitled to the waivers provided in this section until January 1, 2013.

(3) A dependent who is the surviving child, natural or adopted, of an individual killed in the terrorist attacks of September 11, 2001, is entitled to the waivers under subdivision (j) until that person attains the age of 30 years.

(4) A dependent of an individual killed in the terrorist attacks of September 11, 2001, who is determined to be eligible by the California Victim Compensation and Government Claims Board, is also entitled to the waivers provided in this section until January 1, 2013.

(m) (1) It is the intent of the Legislature that sufficient funds be provided to support the provision of a fee waiver for every student who demonstrates eligibility pursuant to subdivisions (g) to (j), inclusive.

(2) From funds provided in the annual Budget Act, the board of governors shall allocate to community college districts, pursuant to this subdivision, an amount equal to 2 percent of the fees waived pursuant to subdivisions (g) to (j), inclusive. From funds provided in the annual Budget Act, the board of governors shall allocate to community college districts, pursuant to this subdivision, an amount equal to ninety-one cents (\$0.91) per credit unit waived pursuant to subdivisions (g) to (j), inclusive, for determination of financial need and delivery of student financial aid services, on the basis of the number of students for whom fees are waived. Funds

persons or, in the case of minors, the parents or guardians of these persons, of their eligibility for tuition and fee waivers under these provisions. This notification shall be in writing, and shall be received by all of the appropriate persons no later than July 1, 2003.

(2) The Trustees of ... the governing board of each community college district in the state shall waive tuition and fees, as specified in this section and in subdivision (j) of Section 76300, for any person who can demonstrate eligibility. If requested by the California State University, the University of California, Hastings College of the Law, or a California Community College, the California Victim Compensation and Government Claims Board, on a case-by-case basis, shall confirm the eligibility of persons requesting the waiver of tuition and fees, as provided for in this section.

(c) A determination of whether a person is a resident of California on September 11, 2001, shall be based on the criteria set forth in this chapter for determining nonresident and resident tuition.

(d) (1) "Dependent," for purposes of this section, is a person who, because of his or her relationship to an individual killed as a result of injuries sustained during the terrorist attacks of September 11, 2001, qualifies for compensation under the federal September 11th Victim Compensation Fund of 2001 (Title IV (commencing with Section 401) of Public Law 107-42).

(2) A dependent who is the surviving spouse of an individual killed in the terrorist attacks of September 11, 2001, is entitled to the waivers provided in this section until January 1, 2013.

(3) A dependent who is the surviving child, natural or adopted, of an individual killed in the terrorist attacks of September 11, 2001, is entitled to the waivers under this section until that person obtains the age of 30 years.

(4) A dependent of an individual killed in the terrorist attacks of September 11, 2001, who is determined to be eligible by the California Victim Compensation and Government Claims Board, is also entitled to the waivers provided in this section until January 1, 2013. [Emphasis added.]

Subdivision (b)(2) of section 68121 (Stats. 2002, ch. 450) requires community colleges to waive tuition and fees for dependents of the victims of the 9/11 terrorist attacks. Because doing so was not required before Statutes 2002, chapter 450, the Commission finds that section 68121, subdivision (b)(2) is a state-mandated new program or higher level of service for a community college to waive mandatory systemwide fees or tuition of any kind for a student in an undergraduate program who is the surviving dependent (as defined)<sup>96</sup> of any individual killed in

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allocated to a community college district for determination of financial need and delivery of student financial aid services shall supplement, and shall not supplant, the level of funds allocated for the administration of student financial aid programs during the 1992-93 fiscal year.

<sup>96</sup> "'Dependent,' for purposes of the section, is a person who, because of his or her relationship to an individual killed as a result of injuries sustained during the terrorist attacks of

the September 11, 2001, terrorist attacks on the World Trade Center in New York City, the Pentagon building in Washington, D.C., or the crash of United Airlines Flight 93 in southwestern Pennsylvania, if the student is determined eligible by the California Victim Compensation and Government Claims Board. The waiver lasts until January 1, 2013, unless the dependent is the surviving child, natural or adopted, of an individual killed in the terrorist attacks of September 11, 2001, in which case the tuition and fees are waived until the person obtains the age of 30 years (Ed. Code, § 68121, Stats. 2002, ch. 450).

