

COMMISSION ON STATE MANDATES

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June 3, 2011

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

And Interested Parties and Affected State Agencies (see mailing list)

RE: **Draft Staff Analysis, Schedule for Comments, and Hearing Date**
Employment of Community College Faculty and Administrators, 02-TC-27
Education Code Section 70901, et al.
Santa Monica Community College District, Claimant

Dear Mr. Petersen:

The draft staff analysis for the above-named matter is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by Friday, **June 24, 2011**. As noted in the analysis, Commission staff concludes that the activities that constitute a new program or higher level of service are already funded through the Board of Governor's base budget appropriations. We seek comments on this finding.

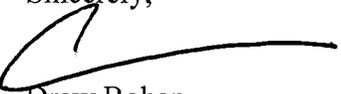
You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents on the Commission's website. Please see the Commission's website at <http://www.csm.ca.gov/dropbox.shtml> for instructions on electronic filing. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This matter is set for hearing on **Thursday, July 28, 2011**, at 9:30 a.m., in the State Capitol, Room 447, Sacramento, California. The final staff analysis will be issued on or about July 14, 2011. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Eric Feller at (916) 323-3562 if you have any questions.

Sincerely,


Drew Bohan
Executive Director

Enclosure

ITEM ____
TEST CLAIM
DRAFT STAFF ANALYSIS

Education Code Sections 70901, subdivision (b)(1)(B), 87356, 87357, 87358, 87359, 87360,
87610.1, 87611, 87663, 87714, 87740, 87743.2, 87743.3, 87743.4, 87743.5

Statutes 1981, Chapter 470, Statutes 1988, Chapter 973, Statutes 1990, Chapter 1302,
Statutes 1993, Chapter 506, Statutes 1995, Chapter 758, Statutes 1998, Chapter 1023,
Statutes 2000, Chapter 124

California Code of Regulations, Title 5, Sections 53130, 53403, 53406, 53407, 53410, 53410.1,
53412, 53414, 53415, 53416, 53417, 53420, 53430

Register 90, No. 37 (July 5, 1990), Register 90, No. 49 (Nov. 30, 1990), Register 91, No. 23,
Register 91, No. 50 (July 19, 1991), Register 92, No. 9 (Nov. 24, 1991), Register 92, No. 26
(July 27, 1992), Register 92, No. 45 (Nov. 6, 1992), Register 93, No. 25 (June 4, 1993), Register
93, No. 42 (Nov. 4, 1993), Register 93, No. 46 (Oct. 8, 1993), Register 94, No. 38 (Oct. 6, 1994),
Register 95, No. 19 (Mar. 19, 1995), Register 96, No. 40 (Oct. 4, 1996)

Employment of Community College Faculty and Administrators
02-TC-27

Santa Monica Community College District, Claimant

EXECUTIVE SUMMARY

Overview

In this test claim, the claimant alleges various activities related to determining the minimum qualifications for academic employees in community colleges, as well as for hiring procedures, evaluating, and providing tenure grievance procedures and faculty service areas for them. Staff finds that the test claim statutes and regulations do not impose a reimbursable state mandate.

Most of the test claim statutes are based on the Community College Reform Act of 1988, (“1988 Reform Act”) which abolished the credential system for community college faculty and administrators, and required the Board of Governors of the California Community Colleges (“board of governors”) to “establish minimum standards ... for the employment of academic and administrative staff in community colleges.” (Ed. Code, § 70901, subd. (b)(1)(B)),¹ Stats. 1988, ch. 973.) Under the 1988 Reform Act, the board of governors is required to adopt regulations that establish the minimum qualifications for community college faculty teaching credit courses, librarians, counselors, and other specified academic employees. (§ 87356.) These regulations

¹ All citations are to the California Education Code between sections 70901 and 87743.5, or to the California Code of Regulations, title 5, between sections 53130 and 53430, et seq., unless otherwise indicated.

were adopted between 1990 and 1994, and many are part of this test claim. (Cal. Code Regs., tit.5, § 53400 et seq.)

The 1988 Reform Act also changed faculty evaluation procedures (§ 87663), such as reducing the evaluation frequency from every two years to every three years for regular (tenured) employees, and requiring temporary employees to be evaluated within the first year of employment, and once every six semesters or nine quarters thereafter.

The 1988 Reform Act also set up a process, in districts where tenure evaluation procedures are collectively bargained and there is a contractual grievance procedure resulting in arbitration, whereby an employee may file a grievance and seek review before an arbitrator for certain allegations. (§ 87610.1, subd. (b), Stats. 1988, ch. 973, Stats. 2000, ch. 124.) Districts without a contractual grievance procedure resulting in arbitration follow the hearing process in section 87740. (§ 87610.1, subd. (b).) Decisions on grievances and arbitrator hearings under the test claim statute are subject to judicial review. (§ 87611.)

Faculty Service Areas (“FSAs”), also added by the 1988 Reform Act, are “a service or instructional subject area or group of related services or instructional subject areas performed by faculty and established by a community college district.” (§ 87743.1.) Each faculty member is required to qualify for one or more FSAs at the time of initial employment, and if qualified, may apply for more FSAs. Any disputes due to denial of FSA applications are treated as grievances. (§ 87743.3.) Districts are required to maintain records of faculty members’ FSAs in the faculty members’ personnel files. (§ 87743.4.)

Procedural History

The test claim was filed by the Santa Monica Community College District on June 13, 2002. The Chancellor’s Office submitted comments on March 11, 2004, to which the claimant filed rebuttal comments on April 26, 2004. The Department of Finance did not file comments. Claimant filed a history of the title 5 regulations in the test claim on November 26, 2007, and a list of registers of the title 5 regulations in the test claim on June 4, 2008. On April 19, 2010, Commission staff requested information from state agencies regarding funding for the test claim legislation, to which the Chancellor’s Office responded on June 2, 2010.

Positions of Parties and Interested Parties

Claimant’s position

Claimant Santa Monica Community College District asserts that the test claim statutes and regulations constitute a reimbursable state mandate. Claimant also argues that although funding for the test claim statutes was provided after the 1988 Reform Act (§ 84755) it did not meet the test of Government Code section 17556, subdivision (e), because it did not provide for offsetting savings that result in no net costs to the school district or include additional revenue that was specifically intended to provide funding in an amount sufficient to fund the cost of the state mandate.

California Community Colleges Chancellor’s Office

The Chancellor’s Office asserts that none of the activities in the statutes or regulations claimed constitute reimbursable mandates because they either do not mandate a program on a community

college district, or do not constitute a new program or higher level of service, or do not impose “costs mandated by the state” because the activities are already funded.

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local governments and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local governments or school districts to be eligible for reimbursement, one or more similarly situated local governments or school districts must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.

Claims

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

Claim	Description	Issues	Recommendation
Establish minimum standards for employment.	Requires the board of governors to establish and implement minimum standards for employment.	The Chancellor’s Office states this only applies to the Board of Governors. Claimant argues it must be involved in consultation.	<u>Denied:</u> This provision is a state mandate only on the board of governors, a state agency.
Adopt regulations to establish minimum qualifications and discipline lists.	Requires the board of governors, in establishing the minimum qualifications for faculty, to consult with the academic senate.	The Chancellor’s Office states that there is no requirement for teachers to consult with the board of governors. Claimant argues that any consultation should be reimbursable.	<u>Denied:</u> This provision only mandates action by the board of governors.
Review community college districts’ application of minimum	Requires the board of governors to periodically designate a faculty team to review each district’s application of	Claimant argues it must participate in the board of governors’ review process.	<u>Denied:</u> The board of governors does not mandate district participation.

qualifications.	minimum qualifications.		
Determine the minimum qualifications of applicants for faculty and administrator positions.	Requires community college to determine qualifications equivalent to the minimum qualifications.	The Chancellor's Office asserts that this activity has been reimbursed.	<u>Denied:</u> This provision does not impose costs mandated by the state.
Development of the process, hiring criteria, and standards for faculty determinations and hiring.	Requires the district to jointly develop with the academic senate and agree on a process for reaching faculty determinations.	Claimant argues it must develop and agree upon the process by which the governing board reaches its determinations regarding faculty"	<u>Denied:</u> This provision does not impose costs mandated by the state.
Develop hiring criteria	In establishing the hiring criteria for faculty and administrators, no later than July 1, 1990, districts develop criteria.	Claimant pled: Complying with the criteria established by the governing board when hiring faculty and administrators.	<u>Denied:</u> This was to be performed by July 1, 1990, so no costs have been incurred during the reimbursement period. Also, this activity has been funded.
Providing an affidavit that academic employees of the district possessed the minimum qualifications.	Requires the district to provide an affidavit that during the 12 preceding months all academic employees possessed the required minimum qualifications.	The Chancellor's Office states that this has been required as early as 1959. Claimant argues that the 1959 statute requires the report to the county superintendent of schools rather than the board of governors.	<u>Denied:</u> This is not a new program or higher level of service.
Authority to continue to employ credentialed academic employees qualified at time of initial hire.	Authorizes the governing board to continue to employ people subject to minimum qualifications, as specified.	Claimant asserts the need to establish and implement policies that allow implementing the grandfathering provision.	<u>Denied:</u> The statute does not require districts to retain employees who were hired before the establishment of the minimum qualifications.

Faculty Evaluations.	The faculty evaluation statute was amended by the test claim statute and a regulation was adopted to require printing and making available to each academic employee.	Claimant argues for reimbursement for faculty evaluation procedures.	<u>Denied:</u> This provision does not impose costs mandated by the state.
Tenure Grievance Arbitration Procedure.	Provides an alternative grievance process for faculty to challenge district's decision not to grant tenure or reappoint	The Chancellor's Office states that this is an optional mechanism. Claimant asserts that new allegations must be addressed as grievances.	<u>Denied:</u> This provision is not a state-mandated new program or higher level of service.
Notice and Hearing Procedure.	Requires notice and hearing procedures before an employee is given notice that his or her services will not be required for the ensuing year.	The Chancellor's Office argues that this activity has been required since 1965. Claimant argues that this is now required for employees who use the new tenure grievance procedure.	<u>Denied:</u> This provision is not a state-mandated new program or higher level of service.
Faculty Service Areas.	Requires faculty service areas (FSAs) to be established, as specified.	Claimant pled various activities such as establishing and updating FSAs.	<u>Denied:</u> This provision does not impose costs mandated by the state.

Staff Analysis

Establishing minimum standards for employment: The board of governors, in consultation with community college districts and interested parties, are required to “establish minimum standards as required by law, including . . . Minimum standards for the employment of academic and administrative staff in community colleges.”

Claimant asserts that community colleges are required to consult with the board of governors, but the Chancellor's Office disagrees.

Staff finds that section 70901, subdivision (b)(1), does not impose a state-mandated activity on community college districts because the statute merely affords districts the opportunity to consult with the board of governors, but does not mandate it.

Adopt regulations to establish minimum qualifications and discipline lists: The board of governors is required to adopt regulations to establish and maintain the minimum qualifications

for various types of faculty service (§ 87356) and is required to consult with and rely primarily on the advice and judgment of the statewide academic senate for the minimum qualifications for faculty. The board is also required to consult with other statewide groups, as specified, regarding the minimum qualifications of educational administrators and apprenticeship instructors, and establish a process to review at least every three years the continued appropriateness of the minimum qualifications. (§ 87357.) The board is also required to develop a list of disciplines that are related to each other, consulting the organizations specified in statute. (§ 87357, subd. (b).)

Claimant requests reimbursement to consult with and advise the board of governors regarding the minimum qualifications for faculty and administrators, and to conduct and to otherwise assist in the review of the continued appropriateness of the minimum qualifications for the employment of faculty and administrators.

The Chancellor's Office states that community college districts are not required to perform these activities. Any claimant asked to participate has the option to decline.

Staff finds that sections 87356 and 87357 do not impose state mandates on community college districts because there is no legal or practical compulsion to consult with the board of governors or participate in the review process.

Review of community college districts application of minimum qualifications: The board of governors is required to "periodically designate a team of community college faculty, administrators, and trustees to review each community college district's application of minimum qualifications to faculty and administrators." (§ 87358.)

Claimant requests reimbursement to participate in the review of each district's application of the minimum qualifications to faculty and administrators. The Chancellor's Office argues that this is not required.

Staff finds section 87358 is not a state mandate because that the plain language of the statute requires the board of governors to "designate" a team of community college faculty, but does not mandate district participation.

Determining the minimum qualifications of applicants for faculty and administrators: Section 87359, subdivision (a), and section 53430, subdivision (a), of the regulations provide that no one may be hired to serve as a community college faculty or educational administrator unless the governing board of the community college district determines that the applicant possesses qualifications that are at least equivalent to the minimum qualifications required pursuant to section 87356 and the implementing title 5 regulations. Sections 53410 through 53420 of the title 5 regulations lay out the minimum qualifications for these positions, and generally specify the educational degrees, professional licenses and certificates, and work experience required for each position.

The claimant requests reimbursement to determine whether applicants for college faculty or educational administrators have qualifications that are at least equivalent to the minimum conditions specified.

The Chancellor's Office states that, "the shift from the credentials system to the minimum qualifications system represented new obligations for districts ..." but also asserts that claimant has already been reimbursed for the activities.

Staff finds that section 87359, subdivision (a), and section 53430, subdivision (a), of the title 5 regulations require community college districts to determine that an applicant for a faculty or educational administrator position possesses qualifications that are at least equivalent to the minimum qualifications identified in sections 53406 (accredited degrees and units), 53407 (discipline lists), 53410 (instructors of credit courses, counselors and librarians), 53410.1 (professional licenses as alternative qualification), 53412 (minimum qualifications for instructors of noncredit courses), 53415 (minimum qualifications for learning assistance or learning skills coordinators or instructors and tutoring coordinators), 53416 (minimum qualifications for work experience instructors or coordinators), 53417 (licensed or certificated occupations), and 53420 (minimum qualifications for educational administrators), as applicable. Staff further finds that the criteria used in making the employment determination is required to be reflected in the district's action to employ. In the context of the entire statutory and regulatory scheme, community college districts have an affirmative duty to determine the minimum qualifications of an applicant for these positions. Staff also finds, however, that section 87359, subdivision (a), and 53430, subdivision (a), do not impose costs mandated by the state because they are already funded pursuant to section 84755, subdivision (d).

Staff further finds that determining that an applicant meets the minimum qualifications for a faculty or administrator position in the Disabled Students Programs and Services (DSPS, Cal. Code Regs., tit. 5 § 53414) and in the Extended Opportunity Programs and Services (EOPS), and reflecting the criteria used in the action to employ an applicant for positions in these programs are not mandated by the state, because both the DSPS and EOPS programs are voluntary.

Staff further finds that determining the minimum qualifications for instructors of noncredit courses (Cal. Code Regs., tit. 5 § 53412) is not a new program or higher level of service because the districts provided certification to these instructors before the test claim statutes and regulations, and determining their minimum qualifications is not a higher level of service than providing certification.

Development of the Process, Hiring Criteria, and Standards for Employment: Section 87360, subdivision (a), requires that in establishing the hiring criteria for faculty and administrators, district governing boards shall no later than July 1, 1990, develop criteria that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students.

Sections 87359, subdivision (b), and 53430, subdivisions (b) and (c), of the title 5 regulations impose specified requirements for developing the hiring criteria, process and standards for the employment of faculty.

Sections 87359, subdivision (c) and 53430, subdivision (d), provides that "[u]ntil a joint agreement is reached and approved pursuant to Subdivision (b), the district process in existence on January 1, 1989, shall remain in effect." In the title 5 regulation, this was changed to: "[u]ntil a joint agreement is reached and approved pursuant to Subdivision (b), the district shall be bound by the minimum qualifications set forth in this Subchapter."

Staff finds that sections 87359, subdivision (b), and 53430, subdivisions (b) and (c) of the title 5 regulations are state mandates for the following activities:

- The process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty whose qualifications are equivalent to the minimum qualifications shall be developed and agreed upon jointly by representatives of the governing board and the academic senate. (§ 87359, subd. (b), Cal. Code Regs, tit. 5, § 53430, subd. (b).)
- The agreed upon process for hiring faculty shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty employed possess qualifications that are at least equivalent to the applicable minimum qualifications specified in the regulations. (§ 87359, subd. (b), Cal. Code Regs, tit. 5, § 53430, subd. (b).)
- The process for hiring faculty shall further require that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to section 87358. (§ 87359, subd. (b), Cal. Code Regs, tit. 5, § 53430, subd. (c).)
- The governing board shall approve the process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty and administrators. (§ 87359, subd. (b), Cal. Code Regs, tit. 5, § 53430, subd. (b).)

Community college districts are *not* entitled to reimbursement for these activities when employing faculty in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.) because those programs are voluntary.

Staff also finds, however, that section 87359, subdivision (b), and 53430, subdivisions (b) and (c), do not impose costs mandated by the state because they are already funded pursuant to section 84755, subdivision (d).

Develop hiring criteria: Staff also finds that the following section 87360 provisions are not reimbursable because they were required to be completed by July 1, 1990, and the reimbursement period for this test claim begins in the 2001-2002 fiscal year (because the test claim was filed on June 13, 2003).² Thus, claimants could not have incurred costs mandated by the state during the period of reimbursement for the following:

- Develop the hiring criteria for faculty and administrators and faculty that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. (§ 87360, subd. (a).)

² Government Code section 17557, subdivision (e).

- Develop hiring criteria, policies, and procedures for new faculty members that are developed and agreed upon jointly by representatives of the governing board, and the academic senate, and approved by the governing board. (§ 87360, subd. (b).)

Moreover, these are one-time activities for which the board of governors certified, at its September 1989 meeting, that adequate funding has been provided, so there are no costs mandated by the state.

Providing an affidavit that the academic employees of the district possess the minimum qualifications for the work they performed in the preceding 12 months: Section 87714 requires districts, “at times as required by the board of governors,” to provide an affidavit that, “during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed.”

Claimant requests reimbursement for “providing affidavits, at times required by the board of governors, that, during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed.”

The Chancellor’s Office states that this activity was required before the test claim statute.

Staff finds that section 87714 (Stats. 1981, ch. 470) is not a new program or higher level of service because former section 87714 (Stats. 1976, ch. 1010) also required providing an affidavit.

Authority to continue to employ credential academic employees qualified at the time of initial hire: Section 53403 authorizes the community college district to “continue to employ a person to teach in a discipline or render a service subject to the minimum qualifications, if he or she, at the time of initial hire by the district, was qualified to teach in that discipline or render that service under the minimum qualifications or disciplines lists then in effect.”

Claimant seeks reimbursement for establishing and implementing policies to recognize faculty who were qualified to teach in their respective disciplines under the minimum qualifications when they were employed.

The Chancellor’s Office asserts that this provision merely permits districts to “grandparent” employees in under the minimum qualifications in effect when the employees were hired, but does not mandate a district activity.

Staff finds that section 53403 of the title 5 regulations is not a state-mandated new program or higher level of service. The section’s plain language authorizes but does not require community college districts to retain employees who were hired before the establishment of the minimum qualifications, and deems those employees to possess the minimum qualifications, until the expiration of their credentials. It does not require the community college district to assess the qualifications of employees at the time the regulation was adopted.

Faculty evaluations: The claimant pled section 87663 as amended by Statutes 1988, chapter 973 and Statutes 1990, chapter 1302, which amended subdivisions (a) and (b). The 1988 amendment added subdivision (c) through (i) to section 87663.

In addition, section 53130 of the title 5 regulations requires that “[t]he governing board of a community college district shall adopt and cause to be printed and made available to each academic employee of the district reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties.”

Claimant seeks reimbursement for conducting evaluations using a peer review process, conducting evaluations pursuant to the terms of a collective bargaining agreement, consulting with the faculty’s exclusive representative before engaging in collective bargaining regarding the evaluation procedures, evaluating faculty using student evaluations, evaluating a probationary faculty member under clear, fair, and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative, evaluating administrators pursuant to evaluation procedures established by the governing board and, to the extent possible, to include faculty evaluation, and pursuant to section 53130 of the title 5 regulations, to adopt and cause to be printed, and made available to each academic employee of the district, reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties.

The Chancellor’s Office asserts various reasons why these activities are not reimbursable.

Because they are state-mandated and not required under prior law, staff finds that the following are a state-mandated new program or higher level of service:

- Evaluate a temporary employee within the first year of employment, and at least once every six regular semester or once every nine regular quarters thereafter (§ 87663, subd. (a).);
- Include a peer review process, and for that the peer review process to be on a departmental or divisional basis, and address the forthcoming demographics of California and the principles of affirmative action, and for the process to require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching (§ 87663, subds. (c) & (d).);
- Develop “evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative” for probationary faculty (§ 87663, subd. (h).);
- Establish and disseminate written evaluation procedures for administrators (§ 87663, subd. (i).); and
- Adopt and cause to be printed and made available to each academic employee of the district amended rules and regulations that reflect the new requirements imposed by Education Code section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) and provide for the evaluation of the performance of academic employees in their assigned duties. This is a one-time activity. (Cal. Code Regs., tit. 5, § 53150.)

Staff also finds, however, that sections 87663 and 53150 of the title 5 regulations do not impose costs mandated by the state because they are already funded pursuant to section 84755, subdivision (d).

Tenure grievance arbitration procedure: Section 87610.1 provides an alternative grievance process for a probationary or contract faculty employee to challenge a district's decision not to reappoint and grant tenure to the employee.

A probationary employee's challenges to a district's decision to deny tenure or not reappoint the employee are classified and procedurally addressed as grievances. In districts where no collective bargaining agreement is in place, however, or if the agreement fails to provide for arbitration of grievances, the employee's allegations challenging the district's decision to deny tenure or reappointment proceed to hearing in accordance with section 87740. The right to a hearing under section 87740 has existed since at least 1971.

If the grievance reaches arbitration, the arbitrator has limited authority to grant a remedy. The arbitrator cannot grant tenure, but may order certain "appropriate make-whole remed[ies]," such as back pay, benefits, and reinstatement in a probationary position. The arbitrator may also order the district to reconsider its original decision.

Because this procedure for dismissing probationary faculty only applies to districts where tenure evaluation procedures are collectively bargained, and the collective bargaining agreements must be entered into voluntarily, the tenure grievance process in section 87601.1 is not a state mandate. It is merely an alternative to the preexisting hearing procedure in section 87740.

Complying with the arbitrator's remedies is also not a mandate because the remedies would come from the arbitrator rather than the state. Moreover, the community college chose to be subject to the arbitrator under the section 87610.1 process.

Section 87611 states that a "final decision reached following a grievance or hearing conducted pursuant to subdivision (b) of Section 87610.1" regarding tenure is subject to judicial review "pursuant to Section 1094.5 of the Code of Civil Procedure." This provision recognizes the ability to challenge final decisions on grievances or tenure hearings, but does not require anything of community college districts. Districts are neither required to petition the court, nor to respond to a petitioner. This provision is also not a new program or higher level of service because judicial review was authorized under prior law.

Notice and hearing procedure: Section 87740 describes notice and hearing procedures for community college districts "before an employee is given notice that his or her services will not be required for the ensuing year." Claimant asserts that a section 87740 hearing is now triggered by section 87610.1, subdivision (b), the tenure grievance procedure discussed above. Because a section 87740 hearing could be triggered by section 87610.1 (Stats. 1988, ch. 973) prior to Statutes 1995, chapter 758, which is the only version of section 87740 pled by claimant, and because Statutes 1998, chapter 758 made only technical, nonsubstantive changes to section 87740, staff finds that section 87740 (Stats. 1988, ch. 973) is not a new program or higher level of service.

Faculty Service Areas: Community college districts were required to establish "faculty service areas" by July 1, 1990 (§ 87743.2). A faculty service area (FSA) is "a service or instructional subject area or group of related services or instructional subject areas performed by faculty and established by a community college district." (§ 87743.1.)

Establishing FSAs is within the scope of negotiation under the Educational Employment Relations Act (EERA), and the exclusive representative is required to consult with the academic senate in doing so (§ 87743.2). Districts were also required to establish competency criteria for faculty members in order to determine competency to serve in an FSA by July 1, 1990, with the development, meeting, and negotiating to take place according to the EERA. (§ 87743.5.)

Although sections 87743.2 and 87743.5 (Stats. 1988, ch. 973) are a state-mandated new program or higher level of service, they are not reimbursable because they were to be completed by July 1, 1990, and the reimbursement period for this test claim is available starting in the 2001-2002 fiscal year (because the test claim was filed on June 13, 2003),³ so there is no evidence that the claimant incurred costs for these activities during the period of reimbursement. Moreover, these are one-time activities for which the board of governors certified, at its September 1989 meeting, that adequate funding has been provided, so there are no costs mandated by the state.

Under section 87743.3, each faculty member is required to qualify for one or more FSAs at the time of initial employment, and may apply for more FSAs if he or she is qualified. Section 87743.3 also requires districts to procedurally address as a grievance, or to use fair and equitable procedures for resolution of, any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area.

Districts are also required to maintain a permanent record for each faculty member employed by the district, in his or her personnel file, of each faculty service area for which the faculty member possesses the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards. (§ 87743.4.)

Staff finds that sections 87743.3 and 87743.4 do not impose costs mandated by the state because they are already funded pursuant to section 84755, subdivision (d).

Conclusion & Recommendation

Staff finds that the test claim statutes and regulations do not impose a reimbursable state mandate on community college districts within the meaning of article XIII B, section 6, of the California Constitution and Government Code sections 17514 or 17556..

Staff recommends that the Commission adopt this analysis to deny the test claim.

³ Government Code section 17557, subdivision (e).

STAFF ANALYSIS

Claimant

Santa Monica Community College District

Chronology

06/13/02 Claimant files test claim 02-TC-27

07/25/03 Department of Finance requests extension of time to file comments

08/21/03 California Community Colleges Chancellor's Office ("Chancellor's Office") requests extension of time to file comments

09/18/03 Department of Finance requests extension of time to file comments

10/10/03 Chancellor's Office requests extension of time to file comments

10/31/03 Department of Finance requests extension of time to file comments

02/13/04 Department of Finance requests extension of time to file comments

03/11/04 California Community Colleges Chancellor's Office submits comments

04/26/04 Claimant files rebuttal comments to the Chancellor's Office comments

06/10/04 Department of Finance requests extension of time to file comments

09/9/04 Department of Finance requests extension of time to file comments

12/24/04 Department of Finance requests extension of time to file comments

03/15/05 Department of Finance requests extension of time to file comments

09/21/05 Department of Finance requests extension of time to file comments

02/3/06 Department of Finance requests extension of time to file comments

11/26/07 Claimant files a supplement (a history of the title 5 regulations) to the test claim

06/04/08 Claimant files a supplement (list of registers of title 5 regulations) to the test claim

04/19/10 Commission staff requests information from state agencies regarding funding for the test claim legislation

06/03/10 Chancellor's Office responds to information request

I. BACKGROUND

The Community College Reform Act of 1988 (Stats. 1988, ch. 973, "Reform Act"), which provides the basis for most of this test claim, was based largely on a study by the Commission for the Review of the Master Plan for Higher Education ("Review Commission") entitled "The Challenge of Change: A Reassessment of the California Community Colleges" ("Reassessment Report"). In its authorization of the Reassessment Report (Stats. 1984, ch. 1506) the Legislature stated:

(a) The Legislature finds and declares that the community colleges are a large and important segment of California's system of public higher education. In the last 20 years, [1964-1984] community colleges have not only experienced tremendous growth in the numbers of students enrolled, but have undergone a major transition in the types of students served and the types of programs and courses offered. Community colleges have also experienced an unacceptable degree of uncertainty and instability in their revenues over the last decade.

(b) The Legislature further finds and declares that legislative actions regarding community colleges have not been based on a comprehensive policy on the role that community colleges should play in public education. Community colleges have been reacting and responding to narrow changes in state policy that have shaped the functions of the colleges by default, rather than by design.

(c) It is, therefore, the intent of the Legislature to require the Commission for the Review of the Master Plan for Higher Education established pursuant to Senate Bill 1570 of the 1983-84 Regular Session to set the reassessment of the mission of the community colleges as its first and highest priority.

The Reassessment Report was submitted to the Joint Legislative Committee for the Review of the Master Plan for Higher Education in March 1986 and recommended many of the changes enacted in the 1988 Reform Act.

Minimum Qualifications for the Employment of Faculty and Educational Administrators

Before the 1988 Reform Act, the Chancellor's Office issued credentials to prospective faculty (including counselors and librarians) and administrators at community colleges. Interested individuals would apply to the Chancellor's Office, which would review the applicants' education and experience to determine if they were eligible for a credential. (Former Cal.Code Regs., tit. 5, § 52030 et seq., Register 83, No. 29 (July 16, 1983) p. 628.15.)

The Review Commission's 1986 Reassessment Report recommended that the community college credential system be abolished, and that community college faculty be subject to peer review, as follows:

The Community Colleges must recruit and retain faculty and administrators with the highest professional qualifications. To this end, the Board of Governors must establish qualifications appropriate to postsecondary institutions and make certain that both full-time and part-time faculty appointments are subject to peer review, as they are in other collegiate institutions.

California is the only state to retain a system of credentialing for community college faculty and administrators originally developed for the elementary and secondary schools. Under this system, new faculty are to obtain a credential in one or more of sixty-six subject matter areas based on a *pro forma* paper review. There is no requirement that proposed new faculty appointments be reviewed by tenured faculty in the appropriate department or division of each college. This system is unnecessarily rigid, cumbersome, and unsuited to the academic rigor of postsecondary institutions.

The Commission recommends:

34. That the Legislature delete from the *Education Code* existing credential requirements for Community College faculty and administrators.

35. That the Legislature authorize the Board of Governors, in consultation with the faculty, to (a) establish qualifications for employment of faculty and administrators, and (b) require that new faculty appointments, both full-time and part-time, be subject to peer review in addition to other administrative procedures.⁴ (Emphasis in original.)

Consequently, the 1988 Reform Act stated that one of the duties of the Board of Governors of the California Community Colleges (“board of governors” or “Chancellor’s Office”), a state agency, is to “establish minimum standards ... for the employment of academic and administrative staff in community colleges.” (§ 70901, subd. (b)(1)(B), Stats. 1988, ch. 973.) Similarly, the Reform Act imposed a duty on community college districts to: “Employ and assign all personnel not inconsistent with the minimum standards adopted by the board of governors, and establish employment practices, salaries, and benefits for all employees not inconsistent with the laws of this state.” (§ 70902, subd. (b)(4), Stats. 1988, ch. 973.)⁵ Regarding these minimum standards or qualifications, the 1988 Reform Act declared the following legislative intent:

(q)(1) In general, the appropriate focus of minimum qualifications is in helping the colleges to ensure that they will select faculty who are competent in subject matter and possess the basic academic preparation needed to work effectively at the college level. The minimum qualifications for all faculty should be the same except where the application of qualifications without differentiation would be clearly unreasonable or impractical.

(2) The minimum qualifications for administrators should help the colleges to ensure that they will select individuals who are competent to perform the kind of administrative responsibilities that administrators are normally required to assume, such as supervision, organizational planning, and budget development and administration, and who understand the needs of faculty and the learning process. [¶]...[¶]

(s) [¶]...[¶] (4)...[C]olleges may establish criteria for hiring that go well beyond the minimum qualifications set by regulation. The establishment of additional criteria of this sort should be expected and encouraged. (Stats. 1988, ch. 973, § 4.)

⁴ Commission for the Review of the Master Plan for Higher Education. “The Challenge of Change: A Reassessment of the California Community Colleges.” March 1986, pages 13-16. See: <http://sunsite.berkeley.edu/uchistory/archives_exhibits/masterplan/post1960.html> as of June 1, 2011.

⁵ Claimant did not plead section 70902 in this test claim, so staff makes no findings on it.

The 1988 Reform Act requires the board of governors to adopt regulations that establish the minimum qualifications for community college faculty teaching credit courses, extended opportunity programs and services workers, handicapped student programs and service workers, and instructional or student services administrators. (§ 87356.) These regulations were adopted between 1990 and 1994, many of which are part of this test claim. (Cal. Code Regs., tit.5, § 53400 et seq.) The regulations require all degrees and units used to satisfy the minimum qualifications to be from accredited institutions, as defined. (Cal. Code Regs., tit. 5, § 53406.) The statute requiring adoption of regulations on minimum qualifications (§ 87356, Stats 1993, ch. 506) was reenacted in 1993 to require the adoption of regulations for specified faculty member and administrator positions.

The 1988 Reform Act also requires the board of governors to “adopt regulations setting forth a process authorizing local governing boards to employ faculty who do not meet the applicable minimum qualifications specified in the regulations” but requires that a new hire have qualifications that are equivalent to the minimum qualifications in the regulations. (§ 87359.) The statute also requires that the governing boards follow a process in developing the process, criteria, and standards by which a district’s governing board “reaches its determinations regarding faculty.” (*Ibid.*) The title 5 regulation (§ 53430) that implements section 87359 was adopted in 1990. Thus, each district may adopt its own minimum qualifications that are equivalent to the minimum qualifications in the regulations.

Faculty Evaluations

Community colleges have been required to evaluate employees at least since 1971. (Stats. 1971, ch. 1653.) The 1988 Reform Act (§ 87663) made changes that: (1) reduced the evaluation frequency from every two years to every three years for regular (tenured) employees; (2) required temporary employees to be evaluated within the first year of employment, and once every six semesters or nine quarters thereafter; (3) required evaluations to include a peer review process, as specified; (4) required consultation between the faculty’s “exclusive representative”⁶ and the academic senate where evaluation procedures are negotiated as part of the collective bargaining process; (5) expressed legislative intent that faculty evaluation procedures include student evaluations to the extent practicable; (6) where the faculty has elected an exclusive representative, accorded probationary faculty the right to be evaluated under clear, fair and equitable evaluation procedures locally defined through collective bargaining, not to include de facto tenure rights; and (7) required governing boards to establish and disseminate written evaluation procedures for administrators that include, to the extent possible, faculty evaluation.

Tenure Grievance Arbitration

Before the 1988 Reform Act, if the district chose to keep the employee in a probationary or contract status for the second year, at the end of that year the district had only two choices: to grant permanent status or not to grant such status and terminate the teacher's employment. (§87609; *McGuire v. Governing Board* (1984) 161 Cal.App.3d 871, 874.) Termination

⁶ “Exclusive representative” means the employee organization recognized or certified as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer. (Gov. Code, § 3540.1, subd. (e).)

procedures were and are governed by section 87740 hearings (originally enacted by Stats. 1976, ch. 1010) as to whether “cause” existed for the termination.

In the 1988 Reform Act, the Legislature stated the following regarding tenure reform: “The current tenure system lacks adequate participation by faculty, provides an inadequate probationary period for the evaluation of permanent faculty, and does not provide uniform systemwide procedures for due process and grievance. (Stats. 1988, ch. 973, § 4, subds. (l) & (m).)

Thus, under the test claim statute (§ 87610.1, Stats. 1988, ch. 973, Stats. 2000, ch. 124), in districts where tenure evaluation procedures are collectively bargained, and there is a contractual grievance procedure resulting in arbitration, the employee may file a grievance and seek review before an arbitrator for the following allegations:

- That the district, in a decision to grant tenure, made a negative decision that to a reasonable person was unreasonable;
- That the district violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees; and
- That the district in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. (§ 87610.1, subd. (b).)

Districts without a contractual grievance procedure resulting in arbitration follow the hearing process in section 87740. (§ 87610.1, subd. (b).)

This statute also outlines grievance procedures (§ 87610.1, subd. (c)) and the authority of the arbitrator. (§ 87610.1, subd. (d).) Decisions on grievances and arbitrator hearings under the test claim statute are subject to judicial review. (§ 87611.)