Determining eligibility (including financial need and residence) for the waiver of "all systemwide fees or tuition of any kind" is the responsibility of the California Victim Compensation and Government Claims Board (VCGCB), not the community college districts. According to subdivision (b)(2) of section 68121, confirmation of the student's eligibility is made by the VCGCB "if requested by ... a California Community College." Thus, the plain language of subdivision (b)(2) indicates that the college's confirmation of the student's eligibility is authorized but not required. Therefore, the Commission finds that confirmation of the student's eligibility for the waiver is not a state mandate. The Board of Governor's Fee Waiver Application requires applicants to submit eligibility documentation received from the VCGCB.<sup>97</sup>

#### **F. Notifying Students of Classification Decision and Appeal Procedure**

Notification and appeal of classification decision (Cal.Code Regs., tit. 5, § 54060): In the title 5 regulations, section 54060, subdivision (a), (added by Register 82, No. 48 (Nov. 27, 1982) p. 638.2) states:

A community college district shall notify each student of the student's residence classification not later than fourteen (14) calendar days after the beginning of the session for which the student has applied, or fourteen (14) calendar days after the student's application for admission, whichever is later.

According to subdivision (b), "Any student, following a decision on residence classification by the college, may make written appeal of that decision. Each community college shall establish procedures for appeals of residence classifications." [Emphasis added.]

Subdivision (c) states that the Chancellor "will advise community college districts on issues in residence classification" and states that "the student shall have no right of appeal [residence classification] to the Chancellor or Board of Governors."

Education Code section 68044 states that the State Board of Governors "shall adopt rules and regulations for determining a student's classification and for establishing procedures for review and *appeal* of that classification." [Emphasis added.]

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September 11, 2001, qualifies for compensation under the federal September 11th Victim Compensation Fund of 2001 (Title IV (commencing with Section 401) of Public Law 107-42)." (§ 68121, subd. (d)(1).)

<sup>97</sup> For example, see the 2004-2005 Board of Governors Fee Waiver Application at <<http://www.cccco.edu/LinkClick.aspx?fileticket=RvsAIDfjE4%3d&tabid=678&mid=1866>> as of May 12, 2008.

Pre-1975 law (Cal. Code Regs., tit. 5, § 54060; Register 73, No. 26 (Jun. 30, 1973) p. 638.1) did not require notifying each student of his or her resident classification outside the context of an appeal.

Therefore, the Commission finds that it is a state-mandated new program or higher level of service for the community college to notify a student of his or her residence classification not later than fourteen (14) calendar days after the beginning of the session for which the student has applied, or fourteen (14) calendar days after the student's application for admission, whichever is later. (Cal. Code Regs., tit. 5, § 54060, subd. (a).)<sup>98</sup>

The 1973 regulations gave students the right to appeal a residence classification (Cal. Code Regs., tit. 5, § 54060; Register 73, No. 26 (Jun. 30, 1973) p. 638.1) but did not require establishing procedures for appeals of residence classification, so the Commission finds that section 54060, subdivision (b),<sup>99</sup> is a state-mandated new program or higher level of service for community colleges to establish procedures for appeals of residence classifications. (Register 82, No. 48 (Nov. 27, 1982) p. 638.2; Register 91, No. 23 (April 5, 1991) p. 336; Register 95, No. 19 (May 19, 1995) p. 336.)

**II. Do the test claim statutes and executive order (found to be a state-mandated new program or higher level of service) impose costs mandated by the state within the meaning of Government Code section 17514 and 17556?**

The final issue is whether the test claim statutes and executive orders that were found to be a state-mandated new program or higher level of service, as discussed above (also see pp. 66-73), impose costs mandated by the state,<sup>100</sup> and whether any statutory exceptions listed in Government Code section 17556 apply to the claim. Government Code section 17514 defines "cost mandated by the state" as follows:

[A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

In the test claim declaration,<sup>101</sup> claimant Contra Costa Community College District estimates that it has incurred "\$1000 or more, in staffing and other costs in excess of any funding provided to school districts and the state for the period from July 1, 2001, through June 20, 2002, to implement these new duties mandated by the state for which the school district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement."