Faculty Service Areas

A Faculty Service Area (“FSA”), also added by the 1988 Reform Act, is “a service or instructional subject area or group of related services or instructional subject areas performed by faculty and established by a community college district.” (§ 87743.1.) Each faculty member is required to qualify for one or more FSAs at the time of initial employment, and if qualified, may apply for more FSAs. Any disputes due to denial of FSA applications are treated as grievances (§ 87743.3.) Districts are required to maintain records of faculty members’ FSAs in the faculty members’ personnel files. (§ 87743.4.) Each community college district is required to establish criteria to determine competency to serve in the FSA by July 1, 1990. (§ 87443.5.) According to a “Frequently Asked Questions” document on the academic senate’s website:

Faculty Service Areas are established by each district and serve as the basis for making decisions in the event of a layoff or reduction in force (RIF). Some districts construct their FSAs by designating each discipline listed in the Disciplines List as an FSA. Other districts combine several disciplines into an FSA. And other districts combine all disciplines into one single FSA. Upon hire, a faculty member is placed in the FSA that includes the discipline for their position. If your FSA includes more than one discipline, it does not mean that

you are qualified for service in each of the disciplines listed in that FSA, but only for those in which you meet the MQs [minimum qualifications].⁷

State Funding

The Legislature established a “trigger provision” in section 70 of the 1988 Reform Act, stating intent that the Act be implemented in two phases of “transitional program improvement”⁸ until program-based funding was implemented in fiscal year 1991-1992.⁹

Phase I of transitional program improvement included the statutes regarding minimum qualifications (§§ 87356, 87357, 87358, 87359) and hiring criteria (§87360), as well as employee evaluations (§ 87663), and FSAs (§§ 87743.2-87743.5). The Reform Act requires the hiring criteria (§ 87360) and FSAs (§ 87743.2 & 87743.5) be implemented by July 1, 1990, and a list of disciplines was to be established by the board of governors by July 1, 1989. (§ 87357, subd. (b).) The Legislature stated intent “that moneys appropriated during Phase I fully fund any state-mandates created pursuant to this section.”¹⁰

Phase II consisted of tenure reform and program-based funding, including the tenure grievance arbitration procedures (§§ 87610.1 & 87611) in this claim. The Legislature stated its intent “that moneys appropriated during Phase II fully fund any state-mandate created pursuant to this section.”¹¹

The 1988 Reform Act made its state-mandated provisions conditional on certification of adequate funding by the Board of Governors of the California Community Colleges. Section 70, subdivision (d), of the Reform Act states that certain Education Code sections are conditional on state certification of adequate funding for Phase I and Phase II transitional program improvement. The Phase I certification requirement is as follows:

[Sections of the Reform Act that include the Phase I test claim statutes] shall be implemented by the board of governors and be mandatory with regard to implementation by community college districts only if the board of governors certifies in writing to the Governor and to the Legislature that adequate funding has been provided for Phase I of transitional program improvement and for any applicable state mandates, as authorized by Section 84755 of the Education Code.

The board of governors provided certification of adequate funding for Phase I in September 1989.¹² The Phase II adequate funding certification was provided in November 1990.¹³

⁷ Academic Senate for California Community Colleges, FAQs on Minimum Qualifications, p. 4.

⁸ Statutes 1988, chapter 973, section 70, subdivision (b).

⁹ Education Code Section 84755, subdivision (a).

¹⁰ Statutes 1988, chapter 973, section 70, subdivision (b)(1).

¹¹ Statutes 1988, chapter 973, section 70, subdivision (b)(2).

¹² Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

The 1988 Reform Act also contained the following legislative declarations:

The Legislature finds and declares that the reforms enacted through this act form a mutually dependent and related set of provisions. While some few provisions could be enacted independently, other sections of this act depend upon adequate support for the programs of the community colleges. There is a direct linkage between those sections of this act which constitute the further professionalization of the faculty and the moneys required to enhance the programs of the community colleges for “transitional program improvement,” as specified in Section 84755 of the Education Code.

For instance, the elimination of credentials must be accompanied by the establishment of minimum qualifications by the board of governors. Minimum qualifications in turn must be implemented by districts through the establishment of faculty service areas, competency criteria, and various waiver processes. The extension of the tenure probationary period to four years as well as the revisions to layoff procedures also depend upon faculty service areas and competency criteria. Similarly, because so many of the reforms call for faculty involvement in the determination and implementation of policy, and because the quality, quantity, and composition of full-time faculty have the most immediate and direct impact on the quality of instruction, overall reform cannot succeed without sufficient members of full-time faculty with sufficient opportunities for continued staff development, and with sufficient opportunity for participation in institutional governance.

The Legislature further finds that, absent resources to reimburse the state-mandated costs of this act, new full-time faculty to replace part-time faculty, and expanded programs for staff development, the viability or success, or both, of many of the reforms in this act will be jeopardized. The Legislature recognizes that due to unanticipated fiscal conditions the State cannot immediately fund all of the reforms contained in this act. The Legislature also recognizes, however, that if minimal funding is not soon provided that it would be inappropriate to proceed with many reforms. (Stats. 1988, ch. 973, § 70, subd. (a).)

Claimants’ Position

Claimant Santa Monica Community College District asserts that the test claim statutes and regulations constitute a reimbursable state mandate within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to do the following pursuant to the code sections and title 5 regulations cited:

Education Code

- A) Establishing and implementing policies and procedures, and periodically updating those policies and procedures regarding the employment of faculty and the resolution of disputes on hiring and tenure issues.

¹³ Board of Governors, California Community Colleges, Board Certification Regarding Adequate Funding for Phase II of AB 1725. (Agenda Item 14) November 8-9, 1990.

- B) Establishing and implementing minimum standards for the employment of academic and administrative staff. (§ 70901, subd. (b)(1)(B).)
- C) Consulting with and advising the board of governors regarding the minimum qualifications for faculty and administrators. (§ 87357, subd. (a)(1).)
- D) Conducting or otherwise assisting, at least every three years, in any review of the continued appropriateness of the minimum qualifications for the employment of faculty and administrators (§ 87357, subd. (a)(2)).
- E) Participating, as designated by the board of governors, in the review of each community college district's application of minimum qualifications to faculty and administrators (§ 87358).
- F) Complying with the process adopted by the board of governors providing for the employment of faculty members and educational administrators who do not meet the applicable minimum qualifications specified in the regulations adopted by the board of governors pursuant to Section 87356. (§ 87359.) These regulations shall require all of the following:
 - (1) No one may be hired to serve as a community college faculty member or educational administrator unless the governing board determines that he or she possesses qualifications that are at least equivalent to the minimum qualifications specified in regulations of the board of governors adopted pursuant to Section 87356.
 - (2) The process, as well as criteria and standards by which the governing board reaches its determinations regarding faculty members, shall be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board. The process shall further require that the governing board provide the academic senate with an opportunity to present its views to the governing board before the board makes a determination, and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to Section 87358.
 - (3) In the event a joint agreement is not reached and approved pursuant to subdivision (b), the district process in existence on January 1, 1989, shall remain in effect.
- G) Complying with the criteria established by the governing board when hiring faculty and administrators that includes a sensitivity to, and understanding of, the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. Pursuant to subdivision (b), developing and agreeing, and updating, with representatives of the governing board and the academic senate hiring criteria, policies, and procedures for new faculty members. In the event a joint agreement is not yet reached, the existing district process in January 1, 1989, shall remain in effect (§ 87360, subd. (a)).
- H) Consulting with the faculty's exclusive representative prior to engaging in collective bargaining on these procedures in those districts where tenure evaluation procedures are collectively bargained pursuant to Section 3543 of the Government Code, (§ 87610.1, subd. (a)).

- I) Participating in arbitration procedures in response to grievance allegations that the community college district in a decision to grant tenure made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740 (§ 87610.1, subd. (b)).
- J) Participating in arbitration procedures in response to grievance allegations that the community college district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740 (§ 87610.1, subd. (b)).
- K) In the event there is no contractual grievance procedure resulting in arbitration pursuant to Education Code Sections 87610.1, subdivision (b), conducting the hearing and making a decision in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency in that chapter, except that all of the following shall apply:
 - (1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing the accusation.
 - (2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if a request is made therefore within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.
 - (3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the colleges and the faculty. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board or on any court in future litigation. Copies of the proposed decision shall be submitted to the governing board and to the employee. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds (§ 87740, subd. (c)).
- L) Complying with an arbitrator's make-whole remedies, which may include, but need not be limited to, backpay and benefits, reemployment in a probationary position, and reconsideration (§ 87610.1, subd. (d)).

- M) The legal cost of appearing in a court or before any other hearing panel when appealing, or in response to a petition appealing, a final decision reached following a grievance or hearing conducted pursuant to subdivision (b) of Section 87610.1 (§ 87611).
- N) Conducting evaluations of faculty members of a community college district using a peer review process on a departmental or divisional basis, which shall address the forthcoming demographics of California and the principles of affirmative action (§ 87663, subs. (c) & (d)).
- (1) When negotiated as part of the collective bargaining process, conducting evaluations of faculty members of a community college district pursuant to the terms of that agreement (§ 87663, subd. (e)).
 - (2) In those districts where faculty evaluation procedures are collectively bargained, consulting with the faculty's exclusive representative prior to engaging in collective bargaining regarding those procedures (§ 87663, subd. (f)).
 - (3) Conducting evaluations of faculty members of a community college district to the extent practicable using student evaluations (§ 87663, subd. (g)).
 - (4) Evaluating a probationary faculty member under clear, fair, and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative (§ 87663, subd. (h)).
 - (5) Evaluating administrators pursuant to evaluation procedures established by the governing board and, to the extent possible, to include faculty evaluation (§ 87663, subd. (i)).
- O) Providing affidavits, at times required by the board of governors, that, during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed (§ 87714).
- P) Establishing and updating faculty service areas, within the scope of meeting and negotiating pursuant to Section 3543.2 of the Government Code. The exclusive representative shall consult with the academic senate in developing its proposals (§ 87743.2).
- Q) Receiving and determining faculty applications to add faculty service areas for which the faculty member qualifies (§ 87743.3).
- R) Classifying and procedurally addressing any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area. If the district has no grievance procedure, fair and equitable procedures for the resolution of the disputes shall be developed by the academic senate and representatives of the governing board (§ 87743.3).
- S) Maintaining a permanent record in each faculty member's personnel file, for each faculty member employed by the district of each faculty service area for which the faculty member possesses the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards (§ 87743.4).
- T) Establishing and updating competency criteria for faculty members employed by the district within the scope of meeting and negotiating pursuant to Section 3543 of the Government Code (§ 87743.5).

Title 5, California Code of Regulations Provisions

- A) Adopt and cause to be printed, and made available to each academic employee of the district, reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties (Cal. Code Regs., tit. 5, § 53130).
- B) Establish and implement policies to recognize faculty who were qualified to teach in their respective discipline under the minimum qualifications when they were employed (Cal. Code Regs., tit. 5, § 53403).
- C) Determine whether applicants for college faculty or educational administrator positions have qualifications that are at least equivalent to the minimum conditions specified, including verifying all of the following (Cal. Code Regs., tit. 5, § 53430, subd. (a)):
 - (1) All degrees and units used to satisfy minimum qualifications are from accredited institutions, unless otherwise specified (Cal. Code Regs., tit. 5, § 53406).
 - (2) Disciplines requiring a Master's Degree and those disciplines in which a Master's Degree is not generally expected or available by reference to publications and lists maintained by the Chancellor's Office (Cal. Code Regs., tit. 5, § 53407).
 - (3) The minimum qualifications for service as a community college faculty member teaching any credit course, or as a counselor or librarian (Cal. Code Regs., tit. 5, § 53410).
 - (4) Possession of a bachelor's degree in the discipline of the proposed assignment plus a professional license or certification (Cal. Code Regs., tit. 5, § 53410.1).
 - (5) Possession of the minimum qualifications for a faculty member teaching a noncredit course (Cal. Code Regs., tit. 5, § 53412).
 - (6) Possession of the minimum qualifications for a faculty member teaching disabled programs and services (Cal. Code Regs., tit. 5, § 53414).
 - (7) Possession of the minimum qualifications for a faculty member teaching as a learning assistance or learning skills coordinator or instructor, or tutoring coordinator (Cal. Code Regs., tit. 5, § 53415).
 - (8) Possession of the minimum qualifications for a faculty member instructing or coordinating general or occupational work experience education (Cal. Code Regs., tit. 5, § 53416).
 - (9) Possession of a current, valid certificate to work or a license to practice in California whenever the instructor's possession of such a certificate or license is required for program or course approval (Cal. Code Regs., tit. 5, § 53417).
 - (10) Possession of the minimum qualifications for service as an educational administrator (Cal. Code Regs., tit. 5, § 53420).
- D) Develop and agree upon the process, as well as criteria and standards by which the governing board reaches its determinations regarding faculty, jointly by representatives of the governing board and the academic senate, and approved by the governing board. The agreed upon process shall include reasonable procedures to ensure that the governing board relies

primarily upon the advice and judgment of the academic senate to determine that each individual faculty member employed under the authority granted by this section possess qualifications that are at least the equivalent to the applicable minimum qualifications specified in this Division (Cal. Code Regs., tit. 5, § 53430, subd. (b)).

- E) The agreed upon process further requires that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination; and that the written record of the decision, including the views of the academic senate, shall be available for review, pursuant to Education Code Section 87358 (Cal. Code Regs., tit. 5, § 53430, subd. (c)).
- F) To be bound by the provisions of the subchapter until a joint agreement is reached and approved pursuant to subdivision (b) (Cal. Code Regs., tit. 5, § 53430, subd. (d)).

In complying with these alleged mandates, claimant alleges more than \$1000 in costs “in excess of any funding provided to community college districts and the state for the period from July 1, 2001 through June 30, 2002”¹⁴

Claimant’s rebuttal comments regarding specific statutes or regulations are discussed below.

State Agency Position

The Chancellor’s Office of the California Community Colleges filed comments on March 11, 2004, asserting that none of the activities in the statutes or regulations claimed constitute reimbursable mandates. According to the Chancellor’s Office, the activities either do not mandate a program on a community college district, or do not constitute a new program or higher level of service, or do not impose “costs mandated by the state” because the activities are already funded. The comments are described in more detail below.

The Department of Finance did not file comments on the test claim.

II. DISCUSSION

Issue 1: Do the test claim statutes and regulations impose a state-mandated new program or higher level of service subject to article XIII B, section 6, of the California Constitution?

The courts have found that article XIII B, section 6 of the California Constitution¹⁵ recognizes the state constitutional restrictions on the powers of local government to tax and spend.¹⁶ “Its

¹⁴ In its April 2004 rebuttal comments, claimant asserts that the March 11, 2004 comments of the California Community College Chancellor’s Office are incompetent and should be excluded from the record because they are not signed under penalty of perjury “with the declaration that it is true and complete to the best of the representative’s personal knowledge or information or belief.” (Cal.Code Regs., tit. 2, § 1183.02, subd. (c).) Staff disagrees. The Chancellor’s Office comments address pure questions of law. The existence of a reimbursable state mandate is a question of law. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.) Commission decisions are based on independent analysis of the test claim statutes.

¹⁵ Article XIII B, section 6, subdivision (a), provides:

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 responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”¹⁷ 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.¹⁸

In addition, the required activity or task must be new, constituting a “new program or higher level of service” over the previously required level of service. To determine this, the test claim statute or regulation is compared to the legal requirements in effect immediately before enacting it.¹⁹

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.²⁰ 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.²¹ A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public.”²²

(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.

¹⁶ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 735.

¹⁷ *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

¹⁸ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

¹⁹ *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*).

²⁰ *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).

²¹ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

²² *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.²³

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 6.²⁴ 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.”²⁵

A. Minimum Qualifications for the Employment of Faculty and Educational Administrators

As indicated in the background, the test claim statutes and regulations changed the process of credentialing faculty and educational administrators at community colleges to a process of establishing minimum qualifications for the hiring of these employees. “Faculty” is defined in Education Code section 87003 and section 53402 of the title 5 regulations as:

[T]hose employees of a community college district who are employed in academic positions that are not designated as supervisory or management . . . and for which minimum qualifications for service have been established by the board of governors Faculty include, but are not limited to, instructors, librarians, counselors, community college health services professionals, handicapped student programs and services professionals, extended opportunity programs and services professionals, and individuals employed to perform a service that, before July 1, 1990, required nonsupervisory, nonmanagement, community college certification qualifications.

“Educational administrator” is defined in Education Code section 87002, subdivision (b), and section 53402 of the title 5 regulations as:

[A]n administrator who is employed in an academic position designated by the governing board of the district as having direct responsibility for supervising the operation of or formulating the policy regarding the instructional or student services program of the college or district. Educational administrators include, but are not limited to, chancellors, presidents, and other supervisory or management employees designated by the governing board as educational administrators.

²³ *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.

²⁴ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

²⁵ *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.

Section 70, subdivision (d), of Statutes 1988, chapter 973 that codified the Minimum Qualifications program states that the requirements imposed shall be implemented and “be mandatory” only if the state board of governors certifies that adequate funding has been provided for Phase I of the program.

Sections 27 to 34, inclusive, and Sections 51 to 56, inclusive, of this act [section 28 codifies the Minimum Qualifications] shall be implemented by the board of governors and be mandatory with regard to implementation by community college districts only if the board of governors certifies in writing to the Governor and to the Legislature that adequate funding has been provided for Phase I of transitional program improvement and for any applicable state mandates, as authorized by Education Code section 84755 [program based funding]. If the board of governors so certifies, each of these sections shall be implemented on the date of certification, or upon any operative date specified for the particular section in this act, whichever is later. For purposes of this subdivision, “adequate funding” means those moneys required to provide an increased quality of instruction and programs, and to carry out applicable mandates of this act, within the California Community Colleges. Based upon estimates provided by the board of governors and exhaustive review of the community colleges’ operations by the Joint Committee for the Review of the Master Plan for Higher Education, the Legislature finds and declares that its estimate of this funding amount is seventy million dollars (\$70,000,000).

At its September 1989 meeting, the state board of governors certified that adequate funding had been provided for Phase I and, thus, community college districts were required to implement the activities mandated by the state as of that date.²⁶ Although the requirements were certified to have adequate funding,” the analysis continues to determine which activities impose a state-mandated new program or higher level of service on community college districts. The analysis of the funding is provided under issue 2.

1. Requirements Imposed on the State Board of Governors do not Impose State-Mandated Duties on Community College Districts.

a) Establishing Minimum Standards for Employment

Education Code section 70901, subdivision (b)(1)(B),²⁷ was added by the 1988 Reform Act and states in pertinent part the following:

[I]n consultation with community college districts and other interested parties as specified in subdivision (e), the board of governors shall provide general supervision over community college districts, and shall, in furtherance of those

²⁶ Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

²⁷ Former section 200.11 (as amended by Stats. 1970, ch. 102) stated: “The board of governors shall establish minimum standards for the employment of academic and administrative staff in community colleges.”

purposes, perform the following functions: (1) Establish minimum standards as required by law, including, but not limited to, the following: [¶]. . . [¶] (B) Minimum standards for the employment of academic and administrative staff in community colleges.

Claimant asserts, in its April 2004 comments, that the minimum standards for the employment of academic and administrative staff must be established “in consultation with community college districts,” so that consultation activities of community college districts are mandated by the state as of the enactment of Statutes 1988, chapter 973.

The Chancellor’s Office, in its March 11, 2004 comments, states that this statute is not a state mandate because it does not apply to local districts, only to the Board of Governors of the California Community Colleges, a state agency. The Chancellor’s Office also states that this law was in existence before 1975 (former § 200.11, Stats. 1969, ch. 1026), and therefore not required to be reimbursed under article XIII B, section 6.

Staff finds that section 70901, subdivision (b)(1), does not impose a state-mandated activity on community college districts. In determining whether consultation is required of the districts, subdivision (e) of section 70901, which is cited in subdivision (b), sheds light on the legislative intent. The pertinent part of subdivision (e) states:

In performing the functions specified in this section, the board of governors shall establish and carry out a process for consultation with institutional representatives of community college districts so as to ensure their participation in the development and review of policy proposals. The consultation process shall also afford community college organizations, as well as interested individuals and parties, an opportunity to review and comment on proposed policy before it is adopted by the board of governors. (Emphasis added.)

There is nothing in the plain language of section 70901 that requires community college districts to consult with the board of governors.

Therefore, staff finds that section 70901, subdivision (b)(1)(B) (Stats. 1988, ch. 973, Stats. 1998, ch. 1023), does not impose any state mandated duties on community college districts within the meaning of article XIII B, section 6.

b) Adopt Regulations to Establish Minimum Qualifications and Discipline Lists

Education Code section 87356, subdivision (a), requires the state board of governors to:

[A]dopt regulations to establish and maintain the minimum qualifications for service as a faculty member teaching credit instruction, a faculty member teaching noncredit instruction, a librarian, a counselor, an educational administrator, an extended opportunity programs and services worker, a disabled students program and services worker, an apprenticeship instructor, and a supervisor of health.

Education Code section 87357, subdivision (a), provides the rules for establishing and maintaining minimum qualifications pursuant to section 87356, and subdivision (b), requires the state to prescribe by regulation a working definition of “discipline.” Specifically, the board of governors is required to:

- Consult with, and rely primarily on the advice and judgment of the statewide academic senate for the minimum qualifications of faculty;
- Consult with, and rely primarily on the advice and judgment of an appropriate statewide organization of administrators for the minimum qualifications of educational administrators;
- Consult with, and rely primarily on the advice and judgment of appropriate apprenticeship teaching faculty and labor organization representatives for the minimum qualifications of apprenticeship instructors;
- Provide a reasonable opportunity for comment by other statewide representative groups in establishing the minimum qualifications;
- Establish a process to review at least every three years the continued appropriateness of the minimum qualifications and the adequacy of the means to which they are administered. The process shall be provided for the appointment of a representative group of community college faculty, administrators, students, and trustees to conduct or otherwise assist in the review, including particularly, representatives of academic senates, collective bargaining organizations, and statewide faculty associations; and
- Relying primarily on the advice and judgment of the statewide academic senate, shall prescribe by regulation a working definition of the term “discipline” and shall prepare and maintain a list of disciplines that are reasonably related to one another. The board of governors shall also prepare and maintain a list of disciplines in which the master’s degree is not generally expected or available.²⁸

Claimant requests reimbursement to consult with and advise the board of governors regarding the minimum qualifications for faculty and administrators, and to conduct and to otherwise assist in the review of the continued appropriateness of the minimum qualifications for the employment of faculty and administrators. (§ 87357, subs. (a)(1) and (a)(2).) The claimant argues that these activities are mandated by the state and emphasizes the part of the statute regarding the board of governors relying *primarily* on the advice and judgment of the statewide academic senate and other organizations. Claimant states: “[i]t cannot be said that the Board will not consult with a wide range of community college districts. When it does so, the costs of those district activities shall be reimbursable.” As for the review process, claimant submits that the section “clearly requires community college districts to ‘conduct or otherwise assist’ in the review.” Claimant emphasizes the factors cited in *City of Sacramento v. State of California*

²⁸ Sections 53400-53420 of the title 5 regulations identify the minimum qualifications for faculty and educational administrators and (except for §§ 53411 & 53413) are discussed further in this analysis. Claimant did not request reimbursement for determining the minimum qualifications for faculty and administrators hired under sections 53411 and 53413, so staff makes no findings on those regulations. Section 53407 of the regulations incorporates the list of disciplines published by the Chancellor’s Office for those disciplines that require a masters’ degree, disciplines in which a master’s degree is not generally expected or available, but which require a bachelor’s degree; and disciplines in which the master’s degree is not generally available.

regarding the “legal and practical consequences of nonparticipation, noncompliance or withdrawal.”²⁹ According to claimant, “when community college districts are ‘asked to participate’ by the Chancellor or the Board of Governors, the ‘legal and practical consequences of nonparticipation’ must be seriously considered.”

The Chancellor’s Office states that community college districts are not required to perform these activities. Any claimant asked to participate has the option to decline. The Chancellor’s Office cites the *Kern High School Dist.*³⁰ case for authority that no mandate exists where a district voluntarily participates in a program.

Staff finds that section 87357, subdivision (a), does not impose any state-mandated duties on community college districts. The requirement in section 87357, subdivision (a)(1), is on the state board of governors to consult with the academic senate, or a statewide organization of administrators, or apprenticeship teaching faculty and labor organization representatives. In addition, there is no requirement in subdivision (a)(2) for districts’ “faculty, administrators, students and trustees” to participate in the review process.

Moreover, there is no evidence that community college districts are practically compelled to perform these activities; i.e. that “certain and severe penalties such as double taxation or other draconian consequences” will occur if a district does not advise the board of governors regarding the minimum qualifications for faculty, or does not assist in the review of the minimum qualifications.³¹

Accordingly, staff finds that sections 87356, subdivision (a) (Stats. 1993, ch. 506), and 87357, subdivision (a) (Stats. 1988, ch. 973, Stats. 1990, ch. 1302), do not impose state-mandated duties on community college districts.

According to section 87357, subdivision (b), the board of governors is required to develop a working definition of “discipline” and prepare and maintain a list of disciplines that are reasonably related to each other. The board of governors does this “relying primarily upon the advice and judgment of the statewide academic senate” which, in turn, is required to “consult with appropriate state-wide organizations representing administrators and faculty collective bargaining agents.”

Staff finds that section 87357, subdivision (b) (Stats. 1988, ch. 973, Stats. 1990, ch. 1302), is not a mandate on a community college district. Regarding consultation, nothing in the law indicates that community college district faculty are required to participate on the academic senate, or that the academic senate’s participation in consultation is anything but voluntary, so any consultation between it and the board of governors does not require an activity on the part of community college districts.

²⁹ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76.

³⁰ *Kern High School Dist.*, *supra*, 30 Cal.4th 727.

³¹ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 751.

c) Review of Community College Districts' Application of Minimum Qualifications

Section 87358 states: "The board of governors shall periodically designate a team of community college faculty, administrators, and trustees to review each community college district's application of minimum qualifications to faculty and administrators."

Claimant requests reimbursement as follows: "Pursuant to Education Code Section 87358, participating, as designated by the board of governors, in the review of each community college district's application of minimum qualifications to faculty and administrators."

The Chancellor's Office, in its March 2004 comments on the test claim, states that claimant's participation in the review is not required. "At most, the section authorizes the Board of Governors to require Claimant to demonstrate that it has been properly applying minimum qualification standards when it hires its academic employees." According to the Chancellor's Office, it has no record that the board of governors has ever conducted a review of claimant with respect to this issue, and further:

Claimant has not alleged that any of its faculty, administrators, or trustees have ever participated in the review of any other district's use of minimum qualifications under this section. Even if Claimant made that allegation, it cannot demonstrate that the participation was anything but voluntary.

Staff finds that section 87358 does not impose a state-mandated program on community college districts. The statute requires the state board of governors to "periodically designate a team of community college faculty, administrators, and trustees to review each ... district's application of minimum qualifications." (Emphasis added.) Being designated does not mandate the district's participation. Any designated faculty, administrators, or trustees may refuse to participate in a review team, and there is nothing in the law or the record that indicates that community college districts are legally or practically compelled to participate in the review of its minimum qualifications for employment. Thus, staff finds that section 87358 (Stats. 1988, ch. 973) is not mandated by the state.

2. Some of the Requirements Imposed on Community College Districts for Determining the Minimum Qualifications for Faculty and Educational Administrators Mandate a New Program or Higher Level of Service.

a) Determining the Minimum Qualifications of Applicants for Faculty and Educational Administrator Positions

Section 87359, subdivision (a), and section 53430, subdivision (a), of the regulations provide that no one may be hired to serve as a community college faculty or educational administrator unless the governing board of the community college district determines that the applicant possesses qualifications that are at least equivalent to the minimum qualifications required pursuant to section 87356 and the implementing title 5 regulations. The minimum qualifications have been adopted as regulations pursuant to section 87356, subdivision (a), for the following positions: faculty member teaching credit instruction; a faculty members teaching noncredit instruction; librarian; counselor; educational administrator; extended opportunity programs and services worker; disabled students program and services worker; apprenticeship instructor; and supervisor of health. Sections 53410 through 53420 of the title 5 regulations lay out the

minimum qualifications for these positions, and generally specify the educational degrees, professional licenses and certificates, and work experience required for each position.³² Claimant has requested reimbursement for determining the minimum qualifications for all the positions in these regulations except sections 53411 (minimum qualifications for health services professionals) and 53413 (minimum qualification for apprenticeship instructors), so staff makes no finding on those sections.

Section 53407 of the title 5 regulations incorporates the list of disciplines published by the Chancellor's Office (as required by Ed. Code, § 87357, subd. (b)) for those disciplines that require a masters' degree; disciplines in which a master's degree is not generally expected or available, but which require a bachelor's degree; and disciplines in which the master's degree is not generally available. And section 53406 requires that all degrees and units used to satisfy minimum qualifications are from accredited institutions,³³ unless otherwise specified in the regulations.

Section 87359, subdivision (a), and section 53430, subdivision (a), of the title 5 regulations further require that the criteria used by the community college governing board's action in making the employment determination "shall be reflected in the governing board's action to employ the individual."

These requirements do not apply to positions relating to community service or contract classes that do not award college credit and are not supported by state apportionment. Contract classes that do award college credit are subject to these provisions, even if they are not supported by state apportionment.³⁴

The claimant requests reimbursement to determine whether applicants for college faculty or educational administrators have qualifications that are at least equivalent to the minimum conditions specified.

³² Section 53410 lists the minimum qualifications for instructors of credit courses, counselors, and librarians. Section 53410.1 identifies the professional licenses and alternative qualifications for disciplines in accounting, counseling, engineering, and nutritional sciences/dietetics. Section 53412 lists the minimum qualifications for instructors of noncredit courses. Section 53414 lists the minimum qualifications for Disabled Students Programs and Services employees. Section 53415 lists the minimum qualifications for learning assistance or learning skills coordinators or instructors, and tutoring coordinators. Section 53416 lists the minimum qualifications for work experience instructors and coordinators. Section 53417 requires that an applicant hold a current occupational license or certificate when such a certificate or license is required for program or course approval. Section 53420 lists the minimum qualifications for educational administrators.

³³ "Accredited institution," for purposes of the test claim regulations, is defined in section 53406 of the title 5 regulations as: "a postsecondary institution accredited by an accreditation agency recognized by either the U.S. Department of Education or the Council on Post-secondary Accreditation. It shall not mean an institution 'approved' by the California Department of Education or by the California Council for Private Postsecondary and Vocational Education."

³⁴ California Code of Regulations, title 5, section 53401.

The Chancellor's Office states that, "the shift from the credentials system to the minimum qualifications system represented new obligations for districts ..." but also asserts that claimant has already been reimbursed for the activities.

Section 87359, subdivision (a), and section 53430, subdivision (a), of the title 5 regulations require community college districts to determine whether an applicant for a faculty or educational administrator position possesses qualifications that are at least equivalent to the minimum qualifications identified in the regulations:

- Extended Opportunity Programs and Services Professionals (§ 53402);
- Instructors of credit courses, counselors and librarians (§ 53410);
- Instructors of noncredit courses (§ 53412);
- Disabled Students Programs and Services Employees (§ 53414);
- Learning assistance or learning skills coordinators or instructors and tutoring coordinators (§ 53415);
- Work experience instructors or coordinators (§ 53416); and
- Educational administrators (§ 53420), as applicable.

In addition, determining whether the applicant possesses the following when required for the position:

- Professional licenses as alternative qualification (§ 53410.1);
- Accredited degrees and units (§ 53406);
- Discipline lists (§ 53407); and
- Licensed or certificated occupations (§ 53417).

The criteria used in making the employment determination are required to be reflected in the district's action to employ the faculty member or administrator.

Although the plain language prohibits the hiring of faculty or educational administrators unless the governing board determines the applicant possesses the minimum qualifications, when read in the context of the entire statutory and regulatory scheme, community college districts have an affirmative duty to determine the minimum qualifications of an applicant for these positions before employing the individual. Section 70902, subdivision (b)(4), requires the governing board of each community college district to "employ and assign all personnel not inconsistent with the minimum standards adopted by the board of governors." Moreover, the criteria used in making the employment determination must be reflected in the district's action. All action of the community college governing board must be open and public and all votes shall be recorded.³⁵

However, determining that an applicant meets the minimum qualifications for a faculty or educational administrator position in the Disabled Students Programs and Services (DSPS, § 53414) and in the Extended Opportunity Programs and Services (EOPS), and reflecting the

³⁵ Education Code section 71021 and 71022.

criteria used in the action to employ an applicant for positions in these programs are not mandated by the state. The DSPS and EOPS programs have been the subject of prior test claims, both of which were denied by the Commission on the ground that the programs were not mandated by the state. (CSM 02-TC-22, 02-TC-29.)

The DSPS program requires that as a condition of receiving funds, community college districts are required to perform accounting, reporting, and administrative activities that go beyond the federal requirements of the Americans with Disabilities Act and the Rehabilitation Act. Section 84850, subdivision (d), states:

As a condition of receiving funds pursuant to this section, each community college district shall certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving disabled students. Districts shall also provide the programmatic and fiscal information concerning programs and services for disabled students that the regulations of the board of governors require. (Emphasis added.)

Section 56000 of the title 5 regulations implementing the DSPS program similarly provides:

This subchapter applies to community college districts offering support services, or instruction through Disabled Student Programs and Services (DSPS), on and/or off campus, to students with disabilities pursuant to Education Code sections 67310-12 and 84850. Programs receiving funds allocated pursuant to Education Code Section 84850 shall meet the requirements of this subchapter. (Emphasis added.)

The direct costs incurred under the DSPS program, including the salaries of DSPS faculty and educational administrators are funded through the DSPS program.³⁶

Similarly, the EOPS program provides academic and financial support to community college students whose educational and socioeconomic backgrounds might otherwise prevent them from successfully attending college. The activities required of the program are triggered by a community college district's decision to establish an EOPS program and to request and accept state funding. Section 69649 states:

(a) [t]he governing board of a community college district may, with the approval of the board, establish an extended opportunity program. Except as provided in subdivision (b), *in order to be eligible to receive state funding*, the program shall meet the minimum standards established pursuant to subdivision (b) of section 69648.

The costs incurred under the EOPS program, including the salaries of EOPS faculty and educational administrators are funded through the EOPS program.³⁷

³⁶ California Code of Regulations, title 5, section 56064.

³⁷ California Code of Regulations, title 5, section 56295.

Pursuant to the court's holding in *Kern High School Dist.*, activities performed as a condition of the receipt of funding are not mandated by the state.³⁸ With respect to optional funded programs like the DSPS and EOPS programs, the court reasoned as follows:

As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the . . . requirements, or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, on balance, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits.³⁹

Therefore, staff finds that the requirements in Section 87359, subdivision (a), and section 53430, subdivision (a), of the title 5 regulations is a state mandate to determine that an applicant for a faculty or educational administrator position identified below possesses qualifications that are at least equivalent to the minimum qualifications before an action is taken to employ the person:

- Instructors of credit courses, counselors and librarians (§ 53410);
- Instructors of noncredit courses (§ 53412);
- Learning assistance or learning skills coordinators or instructors and tutoring coordinators (§ 53415);
- Work experience instructors or coordinators (§ 53416); and
- Educational administrators (§ 53420), as applicable.

In addition, determining whether the applicant possesses the following when required for the position:

- Professional licenses as alternative qualification (§ 53410.1);
- Accredited degrees and units (§ 53406);
- Discipline lists (§ 53407); and
- Licensed or certificated occupations (§ 53417).

Additionally, the criteria used in making the employment determination of faculty and educational administrators shall be reflected in the district's action.

These activities are not state-mandated for persons seeking employment in the DSPS or EOPS programs. (§§ 53402, 53414.)

³⁸ *Kern High School Dist.*, *supra*, 30 Cal.4th 727.

³⁹ *Id.* at page 753.

Staff further finds that these activities, except for determining the minimum qualifications for instructors of noncredit courses (Cal. Code Regs., tit. 5 § 53412), constitute a new program or higher level of service. Prior to the 1988 Reform Act and its title 5 regulations, the Chancellor's Office assessed a person's qualifications and issued a credential to become a faculty member or administrator at a community college.⁴⁰ The determination of minimum qualifications has now been shifted to community college districts.