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<sup>98</sup> Register 82, No. 48 (Nov. 27, 1982) p. 638.2; Register 91, No. 23 (Jun. 7, 1991) p. 336; Register 95, No. 19 (May 19, 1995) p. 336.

<sup>99</sup> Register 82, No. 48 (Nov. 27, 1982) p.638.2; Register 91, No. 23 (Jun. 7, 1991) p. 337; Register 95, No. 19 (May 19, 1995) p. 336.

<sup>100</sup> *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

<sup>101</sup> Test Claim 02-TC-21, Exhibit 1, Declaration of Jeanette Moore, May 7, 2003.

The next issue is whether allocating funds for fees waived for surviving victims of the 9/11 terrorist attacks (in § 76300, subd. (m), Stats. 2002, ch. 405) is subject to Government Code section 17556, subdivision (e), which prohibits the Commission from finding “costs mandated by the state” if:

The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

Surviving dependents of victims of 9/11 terrorist attacks: Section 76300, subdivision (m)(2), was amended by Statutes 2002, chapter 450,<sup>102</sup> the same chapter that added section 68121 regarding surviving dependents of victims of the 9/11 terrorist attacks. Subdivision (m)(2) of section 76300 was amended to add the following underlined text:

- (2) From funds provided in the annual Budget Act, the board of governors shall allocate to community college districts, pursuant to this subdivision, an amount equal to 2 percent of the fees waived pursuant to subdivisions (g) to (j) inclusive. From funds provided in the annual Budget Act, the board of governors shall allocate to community college districts, pursuant to this subdivision, an amount equal to ninety-one cents (\$0.91) per credit unit waived pursuant to subdivisions (g) to (j) inclusive for determination of financial need and delivery of student financial aid services, on the basis of the number of students for whom fees are waived. Funds allocated to a community college district shall supplement, and shall not supplant, the level of funds allocated for the administration of student financial aid programs during the 1992-93 fiscal year.

The issue concerns subdivision (j) of section 76300 (added by Stats. 2002, ch. 450), which states:

The fee requirements of this section shall be waived for any student in an undergraduate program, including a student who has previously graduated from another undergraduate or graduate program, who is the dependent of any individual killed in the September 11, 2001, terrorist attacks on the World Trade Center in New York City, the Pentagon building in Washington, DC, or the crash of United Airlines Flight 93 in southwestern Pennsylvania, if he or she meets the financial need requirements set forth in Section 69432.7 for the Cal Grant A Program and either of the following apply: (1) The dependent was a resident of California on September 11, 2001. (2) The individual killed in the attacks was a resident of California on September 11, 2001.

According to subdivisions (j) and (m)(2) of section 76300, the Legislature requires<sup>103</sup> two percent of the fees waived for dependents of victims of the 9/11 attacks to be allocated to community college districts. And the Legislature requires ninety-one cents (\$0.91) per credit

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<sup>102</sup> Statutes 2002, chapter 450 was pled by claimant except for the portion amending Education Code section 76300. The Commission makes no finding on section 76300.

<sup>103</sup> Education Code section 75: “‘Shall’ is mandatory and ‘may’ is permissive.”



unit waived to also be allocated to community college districts “for determination of financial need and delivery of student financial aid services, on the basis of the number of students for whom fees are waived.”

The Commission finds no evidence in the record or the test claim statutes, or in the 2002-03 State Budget Act,<sup>104</sup> or subsequent budget acts,<sup>105</sup> that an appropriation for tuition fee waivers for dependents of victims of the 9/11 terrorist attacks, resulted in “no net costs to the ... districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate”<sup>106</sup> Therefore, the Commission finds that Government Code section 17556, subdivision (e), does not preclude reimbursement for this activity, and that Education Code section 68121 (the provision waiving mandatory systemwide fees or tuition for surviving dependents of the 9/11 terrorist attacks) imposes costs mandated by the state within the meaning of Government Code section 17514.

The allocations in subdivision (m) of section 76300 may be considered as offsetting revenue<sup>107</sup> for waiving tuition and fees pursuant to Education Code section 68121.<sup>108</sup>

In sum, the Commission finds that there are costs mandated by the state within the meaning of Government Code sections 17514 and 17556 for the activities found to be state-mandated new programs or higher levels of service, as discussed above and listed below.