The California Supreme Court has held that a state-mandated new program or higher level of service results from the state having control of a program that was shifted to local governments or school districts:

Whether the shifting of costs is accomplished by compelling local governments to pay the costs of entirely new programs created by the state, or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIII B, the result seems equally violative of the fundamental purpose underlying section 6 of that article.⁴¹

These activities are uniquely imposed on community college districts and are intended to provide an increased level of service to the public, so staff finds that they constitute a program within the meaning of article XIII B, section 6. Statutes 1988, chapter 973, section 4, subdivision (n), states that it "a general purpose of this act to improve quality education"⁴² Subdivision (q) further states that the focus of the minimum qualifications program is to help the community colleges ensure they will select the faculty and administrators who are competent to work effectively at the college level, and to ensure that the minimum qualifications for faculty are the same except where clearly unreasonable or impractical.

The Chancellor's Office asserts, however, that determining the minimum qualifications for instructors of noncredit courses, sometimes referred to as classes for adults, has been performed by the districts since 1970 (citing former section 52600 of the title 5 regulations).

At least since 1983, and prior to the test claim regulations that were pled in this test claim, community college districts assessed the minimum qualifications for instructors of noncredit courses (or "classes for adults")⁴³ and issued a Certificate of Qualifications to teach them. As stated in former section 52275 of the title 5 regulations:

⁴⁰ Chancellor of the California Community Colleges, comments filed March 2004, p. 11. See also former California Code of Regulations, title 5, section 52030 et seq., Register 83, No. 29 (July 16, 1983) page 628.15.

⁴¹ *Lucia Mar, supra*, 44 Cal.3d 830, 836.

⁴² See also, Statutes 1988, chapter 973, section 70, subdivision (b)(1), which states the following: "It is the intent of the Legislature that those changes [referring to Phase I changes], combined in proper sequence with the professional improvement of faculty, will improve the overall quality of education within the system."

⁴³ The statute that authorized this regulation is former Education Code section 87295, which states: "The board of governors shall, by regulation, establish minimum standards authorizing

An applicant shall be eligible for a Certificate of Qualifications if the requirements of both of the following subdivisions are satisfied:

(a) The applicant satisfies one of the following requirements.

(1) The applicant has successfully completed four years of higher education with a major in a subject matter area.

(2) The applicant has completed four years of occupational experience in a subject matter area.

(b) *The district, which maintains the community college which will employ the applicant, certifies that the applicant has adequate training and experience to teach the classes for which the applicant is to be employed.*⁴⁴ (Emphasis added.)

And as former section 52277 of the regulations stated:

A Certificate of Qualifications authorizes its holder to teach the noncredit classes named on the credential in a community college maintained by the district named on the credential document.⁴⁵

This requirement for certification carried forward into early versions of the test claim regulation that applies to instructors of noncredit courses. Section 53412,⁴⁶ operative November 30, 1990, required the same qualifications for instructors of noncredit courses as under prior law:

(a) Successful completion of four years of higher education with a major in a discipline, or completion of four years of occupational experience in a discipline; and

(b) Certification by the district that the applicant has adequate training and experience to teach the classes for which he or she is to be employed.

The district certification requirement was deleted effective June 26, 1992,⁴⁷ when section 53412 was amended to specify that “the minimum qualification for service as a faculty member teaching a noncredit course shall be the same as the minimum qualifications for credit instruction in the appropriate discipline.” So under current law the minimum qualification to teach noncredit courses is a master’s degree, except for the following courses that require a bachelor’s degree in a specified discipline: interdisciplinary basic skills courses, basic skills courses in mathematics, reading and/or writing, citizenship, English as a second language, health and

service for instructors of classes for adults and shall establish procedures for the issuance of appropriate certificates of qualification.”

⁴⁴ Former California Code of Regulations, title 5, section 52275, Register 83, No. 29 (July 16, 1983) page 628.48.1.

⁴⁵ Former California Code of Regulations, title 5, section 52277, Register 83, No. 29 (July 16, 1983) page 628.48.1.

⁴⁶ Added by Register 90, Nos. 48-50 (December 14, 1990) page 330.2, operative November 30, 1990.

⁴⁷ Register 92, No. 26 (June 16, 1992) page 329.

safety, home economics, courses intended for older adults, parent education, and a short-term vocational course.

Thus, under the pre-1992 regulation, a person could teach a noncredit course by completing four years of higher education with a major in the subject matter area, or four years of occupational experience in a subject matter area. Under current law, the prospective teacher must have a master's degree, or in specified instances a bachelor's degree. (§ 53412.)

Although the minimum qualifications have changed since the test claim regulation, determining the minimum qualifications has not. There is nothing to indicate that determining the minimum qualification under current law is a higher level of service than granting certification to teach under prior law. Each requires the community college to assess an applicant's qualifications. The state has never made this assessment for instructors of noncredit courses, so this activity was not shifted from the state to local districts.

Therefore, staff finds that determining the minimum qualifications of an applicant for a faculty or educational administrator position in a noncredit course (Cal. Code Regs., tit. 5 § 53412)⁴⁸ does not constitute a new program or higher level of service.

Accordingly, staff finds that section 87359, subdivision (a), and section 53430, subdivision (a), of the title 5 regulations mandate a new program or higher level of service on community college districts for the following activities:

- Determine that an applicant for a faculty or educational administrator position possesses qualifications that are at least equivalent to the minimum qualifications identified in sections 53406, 53407, 53410, 53410.1, 53415, 53416, 53417, and 53420 as applicable, before an action is taken to employ the individual.
- The criteria used in making the employment determination of faculty and educational administrators shall be reflected in the district's action.

Community college districts are *not* entitled to reimbursement for these activities when employing faculty or educational administrators in the following programs and courses: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.), or noncredit courses. (Cal. Code Regs., tit. 5, § 53412.)

b) Development of the Process, Criteria, and Standards for Faculty Determinations

Section 87359, subdivision (b), addresses the development of the process, criteria, and standards for qualifications that are equivalent to the minimum qualifications established by the state. This subdivision provides:

- The process, criteria, and standards for reaching determinations regarding faculty [whose qualifications are equivalent to the minimum qualifications (see subs. (a) & (b))] shall

⁴⁸ Added by Register 90, No. 49 (Dec. 14, 1990) page 330.2, operative November 30, 1990; Register 91, No. 50 (July 19, 1991) page 332; Register 92, No. 26 (July 27, 1992) pages 328-329; Register 93, No. 42 (Nov. 4, 1993) pages 329-330.

be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board.

- The agreed upon process shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty employed under the regulation's authority possess qualifications that are at least equivalent to the applicable minimum qualifications specified in the regulations.
- The process shall further require that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to section 87358.

Section 53430, subdivisions (b) and (c), of the title 5 regulations are the same as the requirements in section 87359, subdivision (b).

The academic senates on each campus exist “[i]n order that the faculty may have a formal and effective procedure for participating in the formation and implementation of district policies on academic and professional matters.”⁴⁹ Academic senates are created by a vote of the faculty. Once created, the governing board of the community college district is required to recognize the academic senate and authorize the faculty to: (1) fix and amend by vote of the full-time faculty the composition, structure, and procedures of the academic senate; and (2) “provide for the selection, in accordance with accepted democratic election procedures, the members of the academic senate.”⁵⁰

Staff finds that the activities required by section 87359, subdivision (b), and section 53430, subdivisions (b) and (c), of the title 5 regulations, are mandated by the state, including as applied to noncredit course instructors, as there is no indication that they are excluded from the process, criteria, and standards referred to in the regulation and statute. The exception is for faculty and administrators employed under the DSPS and EOPS programs, for which developing the process, criteria, etc. is not a mandate. As indicated above, the DSPS and EOPS programs are voluntary programs and the requirements are imposed only as a condition of funding.

Staff further finds that the bulleted activities are newly required of community college districts as they relate to the employment of all other faculty positions and provide a higher level of service to the public.

Thus, staff finds that section 87359, subdivision (b), and section 53430, subdivisions (b) and (c) of the title 5 regulations, mandate a new program or higher level of service for the following activities:

- The process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty or administrators whose qualifications are equivalent to the minimum qualifications shall be developed and agreed upon jointly by

⁴⁹ California Code of Regulations, title 5, sections 53200, 53201.

⁵⁰ California Code of Regulations, title 5, section 53202.

representatives of the governing board and the academic senate. (§ 87359, subd. (b); Stats, 1988, ch. 973, Stats 1993, ch. 506, Cal. Code Regs, tit. 5, § 53430, subd. (b).)

- The agreed upon process for hiring faculty shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty employed possess qualifications that are at least equivalent to the applicable minimum qualifications specified in the regulations. (§ 87359, subd. (b), Cal. Code Regs, tit. 5, § 53430, subd. (b).)
- The process for hiring faculty shall further require that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to section 87358. (§ 87359, subd. (b), Cal. Code Regs, tit. 5, § 53430, subd. (c).)
- The governing board shall approve the process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty and administrators. (§ 87359, subd. (b); Cal. Code Regs, tit. 5, § 53430, subd. (b).)

Community college districts are *not* entitled to reimbursement for these activities when employing faculty or administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.)

Section 87359, subdivision (d), states that “[u]ntil a joint agreement is reached and approved pursuant to subdivision (b), the district process in existence on January 1, 1989, shall remain in effect.” Similarly, subdivision (d) of the title 5 regulation states: “[u]ntil a joint agreement is reached and approved pursuant to Subdivision (b), the district shall be bound by the minimum qualifications set forth in this Subchapter.” Thus, until there is an agreement by the governing board and the academic senate on the process, criteria, and standards for the employment of faculty, the district cannot apply additional qualification standards to faculty applicants that go beyond the scope of the minimum conditions established by the regulations.

Staff finds that this provision (§ 87359, subd. (c) & Cal.Code Regs., tit. 5, § 53430, subd. (d)) is not a state mandate because it does not require a community college activity. It merely requires using existing processes or the minimum qualifications regulations (already found above to be a state-mandated new program or higher level of service) until agreement is reached with the academic senate on qualifications that are equivalent to them.

c) Develop Hiring Criteria

In establishing the hiring criteria for faculty and administrators, district governing boards shall no later than July 1, 1990, develop criteria that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. (§ 87360, subd. (a).)

No later than July 1, 1990, hiring criteria, policies, and procedures for new faculty members shall be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board. (§ 87360, subd. (b).)

Until a joint agreement is reached and approved, the district process in existence on January 1, 1989 remains in effect. (§ 87360, subd. (b).)

Staff finds that, based on the language in the statute, that these activities are a state mandate. Since they were not required under prior law, staff also finds that they are a new program or higher level of service for community college districts to do the following:

- No later than July 1, 1990, develop the hiring criteria for faculty and administrators that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. (§ 87360, subd. (a).)
 - No later than July 1, 1990, develop hiring criteria, policies, and procedures for new faculty members that are developed and agreed upon jointly by representatives of the governing board, and the academic senate, and approved by the governing board. (§ 87360, subd. (b).)
- d) Providing an Affidavit that Academic Employees of the District Possessed the Minimum Qualifications for the Work they Performed in the Preceding 12 Months**

Section 87714 (as added by Stats. 1981, ch. 470, and amended by Stats. 1990, ch. 1302) states:

The chief executive officer of each community college district shall, at times as required by the board of governors, provide an affidavit that, during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed.

Claimant pled the following activity based on this section: “providing affidavits, at times required by the board of governors, that, during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed.”

In comments filed in March 2004, the Chancellor’s Office states that this section stated as early as 1976 (Stats. 1976, ch. 1010) the following:

Each general superintendent of community colleges shall make an annual report of the schools under his jurisdiction to the county superintendent of schools on forms furnished by the board of governors which report shall include an affidavit that all employers in positions requiring certification qualifications were properly certificated for the work performed.

The Chancellor’s office also states that the obligation to ensure that all academic employees were qualified has existed since 1959. Section 13566 (Stats. 1959 chs. 2 & 458) required district superintendents of schools to annually report that all employees in positions requiring certification qualification were properly certificated for the work performed. According to the Chancellor’s comments: “Because community college districts grew out of K-12 districts, the terminology has changed somewhat since 1959, but the underlying obligation has been in place.”

The Chancellor’s Office also states that duties to be performed by the superintendents of each community college district were added by Statutes 1963, chapter 629. Former section 939 (later

former § 72413) required the chief executive officer to determine that employees who require certification have valid certificated documents.

The claimant's rebuttal comments state that former section 13566 (recodified as § 87714 by Stats. 1976, ch. 1010) required the report, including the specified affidavit, to be made to the county superintendent of schools, while the 1981 version required the report to be made to the board of governors. Therefore, according to the claimant, section 87714 requires a new program or higher level of service. Claimant also states that the Chancellor's reference to former section 939 is not relevant because it requires only a determination, but not a report or affidavit.

The plain language of the statute requires providing the affidavit "at times required by the board of governors." Whether an affidavit has been requested or not, the statute authorizes the state board of governors to require one from the district in the future. Therefore, staff finds that section 87714 (Stats. 1981, ch. 470, Stats. 1990, ch. 1302)⁵¹ is a state mandate on community college districts to, at times as required by the board of governors, provide an affidavit that, during the 12 months preceding the execution of the affidavit, all academic employees of the district possessed the required minimum qualifications for the work they performed.

Staff also finds, however, that section 87714 (Stats. 1981, ch. 470) is not a new program or higher level of service. Former section 87714 (Stats. 1976, ch. 1010) also required an affidavit. Even though before 1981, the report and affidavit were submitted to the county superintendent of schools, submitting the same information and affidavit to the Chancellor's Office is not a new program or higher level of service (the report requirement was deleted in the 1981 version). In fact, this activity was also part of the 1959 Education Code (Stats. 1959, ch. 458). Therefore, staff finds that section 87714 (Stats. 1981, ch. 470, Stats. 1990, ch. 1302) is not a new program or higher level of service.

e) Authority to Continue to Employ Credentialed Academic Employees Qualified at Time of Initial Hire.

Section 53403 of the title 5 regulations states:

Notwithstanding changes that may be made to the minimum qualifications established by this division, or to the implementing discipline lists adopted by the Board of Governors, [in § 53407] the governing board of a community college may continue to employ a person to teach in a discipline or render a service subject to minimum qualifications, if he or she, at the time of initial hire by the district, was qualified to teach in that discipline or render that service under the minimum qualifications or disciplines lists then in effect.

Every person authorized to serve under a credential shall retain the right to serve under the terms of that credential, and, for that purpose, shall be deemed to

⁵¹ The 1981 version of 87714 (Stats. 1981, ch. 470) required the same activity as the current version: "The chief executive officer of each community college district shall, at times as required by the county superintendent of schools, and at least annually, provide an affidavit that all employees in positions requiring certifications were properly certificated for the work performed."

possess the minimum qualifications specified for discipline or service covered by the credential until the expiration of that credential.⁵²

Claimant pled the activity of establishing and implementing policies to recognize faculty who were qualified to teach in their respective disciplines under the minimum qualifications when they were employed.

The Chancellor's Office states that this section merely permits districts to "grandparent" employees in under the minimum qualifications or faculty service areas in effect when the employees were hired, even if those qualifications or faculty service areas later changed. The Chancellor's Office asserts that there is no mandate involved.

Claimant's rebuttal comments state: "While admitting the 'grandfathering' provision, [the Chancellor's Office] does not describe who, how or when this should be done. The test claim merely recognizes the need to establish and implement policies that allow implementation of the 'grandfather' provision."

Staff finds that section 53403 of the title 5 regulations is not a state-mandated new program or higher level of service. The section's plain language authorizes but does not require community college districts to retain employees who were hired before the establishment of the minimum qualifications, and deems those employees to possess the minimum qualifications, until the expiration of their credentials. It does not require the community college district to assess the qualifications of employees at the time the regulation was adopted. Because section 53403⁵³ does not require community college districts to engage in an activity, staff finds that this section is not a state-mandated new program or higher level of service within the meaning of article XIII B, section 6.

B. Faculty Evaluations

The claimant pled section 87663 as amended by Statutes 1988, chapter 973 and Statutes 1990, chapter 1302.⁵⁴ The 1988 and 1990 amendments made the following changes to subdivisions (a) and (b) regarding regular⁵⁵ and temporary⁵⁶ employees:

⁵² Education Code section 87355, although not a test claim statute, requires the board of governors to adopt this regulation.

⁵³ Register 92, No. 26 (June 26, 1992) operative July 27, 1992, page 328, amended by Register 93, No. 42 (Oct. 5, 1993) operative November 4, 1993, page 328.

⁵⁴ The 1990 amendment changed "certificated employee" in subdivision (b) to "faculty member."

⁵⁵ "A 'regular' employee is . . . one who has achieved tenure." (§ 87609.)

⁵⁶ Temporary employees are defined several ways. They are employees who: (1) may be used to fill temporary vacancies of regular employees (§ 87478); serve during the first three months of a school term to instruct temporary classes or perform other duties (§ 87480); (3) fill needs due to spikes in enrollment (§ 87482); or teach not more than 67 percent of the hours per week of a full-time assignment for regular employees having similar duties (§ 87482.5).

(a) Contract [or probationary] employees shall be evaluated at least once in each academic year. Regular employees shall be evaluated at least once in every ~~two~~ three academic years. Temporary employees shall be evaluated within the first year of employment. Thereafter, evaluation shall be at least once every six regular semesters, or once every nine regular quarters, as applicable.

(b) Whenever an evaluation is required of a ~~certificated employee~~ faculty member by a community college district, the evaluation shall be conducted in accordance with the standards and procedures established by the rules and regulations of the governing board of the employing district.

Subdivisions (c) through (i) were added to section 87663 in 1988 (Stats. 1988, ch. 973, § 51) as follows:

(c) Evaluations shall include, but not be limited to, a peer review process.

(d) The peer review process shall be on a departmental or divisional basis, and shall address the forthcoming demographics of California, and the principles of affirmative action. The process shall require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching.

(e) The Legislature recognizes that faculty evaluation procedures may be negotiated as part of the collective bargaining process.

(f) In those districts where faculty evaluation procedures are collectively bargained, the faculty's exclusive representative shall consult with the academic senate prior to engaging in collective bargaining regarding those procedures.

(g) It is the intent of the Legislature that faculty evaluation include, to the extent practicable, student evaluation.

(h) A probationary faculty member⁵⁷ shall be accorded the right to be evaluated under clear, fair and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative. Those procedures shall ensure good-faith treatment of the probationary faculty member without according him or her de facto tenure rights.

(i) Governing boards shall establish and disseminate written evaluation procedures for administrators. It is the intent of the Legislature that evaluation of administrators include, to the extent possible, faculty evaluation.

Section 70, subdivision (d), of the 1988 statute further states that "Sections 51 to 56" of the bill shall be implemented and "be mandatory" only if the state board of governors certifies that adequate funding has been provided. At its September 1989 meeting, the state board of

⁵⁷ Probationary faculty members are contract employees who are on a tenure track. Temporary employees are generally not on a tenure track, except as provided in section 87478.

governors certified that adequate funding had been provided and, thus, community college districts were required to implement section 87663 as of that date.⁵⁸

In addition, section 53130 of the title 5 regulations requires that “[t]he governing board of a community college district shall adopt and cause to be printed and made available to each academic employee of the district reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties.”

Claimant requests reimbursement for the following activities:

Pursuant to Education Code Section 87663, subdivisions (c) and (d), conducting evaluations of faculty members of a community college district using a peer review process on a departmental or divisional basis, which shall address the forthcoming demographics of California, and the principles of affirmative action.

Pursuant to subdivision (e), when negotiated as part of the collective bargaining process, conducting evaluations of faculty members of a community college district pursuant to the terms of that agreement.

Pursuant to subdivision (f), in those districts where faculty evaluation procedures are collectively bargained, consulting with the faculty’s exclusive representative prior to engaging in collective bargaining regarding those procedures.

Pursuant to subdivision (g), conducting evaluations of faculty members of a community college district to the extent practicable using student evaluations.

Pursuant to subdivision (h), evaluating a probationary faculty member under clear, fair, and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative.

Pursuant to subdivision (i), evaluating administrators pursuant to evaluation procedures established by the governing board and, to the extent possible, to include faculty evaluation.

Pursuant to title 5, California Code of Regulations, Section 53130, to adopt and cause to be printed, and made available to each academic employee of the district, reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties.

The Chancellor’s Office, in its March 2004 comments, asserts that: (1) subdivision (f) requires the exclusive representative to consult with the academic senate prior to bargaining, but contains no district obligations; (2) statements of legislative intent in subdivision (g) regarding faculty evaluations including student evaluations if practicable is not a legal mandate; (3) the obligation of districts to provide for the evaluation of faculty and administrators preceded January 1, 1975; and (4) only districts that have chosen to collectively bargain their evaluation procedures are affected by subdivision (e)’s requirement to conduct evaluation pursuant to an agreement. The

⁵⁸ Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

Chancellor cites *Kern High School Dist.*⁵⁹ case for the proposition that if the district elects to do something, any downstream activity is not a reimbursable mandate. Moreover, the Chancellor's Office states that if the bargained evaluation procedures were in place before the 1988 amendments (Stats. 1988, ch. 973) the claimant has not performed a new program or higher level of service. And if the claimant has been reimbursed under the collective bargaining mandate, reimbursement under this statute would be double recovery.

Claimant, in the April 2004 rebuttal comments, states:

Even if there is a collective bargaining agreement, it may, or may not, encompass faculty evaluation procedures. The inclusion of subdivision (e) in the test claim will allow the parameters and guidelines to provide for reimbursement for these faculty evaluation procedures, with the exception of if, or when, they are part of the district's collective bargaining agreement.

Claimant also asserts that the requirements of section 87663 have been greatly expanded since 1975, especially since the 1988 amendments.

Staff finds, based on the plain language of subdivision (a), that it is a state mandate to evaluate a regular employee once every three academic years, and to evaluate temporary employees within the first year of employment. Thereafter, evaluation for temporary employees shall be at least once every six regular semesters, or once every nine regular quarters, as applicable. Staff also finds that, based on the plain language in subdivision (a), evaluation of temporary employees is a state mandate, and also a new program or higher level of service because it was not required under prior law.

However, evaluating regular employees every three years is less frequent than under prior law, which called for evaluation once every two academic years. This is not a higher level of service. Therefore, staff finds that this amendment in subdivision (a) of section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) on evaluating regular employees is not a new program or higher level of service.

Staff also finds that the amendment to section 87663, subdivision (b), made by Statutes 1990, chapter 1302, does not impose a state-mandated new program or higher level of service. This amendment substituted "faculty member" for "certificated employee" but imposes no state mandates on districts.

Staff finds that it is a state-mandated new program or higher level of service for an evaluation to include a peer review process as specified by subdivision (c), and that the peer review process conform to the requirements of subdivision (d): that it be on a departmental or divisional basis, and address the forthcoming demographics of California and the principles of affirmative action, and "for the process to require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching."

Staff further finds that section 87663, subdivisions (e) and (f), do not impose any state-mandated duties on community college districts. Subdivision (e) is legislative recognition that "faculty

⁵⁹ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742.

evaluation procedures may be negotiated as part of the collective bargaining process.” Subdivision (f) requires, in districts where faculty evaluation procedures are collectively bargained, “the faculty’s exclusive representative shall consult with the academic senate prior to engaging in collective bargaining regarding those procedures.” Subdivision (f) does not impose any requirements on community college districts.

Subdivision (h) of section 87663 states:

A probationary faculty member shall be accorded the right to be evaluated under clear, fair and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative. Those procedures shall ensure good-faith treatment of the probationary faculty member without according him or her de facto tenure rights.

Because this section entitles the probationary faculty member to be evaluated under clear, fair and equitable evaluation procedures locally defined through the collective bargaining process, and the procedures are required to ensure good faith treatment of the probationary faculty member, staff finds that subdivision (h) of section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) is a state mandate.

Staff finds that section 87663, subdivision (h), imposes a new program or higher level of service. Under section 87602, a contract employee is a probationary employee. Under prior law, contract employees are evaluated at least once each academic year. (§ 87663, subd. (a).) Since at least 1971, districts have been required to evaluate certificated employees (i.e., faculty) “in accordance with the standards and procedures established by the rules and regulations of the governing board of the employing district.”⁶⁰ Also since 1971, districts have been required to adopt rules and regulations in consultation with faculty “establishing the specific procedures for the evaluation of its contract and regular employees on an individual basis and setting forth reasonable but specific standards which it expects its certificated employees to meet in the performance of their duties.” The procedures and standards are to be uniform for all contract employees with similar general duties and responsibilities, and uniform for regular employees of the district with similar general duties and responsibilities.⁶¹

However, under prior law, the district was not required to develop “evaluation procedures locally defined through the collective bargaining process” for probationary employees. Therefore, staff finds that subdivision (h) of section 87663 is a new program or higher level of service to develop evaluation procedures that are collectively bargained for probationary employees where the faculty has chosen to elect an exclusive representative.

Two phrases in subdivisions (g) and (i) of section 87663 begin with the phrase “It is the intent of the Legislature...” Subdivision (g) declares legislative intent that faculty evaluations include, to the extent practicable, student evaluation. Subdivision (i) declares legislative intent that evaluations of administrators include, to the extent practicable, faculty evaluation. Courts have

⁶⁰ Former Education Code section 13481 (Stats. 1971, ch. 1654), Education Code section 87663, subdivision (b) (Stats. 1976, ch. 1010)

⁶¹ Former Education Code section 13481.05 (Stats. 1971, ch. 1654). Education Code section 87664 (Stats. 1976, ch. 1010, Stats 1990, ch. 1302).

held that statements of Legislative intent do not give rise to a mandatory duty.⁶² Therefore, staff finds that as declarations of legislative intent, neither subdivisions (g) nor (i) of section 87663 are state mandates.

Subdivision (i) also states: “Governing boards shall establish and disseminate written evaluation procedures for administrators.” Staff finds that this provision is a state-mandated new program or higher level of service to establish and disseminate written evaluation procedures for administrators.

Finally, section 53130 of the title 5 regulations states that the district governing board “shall adopt and cause to be printed and made available to each academic employee of the district reasonable rules and regulations providing for the evaluation of the performance of academic employees in their assigned duties.” The Chancellor’s Office argues that “the requirements that currently appear in section 53130 have existed without lapse since before January 1, 1975 and cannot be claimed for reimbursement under this process.”

Section 53150 was added to the title 5 regulations in 1991.⁶³ In 1971, however, section 13481.05 (Stats. 1971, ch. 1653) was enacted to provide that:

The governing board of each district in consultation with the faculty shall adopt rules and regulations establishing the specific procedures for the evaluation of its contract and regular employees on an individual basis and setting forth reasonable but specific standards which it expects its certificated employees to meet in the performance of their duties. Such procedures and standards shall be uniform for all contract employees and shall be uniform for all regular employees of the district.

Section 13481.05 was renumbered to section 87664 in the 1976 Education Code and has not been pled in this test claim.

Even though adopting rules and regulations establishing the specific procedures for evaluating contract and regular employees was in prior law, new rules and regulations must be adopted due to the amendments to section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) that are discussed above. For example, prior law did not require a peer review process for faculty evaluations and was limited to adopting rules and regulations for the evaluation of contract and regular employees. Under section 53130, rules and regulations have to be adopted for “each academic employee.”

Therefore, staff finds that section 53130 of the title 5 regulations imposes a state mandated new program or higher level of service on community college districts to adopt and cause to be printed and made available to each academic employee of the district amended rules and regulations that reflect the new requirements imposed by Education Code section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) and provide for the evaluation of the performance of academic employees in their assigned duties. This is a one-time activity.

⁶² *Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 633-634.

⁶³ Register 91, No. 25, effective April 5, 1991.

In sum, staff finds that section 87663 (Stats. 1988, ch. 973, Stats, 1990, ch. 1302) imposes a state-mandated new program or higher level of service on community college districts to do as follows:

- Evaluate a temporary employee within the first year of employment, and at least once every six regular semesters or once every nine regular quarters thereafter (§ 87663, subd. (a).);
- Include a peer review process in faculty evaluations, and for the peer review process to be on a departmental or divisional basis, and address the forthcoming demographics of California and the principles of affirmative action, and for the process to require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching (§ 87663, subds. (c) & (d));
- Develop “evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative” for probationary faculty (§ 87663, subd. (h));
- Establish and disseminate written evaluation procedures for administrators. (§ 87663, subd. (i).) This is a one-time activity;
- Adopt and cause to be printed and made available to each academic employee of the district amended rules and regulations that reflect the new requirements imposed by Education Code section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) and provide for the evaluation of the performance of academic employees in their assigned duties. This is a one-time activity. (Cal. Code Regs., tit. 5, § 53150); and
- Community college districts are *not* entitled to reimbursement for these evaluation activities for faculty or administrators employed in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. & 53414), and Extended Opportunity Programs and Services. (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.)

C. Tenure Grievances, Arbitration and Judicial Review

Claimant pled sections 87610.1 and 87611, added by Statutes 1988, chapter 973. Section 87610.1 provides an alternative arbitration grievance process for a probationary or contract faculty employee⁶⁴ to challenge a district’s decision not to grant tenure or reappoint the employee as a contract employee for the following academic year under specified situations. The alternative process is allowed only in those community college districts where tenure evaluation procedures are collectively bargained and the grievance arbitration procedures are in the collective bargaining agreement. Pursuant to section 87611, the decision reached in the grievance arbitration proceeding is subject to judicial review pursuant to Code of Civil Procedure section 1094.5.

⁶⁴ Education Code section 87600 limits applicability of this test claim statute to faculty, not including administrators. (§ 87603.)

If there is no contractual grievance procedure resulting in arbitration, tenure grievances shall proceed under existing law pursuant to section 87740. Section 87740 provides for a hearing under the Administrative Procedure Act conducted by an administrative law judge who prepares a proposed (nonbinding) decision containing a determination as to the sufficiency of the cause and a recommendation as to disposition. The governing board makes the final determination. Section 87740 has been in law since before 1975 (Stats. 1965, ch. 1110, as former § 13443). The claimant also pled section 87740 as amended in 1995.

1. Overview of Tenure Grievance Law

The authority to grant tenure or reappoint a faculty employee for another year is addressed in sections 87600 et seq. Generally, all district academic employees are either contract employees, regular employees, or temporary employees. (§ 87604.) A contract employee is a probationary employee and a regular or tenured employee is a permanent employee. (§ 87602.) A contract employee is an employee of the district who is employed on the basis of a contract in accordance with the provisions of sections 87605 or 87608, subdivision (b). (§ 87601.)

For the first academic year of employment with the district, each faculty member must be employed by contract. (§ 87605.) At the completion of the faculty member's first academic year, the district has the discretion to decide whether or not to contract with the faculty member for the following academic year, or to employ the contract employee as a regular, tenured employee for all subsequent academic years. The decision of the district is not subject to judicial review, except as expressly provided in sections 87610.1 and 87611. (§ 87608.)

The district has the same discretion following completion of the faculty member's second academic year, except a renewal contract may be for the "following two academic years." (§ 87608.5.) If a contract employee is working under the second contract, the governing board, at its discretion and not subject to judicial review except as expressly provided in sections 87610.1 and 87611, shall elect one of the following alternatives: (a) not enter into a contract for the following academic year; (b) enter into a contract for the following two academic years; or (c) employ the contract employee as a regular, tenured employee for all subsequent academic years. (§ 87608.5.)

If a contract employee is employed under his or her third consecutive contract entered into pursuant to section 87608.5, the governing board shall either employ the probationary employee as a tenured employee for all subsequent academic years, or not grant this status and terminate the employee. (§ 87609.)⁶⁵

Before the district can exercise discretion regarding continued employment of a contract employee, the district must evaluate the employee in accordance with the evaluation standards and procedures established pursuant to section 87660 et seq. (§ 87607.) In addition, the governing board must receive the most recent evaluations, recommendation of the superintendent of the district, and the recommendation of the president of the community college before the district exercises its discretion regarding the continued employment of a faculty member. The evaluations and recommendations are considered in a lawful meeting of the board. (§ 87607.) The governing board shall give written notice and the reasons for its decision regarding the first

⁶⁵ *McGuire v. Governing Board, supra*, 161 Cal.App.3d 871, 874.

year and second year contract employees on or before March 15 of the academic year by registered or certified mail. Failure to give notice shall be deemed an extension of the existing contract.

For employees under their third consecutive contract for whom the board must decide to either grant tenure or not employ pursuant to section 87609, the board is required to give written notice of its decision and the reasons therefor on or before March 15 by registered or certified mail. Failure to give notice shall be deemed a decision to employ the faculty member as a tenured employee for all subsequent academic years. (§ 87610.)

As indicated above, when the contract (or probationary) employee objects to the governing board's decision to not grant tenure or not reappoint the employee to another contract year pursuant to sections 87608, 87608.5, and 87609, the governing board's decision may be reviewed in accordance with section 87610.1. That statute, added by the 1988 Reform Act, states in relevant part the following:

- (a) In those districts where tenure evaluation procedures are collectively bargained pursuant to Section 3543 of the Government Code, the faculty's exclusive representative shall consult with the academic senate prior to engaging in collective bargaining on these procedures.
- (b) Allegations that the community college district, in a decision to grant tenure, made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances. Allegations that the community college district in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740.

"Arbitration" as used in this section, refers to advisory arbitration, as well as final and binding arbitration.

- (c) Any grievance brought pursuant to subdivision (b) may be filed by an employee on his or her behalf, or by the exclusive bargaining representative on behalf of an employee or group of employees in accordance with [Gov. Code 3450 et seq.]. The exclusive representative shall have no duty of fair representation with respect to taking any of these grievances to arbitration, and the employee shall be entitled to pursue a matter to arbitration with or without the representation by the exclusive representative. However, if a case proceeds to arbitration without representation by the exclusive representative, the resulting decision shall not be considered a precedent for purposes of interpreting tenure procedures and policies, or the collective bargaining agreement, but instead shall affect only the result in that particular case. When arbitration is not initiated by the exclusive representative, the district shall require the employee submitting the grievance to file with the arbitrator or another appropriate party designed in the collective

bargaining agreement, adequate security to pay the employee's share of the cost of arbitration.

- (d) The arbitrator shall be without power to grant tenure, except for failure to give notice... The arbitrator may issue an appropriate make-whole remedy, which may include, but need not be limited to, backpay, and benefits, reemployment in a probationary position, and reconsideration. Procedures for reconsideration of decisions not to grant tenure shall be agreed to by the governing board and the exclusive representative of faculty pursuant to [Gov. Code 3450 et seq.].

Thus, in those community college districts where tenure evaluation procedures are collectively bargained, and there is a contractual grievance procedure resulting in arbitration, the employee can seek review before the arbitrator on the following grounds:

- With respect to a decision by the governing board to not grant tenure, the employee can allege that the governing board either made a decision that was unreasonable to a reasonable person – or the decision to not grant tenure violated, misinterpreted, or misapplied the board's policies and procedures concerning the evaluation of the employee.
- With respect to the decision to not reappoint the contract employee, the employee can allege that the governing board violated, misinterpreted, or misapplied the board's policies and procedures concerning the evaluation of the employee.

Pursuant to section 87611, the arbitrator's decision is subject to judicial review pursuant to Code of Civil Procedure section 1094.5.

If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to a hearing in accordance with section 87740 before an administrative law judge.

2. The Tenure Grievance Arbitration Procedure (§§ 87610.1 and 87611) does not Impose a State Mandate

Claimant pled the following activities regarding section 87610.1:

In those districts where tenure evaluation procedures are collectively bargained pursuant to Section 3543 of the Government Code, consulting with the faculty's exclusive representative prior to engaging in collective bargaining on these procedures (§ 87610.1, subd. (a)).

Participating in arbitration procedures in response to grievance allegations that the community college district in a decision to grant tenure made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees. If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740 (§ 87610.1, subd. (b)).

Participating in arbitration procedures in response to grievance allegations that the community college district, in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees. If there is no contractual grievance procedure resulting in

arbitration, these allegations shall proceed to hearing in accordance with Section 87740 (§ 87610.1, subd. (b)).