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<sup>104</sup> The 2002-2003 Budget (Stats. 2002, ch. 379) states as follows (in 6870-101-1001, Schedule (1), Provision (2)): “Of the funds appropriated in Schedule (1), Apportionments, up to \$100,000 is for a maintenance allowance, pursuant to regulations adopted by the board of governors. Up to \$500,000 is to reimburse colleges for the costs of federal aid repayments related to assessed fees for fee waiver recipients. This reimbursement only applies to students who completely withdraw from college before the census date.”

<sup>105</sup> The 2003-2004 Budget Act (Stats. 2003, ch. 157) states as follows in 6870-101-1001, Provision (7): “Notwithstanding Section 76300 of the Education Code, or any other provision of law, if the funds appropriated in Schedule (5) [Student Financial Aid Administration] are insufficient to fund all claims, the chancellor shall prorate available funds to each district.”

The 2004-2005 Budget Act (Stats. 2004, ch. 208) states as follows in 6870-101-1001, Provision 11(a): Of the funds appropriated in Schedule (5), [Student Financial Aid Administration] not less than \$10,338,000 is available to reimburse community college districts for the provision of Board of Governors of the California Community Colleges fee waiver awards.

<sup>106</sup> Government Code section 17556, subdivision (e).

<sup>107</sup> California Code of Regulations, title 2, section 1183.1, subdivision (a)(7) requires the parameters and guidelines to contain “Identification of: (i) dedicated state and federal funds appropriated for this program.”

<sup>108</sup> “The waiver lasts until January 1, 2013, unless the dependent is the surviving child, natural or adopted, of an individual killed in the terrorist attacks of September 11, 2001, in which case the tuition and fees are waived until the person obtains the age of 30 years.” (Ed. Code, § 68121, Stats. 2002, ch. 450.)

## CONCLUSION

For the reasons discussed above, the Commission finds that the test claim statutes, regulations, and executive order (found above to be a state-mandated new program or higher level of service) impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for community college districts to be reimbursed for the following:

### **District Governing Board Rules and Regulations on Nonresident Tuition**

- Adopt rules and regulations relating to the method of calculation of the amount of nonresident tuition, the method of payment, and the method and amount of refund (Ed. Code, § 68051, Stats. 1990, ch. 1372).

### **Determining Residence Classification**

- Require applicant to supply, and district to weigh, the residence determination factors: Require applicants to supply, and for the district to weigh, the following information to determine the student's residence classification (Cal. Code Regs., tit. 5, § 54024, subd. (e)).<sup>109</sup>
  - Ownership of residential property
  - Registering to vote in California
  - Active membership in service or social clubs.
  - Being the petitioner for a divorce in California.

Require a student to supply, and for the district to weigh, information regarding whether the student or the parents of a minor student who relinquished California residence after moving from the state has reestablished residence by one full year of physical presence coupled with demonstrated intent to be a California resident. (Cal. Code Regs., tit. 5, § 54030, Register 82, No. 48 (Nov. 27, 1982) p. 637.)

- Residence classification questionnaires: To revise the residence questionnaire based on a sample residence questionnaire provided by the Chancellor's Office (a one-time activity).

To require the student to supply, and for the district to weigh, the following information in a residence questionnaire to determine the student's residence classification:

- Where the student has maintained his or her home for the last two years and whether the student has engaged in any activity listed in subdivision (f) of section 54024 of the title 5 regulations, i.e., has maintained voter registration in another state and voted in another state; was a petitioner for a divorce in another state, as attended an out-of-state institution as a resident of that other state; has declared nonresidence for state income tax purposes.
- For each student under 19 years of age, consideration of where the parent has lived for the last two years and where the parent has engaged in any activity listed in subsection (f) of section 54024 of the title 5 regulations.

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<sup>109</sup> Register 82, No. 48 (Nov. 27, 1982), Register 91, No. 23 (April 5, 1991) p. 334, Register 95, No. 19 (May 19, 1995) p. 333; Register 99, No. 20 (May 14, 1999) p. 333.