Complying with an arbitrator's make-whole remedies, which may include, but need not be limited to, backpay and benefits, reemployment in a probationary position, and reconsideration (§ 87610.1, subd. (d)).

The claimant also requests reimbursement based on section 87611 for "the legal cost of appearing in a court or before any other hearing panel when appealing, or in response to a petition appealing, a final decision reached following a grievance or hearing conducted pursuant to subdivision (b) of Section 87610.1."

The Chancellor's Office March 2004 comments state that subdivision (a) requires the faculty exclusive representatives, not districts, to consult with the academic senate prior to collective bargaining, and therefore "includes no directives to districts." The Chancellor's Office also states:

Subdivision (b) provides an optional mechanism for addressing decisions to discontinue the service of probationary faculty. Prior to the addition of section 87610.1, districts were required to follow section 87740 when they decided to terminate the probationary period of new faculty members. . . . Section 87610.1 represents an alternative to the provisions of section 87740. Districts are never required to proceed under section 87610.1. As the section indicates "If there is no contractual grievance procedure resulting in arbitration, these allegations [to challenge a decision not to continue a probationary faculty member] shall proceed to hearing in accordance with Section 87740." If districts choose to collectively bargain a grievance procedure that results in arbitration, section 87610.1 applies; otherwise, districts continue to follow section 87740. Because the decision to come under section 87610.1 is voluntary, the provisions of section 87610.1 cannot be the basis of a claim. (Emphasis in original.)

The Chancellor's Office also states the following regarding the remedies an arbitrator may impose in subdivision (d) of section 87610.1:

If the District improperly attempts to end the employment of a probationary employee, it will be responsible for making the employee whole, including back pay and benefits in the proper case. . . . Nothing mandates that Claimant take improper action against an employee, so the State is not responsible for the Claimant's conduct in this regard.

In addition, the Chancellor's Office comments on section 87611's limited judicial review of an administrative decision under section 1094.5 of the Code of Civil Procedure, which focuses on whether or not the administrative body acted within its jurisdiction, whether there was a fair trial, or whether there was an abuse of discretion in the administrative agency's findings or conclusion. According to the Chancellor's Office, a claimant is not required to proceed under section 87610.1, and section 87611 makes no mention of any costs. Rather, it "merely indicates that arbitration decisions regarding the release of a probationary faculty member can be judicially reviewed pursuant to section 1094.5 of the Code of Civil Procedure." The Chancellor's Office also points out that "judicial review under section 1094.5 has long been

available for review of community college decisions concerning probationary employees,” citing *Steward v. San Mateo Junior Collect Dist. et al.* (1974) 37 Cal.App.3d 345.

According to claimant’s rebuttal comments, there are a new group of allegations in subdivision (b) of section 87610.1 that are now required to be procedurally addressed as grievances. These allegations are that “the community college district, in a decision to grant tenure, made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees.” Also, “allegations that the community college district in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances.”

Staff finds that section 87610.1 and any resulting litigation following arbitration pursuant to section 87611 do not impose state-mandated duties on community college districts. The alternative arbitration procedures provided by sections 87610.1 and 87611 only apply to “those districts where tenure evaluation procedures are collectively bargained pursuant to Section 3543 of the Government Code [the Educational Employment Relations Act, or “EERA”]....” (§ 87610.1, subd. (a).) Section 87610.1 also provides for the original hearing alternative, which has been in place since at least 1965: “If there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740.” (§ 87610.1, subd. (b), and former §§ 13343, 13346.25, and 13346.32.)

Courts have construed the term “mandate” according to its commonly understood meaning as an “order” or “command.”⁶⁶ Government Code section 17514 defines “[c]osts mandated by the state” to mean “any increased costs which a local agency or school district is *required* to incur...” (emphasis added).⁶⁷ This narrow construction of “mandate” is consistent with the analysis adopted by the court in *City of Merced v. State of California*.⁶⁸ In that case, the City of Merced sought reimbursement from the state for costs incurred as a result of a statutory requirement that when a city or county chooses to exercise its power of eminent domain it must compensate for business goodwill. The court rejected the City’s argument that business goodwill compensation amounted to a reimbursable state mandate, finding that “the Legislature intended for payment of goodwill to be discretionary.”⁶⁹ The court proceeded to clarify its conclusion by reasoning that:

[W]hether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. *The fundamental concept is that the city or county is not required to exercise eminent domain.* If,

⁶⁶ See *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155, 174 (stating that “[w]e understand the use of ‘mandates’ in the ordinary sense of ‘orders’ or ‘commands’”).

⁶⁷ Government Code section 17514.

⁶⁸ *City of Merced v. State of California (City of Merced)* (1984) 153 Cal.App.3d 777.

⁶⁹ *Id.* at page 783.

however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost. (Emphasis added.)

City of Merced has been followed and interpreted by the California Supreme Court to stand for the proposition that activities pursued voluntarily at the discretion of a local government entity, without any legal compulsion to do so, “do not trigger a state mandate and hence do not require reimbursement of funds.”⁷⁰ In *Kern High School District*, the California Supreme Court analogized the analysis of *City of Merced* to the facts before it, stating:

... if a school district elects to participate in or continue participation in any underlying *voluntary* education-related program, the district’s obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)⁷¹

The California Supreme Court has stated, “The proper focus under a legal compulsion inquiry is upon the nature of the claimants’ participation in the underlying programs themselves.”⁷² This means the focus is on the local government’s initial decision to participate in the underlying program. Accordingly, where decision-making authority is reserved to a local government that chooses to participate in a voluntary underlying program, the Legislature may issue guidelines directing the entity’s consequent conduct concerning that program. Any resulting “downstream” requirements with which the local government must comply are not reimbursable state mandates. This is consistent with the decisions in *City of Merced* and *Kern High School District*.⁷³

Section 87610.1 provides an alternative arbitration procedure for processing a probationary employee’s challenge to a district’s decision not to grant tenure or reappoint the employee. Before the enactment of section 87610.1, an affected employee could proceed according to the procedures outlined in section 87740 by requesting that a hearing be held to determine whether there was cause for denying tenure or reappointment.

With the enactment of section 87610.1, the hearing recourse in section 87740 is left intact for employees in districts without collective bargaining provisions. But an employee challenging that same decision of the district will have recourse pursuant to the terms of a collective bargaining agreement, *if* a collective bargaining agreement is in place in that district and provides for arbitration of grievances. The issue is whether the collective bargaining route imposes a state-mandated activity.

In the context of collective bargaining, the EERA imposes on a community college district the obligation “to meet and negotiate” in good faith with the exclusive representative of a faculty

⁷⁰ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742.

⁷¹ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 743.

⁷² *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 743.

⁷³ *Kern High School Dist.*, *supra*, 30 Cal.4th 727.

bargaining unit “upon request with regard to matters within the scope of representation.”⁷⁴ Falling within this scope are, “procedures for processing grievances” culminating in arbitration.⁷⁵

Section 87610.1, subdivision (b), provides that, in districts where a collective bargaining agreement is in place, allegations that a community college district wrongfully denied tenure or reappointment to a probationary employee “shall be classified and procedurally addressed as grievances.”⁷⁶ The EERA recognizes the right of employees to file grievances,⁷⁷ and grievance procedures are within the scope of representation under the EERA,⁷⁸ resulting in a duty on the community college district to “meet and negotiate” over such procedures.⁷⁹ While there is a requirement under the EERA that the district exercise good faith in negotiating with the employee organization’s exclusive representative, there is no requirement for the district to ultimately reach agreement with the exclusive representative. Any agreement reached pursuant to negotiations between a community college district and an employee organization’s exclusive representative must be entered into voluntarily.

Thus, a community college district is not legally required to agree to participate in any programs or procedures entered into as a result of its obligation to engage in the collective bargaining process. A community college district and an employee organization *may* agree to certain procedures for processing grievances, and the parties *may* agree that such procedures should culminate in arbitration. However, the parties at the bargaining table are not required to provide for such procedures at all. The district’s decision to enter into an agreement containing a grievance arbitration clause triggers the potential costs incurred by the district under the test claim statutes. Thus, as the term “mandate” has been narrowly construed by the courts, it follows that the costs incurred by a community college district to process tenure or reappointment denial grievances under section 87610.1 and to participate in the litigation of grievances post arbitration pursuant to section 87611 are not mandated by the state.

And there is no evidence that the community college district faces practical compulsion to comply with sections 87610.1 and 87611. The California Supreme Court described practical compulsion as “for example, 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...”⁸⁰ There is nothing in the record or in the statutes that demonstrate a substantial penalty for failure

⁷⁴ Government Code section 3543.3; see Government Code section 3543.5, subdivision (c) (declaring it to be unlawful for a public school employer to “[r]efuse to meet or negotiate in good faith with an exclusive representative”).

⁷⁵ Government Code section 3543.2, subdivision (a).

⁷⁶ Education Code section 87610.1, subdivision (b).

⁷⁷ Government Code section 3543, subdivision (b).

⁷⁸ Government Code section 3543.2, subdivision (a).

⁷⁹ Government Code section 3543.3.

⁸⁰ *Kern High School Dist.*, *supra*, 30 Cal. 4th 727, 731.

to adopt the arbitration process in section 87610.1 for tenure grievances. Thus, community colleges are not practically compelled to comply with sections 87610.1 and 87611.

Moreover, judicial review under writ of mandate was available for grievances or tenure hearings prior to the enactment of section 87611 (Stats. 1988, ch. 973).⁸¹ Thus, district participation in judicial proceedings is not a new program or higher level of service.

Claimant also pled the activity of “complying with the arbitrator’s make-whole remedies” pursuant to subdivision (d) of section 87610.1. Staff finds that compliance with the remedies determined by the arbitrator is not a state mandate because the remedies would come from the arbitrator rather than the state. Moreover, the community college chose to be subject to the arbitrator under the section 87610.1 process in the first place.

In the absence of either legal or practical compulsion to use the arbitration process in section 87610.1, staff finds that sections 87610.1 and 87611 (Stats. 1988, ch. 973, Stats. 2000, ch. 124) do not impose a state-mandated new program or higher level of service under article XIII B, section 6.

3. The Notice and Hearing Procedures in section 87740 (as amended in 1995) do not Mandate a New Program or Higher Level of Service

As indicated above, if there is no contractual grievance procedure resulting in arbitration, tenure grievance allegations shall proceed to a hearing in accordance with section 87740 before an administrative law judge. Section 87740 describes notice and hearing procedures for community college districts “before an employee is given notice that his or her services will not be required for the ensuing year.”

Claimant pled section 87740 as amended by Statutes 1995, chapter 758, for the following activities:

In the event there is no contractual grievance procedure resulting in arbitration pursuant to Education Code Sections 87610.1, subdivision (b), conducting the hearing and making a decision in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency in that chapter, except that all of the following shall apply:

The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing the accusation.

The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefore within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

⁸¹ In *McGuire v. Governing Board*, *supra*, 161 Cal.App.3d 871, a temporary employee sued for tenure using a writ of mandate, but the court denied tenure, holding that his tutorial duties did not rise to the level of classroom teaching. In *Steward v. San Mateo Junior Collect Dist. et al.* (1974) 37 Cal.App.3d 345, the court upheld a lower court mandamus proceeding finding that the dismissal of a probationary junior college teacher was invalid.

The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the colleges and the faculty. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board or on any court in future litigation. Copies of the proposed decision shall be submitted to the governing board and to the employee. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds. (§ 87740, subd. (c).)

The Chancellor's Office argues that section 87740's procedures have been required (as former section 13443) since 1965, and are therefore not subject to reimbursement under article XIII B, section 6.

Claimant's rebuttal comments assert that a section 87740 hearing is now triggered by section 87610.1, subdivision (b), the tenure grievance procedure discussed above, for denying tenure or reappointing probationary employees and is therefore reimbursable.

Staff finds that section 87740, as amended by Statutes 1995, chapter 758, does not mandate a new program or higher level of service.

Section 87740, as amended by Statutes 1995, chapter 758, made only technical, nonsubstantive changes. For example, it added to subdivision (a): "No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year ..." In subdivision (b), the word "must" was twice replaced by the word "shall" as follows: "A request for hearing shall be in writing and shall be delivered to the person who sent the notice ..." In subdivision (c)(1), the word "in" was removed as follows: "... he or she shall be notified of this five-day period for filing ~~in~~ the accusation." In subdivision (c)(3), the word "schools" was replaced by the word "colleges" and edited the last sentence as follows: "The board may adopt, from time to time, ~~such~~ rules and procedures not inconsistent with ~~the provisions of this section that~~ that may be necessary to effectuate this section. In subdivision (d), the words "school" and "schools" were replaced with the words "college" and "colleges." Subdivision (f) was amended as follows:

If a governing board notifies a contract employee that his or her services will not be required for the ensuing year, the board ~~shall~~, within 10 days after delivery to it of the employee's written request, shall provide him or her with a statement of its reasons for not reemploying him or her for the ensuing ~~school~~ college year.

In subdivision (h), "In the event that" was changed to "if" and in subdivision (i) "which" was changed to "that."

Thus, because section 87740 (Stats. 1995, ch. 758) is substantively identical to the prior versions of that section (Stats. 1985, ch. 324, Stats. 1976, ch. 1010), and has, since 1965, allowed contract employees to request administrative hearings to challenge district tenure and contract decisions,

it imposes no new activities on community college districts. Staff finds that section 87740, as amended in 1995, does not impose a state-mandated new program or higher level of service.

D. Faculty Service Areas

Claimant pled sections 87743.2, 87743.3, 87743.3, and 87743.5, as added by Statutes 1988, chapter 973. These sections require community college districts to establish “faculty service areas” by July 1, 1990 (§ 87743.2). A faculty service area (FSA) is “a service or instructional subject area or group of related services or instructional subject areas performed by faculty and established by a community college district.” (§ 87743.1.)

As a preliminary matter, section 70, subdivision (d), of the 1988 statute states that “Sections 51 to 56” of the bill shall be implemented and “be mandatory” only if the state board of governors certifies that adequate funding has been provided. The faculty service area statutes were added by sections 52 through 56 and, thus, they are subject to the condition identified in section 70.

At its September 1989 meeting, the state board of governors certified that adequate funding had been provided and, thus, community college districts were required to implement sections 87743.2, 87743.3, 87743.3, and 87743.5 as of that date.⁸² The analysis continues to determine which activities impose a state-mandated new program or higher level of service on community college districts.

1. Establish FSAs and competency criteria for faculty members

Establishing FSAs is within the scope of negotiation under the Educational Employment Relations Act (EERA), and the exclusive representative is required to consult with the academic senate in developing its proposals. (§ 87743.2.) Districts are also required to establish competency criteria for faculty members in order to determine competency to serve in an FSA by July 1, 1990, with the development, meeting and negotiating to take place according to the EERA. (§ 87743.5.)

Claimant pled the following activities:

Establishing and updating faculty service areas, within the scope of meeting and negotiating pursuant to Section 3543.2 of the Government Code. The exclusive representative shall consult with the academic senate in developing its proposals. (§ 87743.2.)

Establishing and updating competency criteria for faculty members employed by the district within the scope of meeting and negotiating pursuant to Section 3543 of the Government Code. (§ 87743.5.)

The Chancellor’s Office states that there is no express updating requirement in section 87743.2, only that the FSAs be established by July 1, 1990.

Staff finds that the plain language of sections 87743.2 and 87743.5 (Stats. 1988, ch. 973) impose the following new requirements on community college districts, which constitute state mandates:

⁸² Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

- Not later than July 1, 1990, each community college district shall establish faculty service areas. The establishment of faculty service areas is subject to the collective bargaining process in Government Code section 3543.2. (§ 87743.2.)
- Not later than July 1, 1990, each community college shall establish competency criteria for faculty members employed by the district. The establishment of competency criteria for faculty members is subject to the collective bargaining process in Government Code section 3543. (§ 87743.5.)

Staff also finds that sections 87743.2 and 87743.5, as added by Statutes 1988, chapter 973, mandate a new program or higher level of service, since they were not required under prior law.

2. Qualifying for FSAs

Under section 87743.3, each faculty member is required to qualify for one or more FSAs at the time of initial employment, and may apply for more FSAs if he or she is qualified. Any disputes due to denial of FSA applications are treated as grievances. Section 87743.3 states the following:

Each faculty member shall qualify for one or more faculty service areas at the time of initial employment. A faculty member shall be eligible for qualification in any faculty service area in which the faculty member has met both minimum qualifications pursuant to Section 87356 and district competency standards. After initial employment, a faculty member may apply to the district to add faculty service areas for which the faculty member qualifies. The application shall be received by the district on or before February 15 in order to be considered in any proceeding pursuant to Section 87743 [reduction in the number of employees due to declined average daily attendance] during the academic year in which the application is received. Any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area shall be classified and procedurally addressed as a grievance. If the district has no grievance procedure, fair and equitable procedures for the resolution of the disputes shall be developed by the academic senate and representatives of the governing board.

Claimant pled the following activities:

Receiving and determining faculty applications to add faculty service areas for which the faculty member qualifies.

Classifying and procedurally addressing any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area. If the district has no grievance procedure, fair and equitable procedures for the resolution of the disputes shall be developed by the academic senate and representatives of the governing board.
(§ 87743.3.)

Staff finds, based on the plain language of the statute, that section 87743.3 (Stats. 1988, ch. 973) imposes a state mandate on community college districts to receive faculty service area applications from faculty members and determine whether a faculty member qualifies for one or more faculty service areas at the time of initial employment, and whether the faculty member qualifies for additional faculty service areas to which he or she may apply. Staff also finds that

this activity is a new program or higher level of service because it was not required before Statutes 1988, chapter 973 was enacted.

The last two sentences of section 87743.3 state:

Any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area shall be classified and procedurally addressed as a grievance. If the district has no grievance procedure, fair and equitable procedures for the resolution of the dispute shall be developed by the academic senate and representatives of the governing board.

Staff finds that, based on its plain language, section 87743.3 (Stats. 1988, ch. 973) imposes a state-mandated new program or higher level of service on community college districts to procedurally address as a grievance, or to use fair and equitable procedures for resolution of, any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area.