- o If the student, or the student's parent if the student is under age 19, has either maintained a home outside of California at any time during the last two years, or has engaged in any activity listed in subsection (f) of section 54024 of the title 5 regulations, the student shall be asked for additional evidence of intent to reside in California such as that identified in subsection (e) of section 54024.<sup>110</sup> (Cal. Code Regs., tit. 5, § 54012, subds. (b), (c) & (d).)<sup>111</sup>

- Financial independence: Determine whether the student is financially independent or dependent, in accordance with Education Code section 68044, when a student is seeking reclassification as a resident who was classified as a nonresident in the preceding term. (Cal. Code Regs., tit. 5, § 54032, subd (a).)<sup>112</sup>

Determine whether the student seeking reclassification as a resident who was classified as a nonresident in the preceding term is financially dependent or independent, by requiring the student to supply, and the district to weigh, information on whether the student (1) has not and will not be claimed as an exemption for state and federal tax purposes by his or her parent in the calendar year the reclassification application is made and in any of the three calendar years prior to the reclassification application, (2) has not and will not receive more than seven hundred fifty dollars (\$750) per year in financial assistance from his or her parent in the calendar year the reclassification application is made and in any of the three calendar years prior to the reclassification application, and (3) has not lived and will not live for more than six weeks in the home of his or her parent during the calendar year the reclassification application is made and in any of the three calendar years prior to the reclassification application. (Ed. Code, § 68044, subds. (a), (b) & (c); Stats. 1981, ch. 102, Stats. 1982, ch. 1070.)

#### **Nonresident Tuition Fee**

- Provide nonresident students with notice of nonresident tuition fee charges during the spring term before the fall term in which the change will take effect, and to consider nonresident

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<sup>110</sup> Section 54024, subdivision (e), of the title 5 regulations states: "Objective manifestations of intent to establish California residence include but are not limited to: (1) Ownership of residential property or continuous occupancy of rented or leased property in California. (2) Registering to vote and voting in California. (3) Licensing from California for professional practice. (4) Active membership in service or social clubs. (5) Presence of spouse, children or other close relatives in the state. (6) Showing California as home address on federal income tax form. (7) Payment of California state income tax as a resident. (8) Possessing California motor vehicle license plates. (9) Possessing a California driver's license. (10) Maintaining permanent military address or home of record in California while in armed forces. (11) Establishing and maintaining active California bank accounts. (12) Being the petitioner for a divorce in California."

<sup>111</sup> Register 82, No. 48 (Nov. 27, 1982) pp. 635-636; Register 91, No. 23 (April 5, 1991) p. 334; Register 95, No. 19 (May 19, 1995) p. 333.

<sup>112</sup> Register 82, No. 48 (Nov. 27, 1982) p. 637; Register 91, No. 23 (April 5, 1991) p. 335; Register 95, No. 19 (May 19, 1995) p. 334.

tuition fees of public community colleges in other states in determining nonresident tuition fees, and to make nonresident tuition fee increases gradual, moderate, and predictable. (Ed. Code, § 76140, subd. (d), Stats. 1989, ch. 985.)

### Exceptions to Determination of Nonresidence

The following are entitled to resident tuition or are exempted from paying nonresident tuition:

- Dependent of member of armed forces: Classify as residents for the purpose of determining the amount of tuition and fees those dependents (defined as a natural or adopted child, stepchild, or spouse who is a dependent of a member of the armed forces) of military personnel who retire from active duty after the residence determination date until the student dependent has resided in the state the minimum time necessary to become a resident. (Ed. Code, § 68074, Stats. 1980, ch. 580, Stats. 1989, ch. 900, Stats. 2000, ch. 571.)

Require applicants claiming residence status pursuant to section 68074 of the Education Code (dependent member of the armed forces) to supply, and for the district to weigh, the following documentation in determining the applicant's residence:

- A statement from the military person's commanding officer or personnel officer that: (1) the military person's duty station is in California on active duty as of the residence determination date; or (2) that the military person is outside of California on active duty after having been transferred immediately and directly from a California duty station after the residence determination date; or (3) that the military person has, after the residence determination date, retired as an active member of the armed forces of the United States.
- A statement that the student who qualifies for resident classification as a natural or adopted child or stepchild is a dependent of the military person for an exemption on federal taxes (Cal.Code. Regs., tit. 5, § 54041).<sup>113</sup>
- Member of armed forces after discharge: Classify as a resident a student who was a member of the armed forces of the United States stationed in California on active duty for more than one year immediately prior to being discharged from the armed forces, for the length of time he or she lives in California after being discharged up to the minimum time necessary to become a resident (Ed. Code, § 68075.5, Stats. 1995, ch. 389).
- Dependent of California resident for more than one year: Classify as a resident a student who (a) has not been an adult resident of California for more than one year and (b) is either the dependent child of a California resident who has had residence in California for more than one year prior to the residence determination date, or has a parent who has both contributed court-ordered support for the student on a continuous basis and has been a California resident for a minimum of one year. This exception shall continue until the student has resided in the state the minimum time necessary to become a resident, so long as continuous attendance is maintained at a community college (Ed. Code, § 68076, Stats. 1988, ch. 753, Stats. 1991, ch. 455, Stats. 1993, ch. 8).

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<sup>113</sup> Register 82, No. 48 (Nov. 27, 1982) p. 638; Register 83, No. 24 (Jun. 11, 1983) p. 638. Register 91, No. 23 (April 5, 1991) p. 336; Register 95, No. 19 (May 19, 1995) p. 335.

- Graduate of Bureau of Indian Affairs school: Classify a student as a resident if he or she has graduated from any school located in California that is operated by the United States Bureau of Indian Affairs, so long as continuous attendance is maintained by the student at a community college (Ed. Code, § 68077, Stats. 1989, ch. 424, Stats. 1993, ch. 8).
- Student holding emergency permit or public school credential: Classify as a resident a student who holds a valid emergency permit authorizing service in the public schools of this state, who is employed by a school district in a full-time position requiring certification qualifications for the academic year in which the student enrolls at an institution in courses necessary to fulfill teacher credential requirements. This classification is only for the purposes of determining the amount of tuition and fees for no more than one year. (Ed. Code, § 68078, subd. (b), Stats. 2000, ch. 949).

For students claiming residency status pursuant to section 68078 of the Education Code, require the student to supply, and for the district to weigh, the following:

- A statement from the employer showing employment by a public school in a full-time position requiring certification qualifications for the college year in which the student enrolls. (Cal. Code Regs., tit. 5, § 54046; Register 82, No. 48 (Nov. 27, 1982) p. 638.1; Register 91, No. 23 (April 5, 1991) p. 337; Register 95, No. 19 (May 19, 1995) p. 335.) This section is state-mandated new program or higher level of service for students claiming residence under subdivision (a) of section 68078,<sup>114</sup> as well as subdivision (b) (student holding a valid emergency permit, as specified).
- Any teaching credential (except a provisional credential). Require the student to show he or she will enroll in courses necessary to obtain another type of credential authorizing service in the public schools, or holds a credential issued by the Board of Governors and

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<sup>114</sup> Subdivision (a) of section 68078 provides:

(a) A student holding a valid credential authorizing service in the public schools of this state who is employed by a school district in a full-time position requiring certification qualifications for the college year in which the student enrolls in an institution is entitled to resident classification if that student meets any of the following requirements:

(4) He or she holds a provisional credential and is enrolled at an institution in courses necessary to obtain another type of credential authorizing service in the public schools.

(5) He or she holds a credential issued pursuant to Section 44250 and is enrolled at an institution in courses necessary to fulfill credential requirements [§ 44250 states that the commission (on teacher credentialing) issues only the following two types of credentials: "(a) A teaching credential. (b) A services credential. The commission may issue an internship teaching or services credential.]

(6) He or she is enrolled at an institution in courses necessary to fulfill the requirements for a fifth year of education prescribed by subdivision (b) of Section 44259. [§ 44259, subd. (b), specifies the minimum requirements for the preliminary multiple or single subject teaching credential.]

is enrolled in courses necessary to fulfill credential requirements. (Former Cal. Code Regs., tit. 5, § 54036; Register 77, No. 45 (Nov. 5, 1977) p. 638.2. Cal. Code Regs., tit. 5, § 54046.)<sup>115</sup>