3. Maintain FSA records

Districts are also required to maintain permanent records of faculty members' FSAs in the faculty members' personnel files as follows:

Each district shall maintain a permanent record for each faculty member employed by the district of each faculty service area for which the faculty member possesses the minimum qualifications for service and in which he or she has established competency pursuant to the district competency standards. The records shall be contained in the faculty member's personnel file. (§ 87743.4.)

Claimant pled the following:

Maintaining a permanent record in each faculty member's personnel file, for each faculty member employed by the district of each faculty service area for which the faculty member possesses the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards. (§ 87743.4.)

Staff finds that, based on the plain language of section 87743.4 (Stats. 1988, ch. 973), it is a state mandate for districts to maintain a permanent record for each faculty member employed by the district, in his or her personnel file, of each faculty service area for which the faculty member possesses the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards. This is also a new program or higher level of service, since it was not required under prior law.

As discussed above, because they are voluntary programs, community college districts are *not* entitled to reimbursement for any FSA activities for faculty or educational administrators employed the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

Issue 2: Do the test claim statutes and regulations impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

The final issue is whether the test claim statutes and regulations impose costs mandated by the state,⁸³ 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.

Government Code section 17564 requires that claims exceed \$1000 to be eligible for reimbursement.

The test claim includes declarations that claimant will incur costs estimated to exceed \$1000 to implement the test claim statutes and regulations. (Exhibit 1 to test claim, page 12.)

A. Activities Required by Phase I of the 1988 Reform Act (Phase I of Transitional Program Improvement) to be Completed by July 1, 1990 do not Impose Costs Mandated by the State

The following mandated activities were required to be completed by July 1, 1990:

- Develop hiring criteria for faculty and administrators that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students. (§ 87360, subd. (a).)
- Develop hiring criteria, policies, and procedures for new faculty members that are developed and agreed upon jointly by representatives of the governing board, and the academic senate, and approved by the governing board. (§ 87360, subd. (b).)
- Establish faculty service areas, subject to the collective bargaining process in Government Code section 3543.2. (§ 87743.2.)
- Establish competency criteria for faculty members employed by the district, subject to the collective bargaining process in Government Code section 3543. (§ 87743.5.)

The period of reimbursement for this claim begins July 1, 2001, eleven years after these activities were required to be completed.⁸⁴ There is no evidence in the record that the claimant or any community college district incurred costs for these activities during the period of reimbursement.

Moreover, pursuant to the plain language of the statutes, these activities are one-time activities. Based on certification by the board of governors, these activities have been “adequately funded.”

⁸³ *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

⁸⁴ The test claim was filed June 13, 2003, so reimbursement is only available starting in the 2001-2002 fiscal year pursuant to Government Code section 17557, subdivision (e).

Section 70, subdivision (d), of the 1988 test claim statute placed these activities within Phase I of the program and required that these activities be implemented only upon certification by the board of governors that adequate funding has been provided. "Adequate funding" is defined as "those moneys required to provide an increased quality of instruction and programs, and to carry out applicable mandates of this act, within the California Community Colleges." Section 70, subdivision (d), further states that "[b]ased on estimates provided by the board of governors and exhaustive review of the community colleges' operations by the Joint Committee for the Review of the Master Plan for Higher Education, the Legislature finds and declares that its estimate of this funding amount is seventy million dollars (\$70,000,000)." At its September 1989 meeting, the board of governors certified that adequate funding has been provided to community college districts for completion of these one-time activities.⁸⁵

Accordingly, staff finds that the activities required by sections 87360, 87743.2, and 87743.5 do not impose increased costs mandated by the state within the meaning of Government Code section 17514.

B. The Remaining Activities Do Not Impose Costs Mandated by the State

The remaining activities mandated by the state require community college districts to:

1. Determine the minimum qualifications of applicants for faculty and educational administrator positions as follows (§ 87359, subd. (a), as added by Stats. 1988, ch. 973; Cal. Code Regs, tit. 5, § 53430, subd. (a.):
 - Determine that an applicant for a faculty or educational administrator position possesses qualifications that are at least equivalent to the minimum qualifications identified in sections 53406, 53407, 53410, 53410.1, 53415, 53416, 53417, and 53420 as applicable, before an action is taken to employ the individual.
 - The criteria used in making the employment determination of faculty and educational administrators shall be reflected in the district's action. (§ 53430, subd. (a).)

Community college districts are *not* entitled to reimbursement for these activities above when employing faculty or educational administrators in the following programs and courses: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.), and noncredit courses (Cal. Code Regs., tit. 5, § 53412).

2. Develop Process, Criteria, and Standards for Determinations on Faculty (§ 87359, subd. (b), Stats. 1988, ch. 973; Stats. 1993, ch. 506; Cal. Code Regs, tit. 5, § 53430, subds. (b) & (c).):
 - The process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty whose qualifications are equivalent to the minimum qualifications shall be developed and agreed upon jointly

⁸⁵ Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

by representatives of the governing board and the academic senate. (§ 87359, subd. (a); Cal. Code Regs, tit. 5, § 53430, subd. (b).)

- The agreed upon process for hiring faculty shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that each individual faculty employed possess qualifications that are at least equivalent to the applicable minimum qualifications specified in the regulations. (§ 87359, subd. (a), Cal. Code Regs, tit. 5, § 53430, subd. (b).)
- The process for hiring faculty shall further require that the academic senate be provided with an opportunity to present its views to the governing board before the governing board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to section 87358. (§ 87359, subd. (a), Cal. Code Regs, tit. 5, § 53430, subd. (c).)
- The governing board shall approve the process, criteria, standards, and policies and procedures for reaching determinations regarding the employment of faculty and administrators. (§ 87359, subd. (a); Cal. Code Regs, tit. 5, § 53430, subd. (b).)

Community college districts are *not* entitled to reimbursement for these activities above when employing faculty or administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

3. Faculty Evaluations:

- Evaluate a temporary employee within the first year of employment, and at least once every six regular semester or once every nine regular quarters thereafter. (§ 87663 subd. (a), Stats. 1988, ch. 973, Stats. 1990, ch. 1302.)
- Include a peer review process in evaluations of academic employees, on a departmental or divisional basis, that addresses the forthcoming demographics of California and the principles of affirmative action. The process shall require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching. (§ 87663, subds. (c) and (d), Stats. 1988, ch. 973, Stats. 1990, ch. 1302.)
- Develop “evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative” for probationary faculty. (§ 87663, subd. (h).)
- Establish and disseminate written evaluation procedures for administrators (§ 87663, subd. (i), Stats. 1988, ch. 973, Stats. 1990, ch. 1302).
- Adopt and cause to be printed and made available to each academic employee of the district amended rules and regulations that reflect the new requirements imposed by Education Code section 87663 (Stats. 1988, ch. 973, Stats. 1990, ch. 1302) and

provide for the evaluation of the performance of academic employees in their assigned duties. This is a one-time activity. (Cal. Code Regs., tit. 5, § 53150.)⁸⁶

Community college districts are *not* entitled to reimbursement for these evaluations activities above when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414), and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

4. Faculty Service Areas:

- Receive faculty service area applications from faculty members and determine whether a faculty member qualifies for one or more faculty service areas at the time of initial employment, and whether the faculty member qualifies for additional faculty service areas to which he or she may apply. (§ 87743.3, Stats. 1988, ch. 973.)
- Procedurally address as a grievance, or use fair and equitable procedures for resolution of, any dispute arising from an allegation that a faculty member has been improperly denied a faculty service area. (§ 87743.3, Stats. 1988, ch. 973.)
- Maintain a permanent record for each faculty member employed by the district, in his or her personnel file, of each faculty service area for which the faculty member possess the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards. (§ 87743.4, Stats. 1988, ch. 973.)

Community college districts are *not* entitled to reimbursement for these FSA activities above when employing faculty or educational administrators in the following programs: Disabled Students Programs and Services (§§ 67300 et seq., Cal. Code Regs., tit. 5, §§ 56000 et seq. and 53414) and Extended Opportunity Programs and Services (§§ 69640 et seq., Cal. Code Regs., tit. 5, §§ 56200 et seq.).

The next question is whether funding in an amount sufficient to fund the costs of these mandated activities has been provided to community college districts. If so, the activities would not impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556. Government Code section 17556, subdivision (e), provides that the Commission shall not find 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.

⁸⁶ California Code of Regulations, title 5, section 53130, Register 91, No. 23 (June 7, 1991). A new article heading was added by Register 93, No. 25 (June 18, 1993). Editorial correction of the history was made by Register 95, No. 19 (March 19, 1995).

The 1988 Reform Act included the following legislative intent regarding funding its reforms:

The Legislature finds and declares that the reforms enacted through this act form a mutually dependent and related set of provisions. While some few provisions could be enacted independently, other sections of this act depend upon adequate support for the programs of the community colleges. There is a direct linkage between those sections of this act which constitute the further professionalization of the faculty and the moneys required to enhance the programs of the community colleges for “transitional program improvement,” as specified in Section 84755 of the Education Code.

For instance, the elimination of credentials must be accompanied by the establishment of minimum qualifications by the board of governors. Minimum qualifications in turn must be implemented by districts through the establishment of faculty service areas, competency criteria, and various waiver processes. The extension of the tenure probationary period to four years as well as the revisions to layoff procedures also depend upon faculty service areas and competency criteria. Similarly, because so many of the reforms call for faculty involvement in the determination and implementation of policy, and because the quality, quantity, and composition of full-time faculty have the most immediate and direct impact on the quality of instruction, overall reform cannot succeed without sufficient members of full-time faculty with sufficient opportunities for continued staff development, and with sufficient opportunity for participation in institutional governance.

The Legislature further finds that, absent resources to reimburse the state-mandated costs of this act, new full-time faculty to replace part-time faculty, and expanded programs for staff development, the viability or success, or both, of many of the reforms in this act will be jeopardized. The Legislature recognizes that due to unanticipated fiscal conditions the State cannot immediately fund all of the reforms contained in this act. The Legislature also recognizes, however, that if minimal funding is not soon provided that it would be inappropriate to proceed with many reforms.⁸⁷

The 1988 Reform Act also added section 84755, as mentioned in the first paragraph of the legislative intent language quoted above. Section 84755 provides funding guidance for the minimum qualifications, evaluation, and faculty service area mandates imposed on community college districts. It reads in part:

(a) The Legislature finds and declares that program-based funding, once implemented, will more adequately and accountably fund the costs of providing quality community college education. Given that program-based funding will not be implemented until fiscal year 1991-92, given that community colleges will be entering a period of major reform and incurrence of new state mandates commencing in January 1989, and given that community colleges will be entering

⁸⁷ Statutes 1988, chapter 973, section 70, subdivision (a).

this period of reform having lost purchasing power since the 1977-78 fiscal year, the Legislature recognizes the need to create a transitional funding mechanism for program improvement and mandate funding that can operate until program-based funding is implemented.

(b) For the purpose of improving the quality of community college educational programs and services, for the purpose of reimbursing state-mandated local program costs imposed by this act, and for the purposes of initially implementing specified reforms, the board of governors shall, from amounts appropriated for purposes of this section, allocate program improvement revenues to each district on the basis of an amount per unit of average daily attendance funded in the prior fiscal year [originally: generated in the 1987-88 fiscal year]. However, this amount shall be increased or decreased to provide for equalization in a manner determined by the Board of Governors, consistent with Sections 84703 to 84705, inclusive.

Each community college district shall use its allocation to initially reimburse state-mandated local program costs, and then to implement specified reforms and make authorized program and service improvements as follows:

[¶]...[¶]

(2) Applying minimum qualifications to all newly hired faculty and administrators, including candidates for these positions as required by Section 87356.

(3) Developing and administering a process for waiver of minimum qualifications as required by Section 87359.

(4) Establishing and applying local hiring criteria as required by Section 87360.

(5) Establishing and applying faculty service areas and competency criteria as required by Sections 87743 to 87743.5, inclusive.

(6) Evaluating temporary employees, instituting peer review evaluation, and widely distributing evaluation procedures as required by Section 87663.

(7) Establishing and applying new processes for tenure evaluation required by Section 87610.1.

(8) Establishing and applying the tenure denial grievance procedure required by Section 87610.1.

[¶]...[¶]

Except as provided by Section 87482.6, and except as necessary to reimburse the costs of new state mandates, district governing boards shall have full authority to expend program improvement allocations for any or all of the authorized purposes specified in subdivision (b). (Emphasis added.)

Because program-based funding was not to be implemented until fiscal year 1991-1992,⁸⁸ the Legislature intended that program-improvement funding for the 1988 Reform Act be implemented in two phases of “transitional program improvement.”⁸⁹ Phase I includes the

⁸⁸ Education Code Section 84755, subdivision (a).

⁸⁹ Statutes 1988, chapter 973, section 70, subdivision (b).

remaining mandated activities bulleted above. The Legislature stated its intent “that moneys appropriated during Phase I fully fund any state-mandates created pursuant to this section” and required each community college district to use its allocation to initially reimburse state-mandated local program costs.⁹⁰ After the districts used the funds to reimburse the costs of the new state mandates, the districts had authority to use the program improvement allocations as they saw fit to pay for the program.

The certification that the districts had received adequate Phase I funding was adopted by the board of governors at its September 14-15, 1989 meeting.⁹¹ Thus, the costs of the state-mandated activities were fully funded with the program improvement funding until fiscal year 1991-1992. The reimbursement period for this claim, however, begins in fiscal year 2001-2002.

After program improvement funding ended in fiscal year 1991-1992, funding for the mandated activities was appropriated through program-based funding.⁹² (§ 84755, subd. (a).) Subdivision (d) of section 84755 states that each district governing board was to submit a “plan for using the resources allocated pursuant to this section” which the board of governors was to review and approve. Subdivision (d) further states: “[t]o the extent that a community college district expends its program improvement allocation consistent with its plan, the board of governors *shall include the district’s allocation as part of the district’s base budget for subsequent years.*” (Emphasis added.) Thus, by law the district’s plan for using funds appropriated for its base budget must be consistent with section 84755, subdivision (b), including the requirement for districts to first use their allocations to specifically fund the costs of the following mandated activities:

- Applying minimum qualifications to all newly hired faculty and administrators including candidates for these positions as required by Section 87356 (§ 84755, subd. (b)(2));
- Developing and administering a process for waiver of minimum qualifications as required by Section 87359 (§ 84755, subd. (b)(3));
- Establishing and applying faculty service areas and competency criteria as required by Sections 87743 to 87743.5, inclusive (§ 84755, subd. (b)(5)); and
- Evaluating temporary employees, instituting peer review evaluation, and widely distributing evaluation procedures as required by Section 87663. (§ 84755, subd. (b)(6).)

The base funding for community college districts has been appropriated in line item 6870-101-0001 of the state budget acts.

The Chancellor’s Office, in its comments on the test claim, asserts that this program was funded originally, as stated in the legislative intent language above, and was built into the base for the community college districts.

⁹⁰ Statutes 1988, chapter 973, section 70, subdivision (b)(1).

⁹¹ Board of Governors, California Community Colleges, AB 1725: Board Certification Necessary to Trigger Phase I of Reform. (Agenda Item 11) September 14-15, 1989.

⁹² Program-based funding was superseded by Statutes 2006, chapter 631.

Claimant disagrees that funding has been adequate and asserts that section 87455, subdivision (b), states that the board of governors “shall, from amounts appropriated for purposes of this section, allocate program improvement revenues to each district on the basis of an amount per unit of average daily attendance funded in the prior fiscal year,” but only after the amount is “increased or decreased to provide for equalization.” According to claimant, this effectively negates any concept of cost reimbursement, which is the actual cost of the increased level of reimbursement.

Claimant also states that offsetting revenues in the 1988 Reform Act (Stats. 1988, ch. 973) did not provide for offsetting savings to local agencies or school districts which result in no net costs ... or include additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund it, in accordance with Government Code section 17556, subdivision (e). According to claimant, later provided funding is a question of fact subject to the Commission’s determination. Claimant states that any revenue received by the districts are merely offsets and do not preclude reimbursement.

Staff finds that the remaining test claim statutes and regulations found above to be a state-mandated new program or higher level of service do not impose costs mandated by the state. During the period of reimbursement, funding has been appropriated for the costs of the mandated activities through the base funding in the budget acts, and pursuant to section 84755, subdivisions (b) and (d). That funding must first be used to pay for the mandated activities here. Thus, pursuant to Government Code section 17556, subdivision (e), revenue has been appropriated that was specifically intended to fund the costs of the state mandate.

The claimant has alleged costs of over \$1000 (exhibit 1 to test claim, page 12) to implement the mandated new program or higher level of service and argues that funding has not been sufficient. However, there is no evidence in the record that the claimant’s base funding, which by law must first be used to pay for the mandated activities here, is not sufficient to fully cover its costs.

Moreover, Claimant’s argument with regard to average daily attendance is not relevant because subdivision (b) of section 84755 only applies to allocating program improvement revenue, which ended in fiscal year 1991-1992 when program-based funding replaced it.

Even though funding is now based on full time equivalent students (§ 84750.5) the priorities in section 84755, including paying the costs of specified state mandates first, were built into the districts’ base budgets according to subdivision (d) of section 84755.

Thus, there is no evidence that the claimant has incurred actual increased costs mandated by the state pursuant to Government Code section 17514⁹³ because funding or other appropriations (in this case, the district’s base budget) exist in a form “specifically intended to fund the mandate” and appears are “sufficient to fund the cost of the state mandate.” (Gov. Code, § 17556, subd. (e).)

III. CONCLUSION

⁹³ *Kern School Dist., supra*, 30 Cal.4th 727, 747, fn. 16.

For the foregoing reasons, staff finds that the test claim statutes and regulations do not impose a reimbursable state mandate on community college districts within the meaning of article XIII B, section 6, of the California Constitution and Government Code sections 17514 or 17556.

Recommendation

Staff recommends that the Commission adopt this analysis to deny the test claim.

Commission on State Mandates

Original List Date: 6/26/2003
Last Updated: 6/6/2011
List Print Date: 06/06/2011
Claim Number: 02-TC-27
Issue: Employment of College Faculty and Administrators

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