- Native American student: Classify as a resident a Native American student who attends a school administered by the Bureau of Indian Affairs located within the community college district (Ed. Code, §68082, Stats. 1977, ch. 36).
- Amateur student athlete in training at U.S. Olympic Training Center: Classify as a resident for tuition purposes any amateur student athlete (as defined in Ed. Code, § 68083, subd. (b))<sup>116</sup> in training at the United States Olympic Training Center in Chula Vista, until he or she has resided in the state the minimum time necessary to become a resident (Ed. Code, § 68083, Stats. 1997, ch. 438).
- Federal civil service employee in state due to military mission realignment: Classify as a state resident a federal civil service employee and his or her natural or adopted dependent children if the parent has moved to this state as a result of a military mission realignment action that involves the relocation of at least 100 employees, until the student is entitled to be classified as a resident pursuant to Section 68017, so long as the student continuously attends an institution of public higher education (Ed. Code, § 68084, Stats. 1998, ch. 952).
- Nonresident California high school graduates: Exempt a student (other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of title 8 of the United States Code) from paying nonresident tuition if he or she meets the following criteria: (1) high school attendance in California for three or more years; (2) graduation from a California high school or attainment of the equivalent thereof; (3) registers for or is enrolled in a course offered by any college in the district for any term commencing on or after January 1, 2002; (4) in the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so; and (5) completion of a questionnaire form prescribed by the Chancellor and furnished by the district of enrollment verifying eligibility for this nonresident tuition exemption. (Ed. Code, § 68130.5, Stats. 2001, ch. 814, & Cal.Code Regs., tit. 5, § 54045.5, subd. (b); Register 02, No. 25 (Jun. 21, 2002) p. 335.)<sup>117</sup> For these students:

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<sup>115</sup> Register 82, No. 48 (Nov. 27, 1982) p. 638.1; Register 91, No. 23 (April 5, 1991) p. 337; Register 95, No. 19 (May 19, 1995) p. 335.

<sup>116</sup> “‘Amateur student athlete,’ for purposes of this section, means any student athlete who meets the eligibility standards established by the national governing body for the sport in which the athlete competes.” (§ 68083, subd. (b).)

<sup>117</sup> On September 15, 2008, California’s Third District Court of Appeal issued an opinion on section 68130.5 (Stats. 2001, ch. 814). The opinion reverses a lower court’s decision to grant a demurrer, and holds that plaintiffs stated a viable claim that section 68130.5 conflicts with and is preempted by federal title 8 U.S.C. sections 1623 and 1621. (*Martinez v. Regents of the University of California* (2008) 166 Cal.App.4th 1121.) The case was remanded back to the trial court. If the court ultimately finds that section 68130.5 is invalid, the statute would become

- Retain indefinitely, as Class I permanent records, the original certified affidavit and other materials utilized by a district in meeting the certification requirements; or, copying or reproducing by photograph, microphotograph or reproduced on film or electronically the original certified affidavit and other materials utilized by a district in meeting the certification requirements (Chancellor of the California Community Colleges, "Revised Guidelines and Information on AB 540 Exemption From Nonresident Tuition" May 2002, p. 4, par. 20).
- Refund the student's nonresident tuition if the student is determined eligible for the exemption after he or she has paid nonresident tuition (*Id.*, p. 2, par. 8).
- Discard and replace old questionnaire forms with the newly prescribed Chancellor's form in printed materials for Summer or Fall 2002, unless the district's form is part of a major preprinted document such as a Schedule of Classes. This is a one-time activity (*Id.* at p. 3, par. 14).
- Alien students: Require a student alien to supply, and for the district to weigh, information on whether the student is precluded from establishing domicile. An alien is precluded from establishing domicile in the United States if the alien: (1) entered the United States illegally; (2) entered the United States under a visa requiring that the alien have a residence outside the United States; or (3) entered the United States under a visa that permits entry solely for some temporary purpose. And for the community college district to determine, for an alien who is precluded from establishing domicile in the United States pursuant to subdivision (b) of section 54045 of the title 5 regulations, whether that alien has (1) taken appropriate steps to obtain a change of status with the Immigration and Naturalization Service<sup>118</sup> to a classification which does not preclude establishing domicile, and (2) met the residence requirements of sections 54020-54024<sup>119</sup> of the title 5 regulations related to physical presence

void. At that point, reimbursement for activities under section 68130.5 would end on the date the court's decision becomes final.

<sup>118</sup> The current name of this government agency is U.S. Citizenship and Immigration Services. See < <http://www.uscis.gov> > as of May 8, 2008.

<sup>119</sup> Section 54020 of the title 5 regulations requires "to establish a residence, it is necessary that there be a union of act and intent. To establish residence, a person capable of establishing residence in California must couple his or her physical presence in California with objective evidence that the physical presence is with the intent to make California the home for other than a temporary purpose."

Section 54022 of the title 5 regulations states:

(a) A person capable of establishing residence in California must be physically present in California for one year prior to the residence determination date to be classified as a resident student.

(b) A temporary absence for business, education or pleasure will not result in loss of California residence if, during the absence, the person always intended to return to California and did nothing inconsistent with that intent.

and the intent to make California home for other than a temporary purpose. (Cal. Code Regs., tit. 5, § 54045, subs. (b) & (c).)<sup>120</sup>

### **Tuition and Fee Waivers for Dependents of Victims of the 9/11 Terrorist Attacks**

- Surviving dependents of victims of 9/11 terrorist attacks: Waive mandatory systemwide fees or tuition of any kind for a student in an undergraduate program who is the surviving dependent (as defined)<sup>121</sup> of any individual killed in the September 11, 2001, terrorist attacks on the World Trade Center in New York City, the Pentagon building in Washington, D.C., or the crash of United Airlines Flight 93 in southwestern Pennsylvania, if the student is determined eligible by the California Victim Compensation and Government Claims Board. The waiver lasts until January 1, 2013, unless the dependent is the surviving child, natural or adopted, of an individual killed in the terrorist attacks of September 11, 2001, in which case

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(c) Physical presence within the state solely for educational purposes does not constitute establishing California residence regardless of the length of that presence.”

Section 54024 of the title 5 regulations states:

(a) Intent to make California the home for other than a temporary purpose may be manifested in many ways. No one factor is controlling.

(b) A student who is 19 years of age or over, and who has maintained a home in California continuously for the last two years shall be presumed to have the intent to make California the home for other than a temporary purpose unless the student has engaged in any of the activities listed in subdivision (f).

(c) A student who is under 19 years of age shall be presumed to have the intent to make California the home for other than a temporary purpose if both the student and his or her parent have maintained a home in California continuously for the last two years unless the student has evidenced a contrary intent by having engaged in any of the activities listed in subdivision (f).

(d) A student who does not meet the requirements of subdivision (b) or subdivision (c) shall be required to provide evidence of intent to make California the home for other than a temporary purpose as specified in subdivision (e).

[Subdivision (e) lists 12 objective manifestations of intent to establish California residence. Subdivision (f) lists 4 acts of conduct inconsistent with a claim of California residence.]

<sup>120</sup> Register 86, No. 10 (Mar. 8, 1986) p. 638.1, Register 91, No. 23 (April 5, 1991) p. 336; Register 92, No. 4 (Jan. 24, 1992) p. 336, Register 95, Nos. 19-20 (May 19, 1995) p. 335.

<sup>121</sup> “‘Dependent,’ for purposes of the section, is a person who, because of his or her relationship to an individual killed as a result of injuries sustained during the terrorist attacks of September 11, 2001, qualifies for compensation under the federal September 11th Victim Compensation Fund of 2001 (Title IV (commencing with Section 401) of Public Law 107-42).” (§ 68121, subd. (d)(1).)



the tuition and fees are waived until the person obtains the age of 30 years (Ed. Code, § 68121, Stats. 2002, ch. 450).

### **Notifying Students of Classification Decision and Appeal Procedure**

- Notification and appeal of classification decision: Notify a student of his or her residence classification not later than fourteen (14) calendar days after the beginning of the session for which the student has applied, or fourteen (14) calendar days after the student's application for admission, whichever is later. (Cal. Code Regs., tit. 5, § 54060, subd. (a); Register 82, No. 48 (Nov. 27, 1982) p. 638.2.)

Establish procedures for appeals of residence classifications (Cal Code Regs., tit. 5, § 54060, subd. (b).)<sup>122</sup>

The Commission also finds that all other statutes, regulations, and executive orders in the test claim do not constitute a reimbursable state-mandated program.

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<sup>122</sup> Register 82, No. 48 (Nov. 27, 1982) p. 638.2); Register 91, No. 23 (April 5, 1991) p. 336; Register 95, No. 19 (May 19, 1995) p. 336.