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March 13, 2015

Ms. Sigrid Asmundson
Best Best & Krieger LLP
500 Capitol Mall, Suite 1700
Sacramento, CA 95814

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

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

Re: **Proposed Decision**
*Health Fee Elimination,* 05-4206-I-06
Education Code Section 76355
Statutes 1984, Chapter 1, 2nd E.S.; Statutes 1987, Chapter 1118
Fiscal Years 1997-1998, 1998-1999, 1999-2000, 2000-2001, and 2001-2002
Los Rios Community College District, Claimant

Dear Ms. Asmundson and Ms. Kanemasu:

The proposed decision for the above-named matter is enclosed for your review.

**Hearing**

This matter is set for hearing on **Friday, March 27, 2015**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

**Special Accommodations**

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

Sincerely,

Heather Halsey
Executive Director

Hearing Date: March 27, 2015
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# ITEM 7

# INCORRECT REDUCTION CLAIM

# PROPOSED DECISION

Former Education Code Section 72246 (Renumbered as § 76355)[1]

Statutes 1984, Chapter 1 (1983-1984 2nd Ex. Sess.); Statutes 1987, Chapter 1118

*Health Fee Elimination*

Fiscal Years 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002

05-4206-I-06

Los Rios Community College District, Claimant

## EXECUTIVE SUMMARY

### Overview

Los Rios Community College District (claimant) filed this incorrect reduction claim (IRC) challenging the reduction by the State Controller's Office (Controller) of all costs claimed totaling $3,205,600 in fiscal years 1997-1998 through 2001-2002 under the *Health Fee Elimination* program. The parties dispute the following issues:

- The statute of limitations applicable to the Controller's audit of the 1997-1998, 1998-1999, and 1999-2000 fiscal year reimbursement claims;
- Reduction of salary, benefit, and related indirect costs claimed, based on the scope of services provided during fiscal years 1997-1998 through 2001-2002 that allegedly exceed the services provided by claimant in the 1986-1987 base year;
- Reduction of costs for services and supply costs, including those costs claimed for student athletic costs, which the Controller asserts go beyond the scope of the mandate, were not provided by claimant in the 1986-1987 base year, and are not supported by source documentation;
- Reduction of indirect costs based on asserted faults in the development and application of indirect cost rates; and
- The amount of offsetting revenue to be applied from student health fee authority.

As described further below, this proposed decision addresses the statute of limitations and offsetting revenue issues only. Upon further review of the law and the record, staff finds that the Controller timely initiated the audit of the 1997-1998, 1998-1999, and 1999-2000 fiscal year claims within the deadlines imposed by Government Code section 17558.5. Since the amount authorized to be charged and required to be identified as offsetting revenue in fiscal years 1997-1998 through 2001-2002 ($6,101,947) exceeds the total amount claimed in those years

[1] Statutes 1993, chapter 8.

($3,205,600), the remaining substantive issues challenging the reduction of costs claimed for salaries and benefits, services and supplies, and indirect costs are not addressed.

*Health Fee Elimination* Program

Prior to 1984, former Education Code section 72246 authorized community college districts to charge almost all students a general fee (health service fee) for the purpose of voluntarily providing health supervision and services, direct and indirect medical hospitalization services, and operation of student health centers.[2] In 1984, the Legislature repealed the community colleges' fee authority for health services.[3] However, the Legislature also reenacted section 72246, to become operative on January 1, 1988, in order to reauthorize the fee, at $7.50 for each semester (or $5 for quarter or summer semester).[4]

In addition to temporarily repealing community college districts' authority to levy a health services fee, the 1984 enactment required any district that provided health services during the 1983-1984 fiscal year, for which districts were previously authorized to charge a fee, to maintain health services at the level provided during the 1983-1984 fiscal year for every subsequent fiscal year until January 1, 1988.[5] As a result, community college districts were required to maintain health services provided in the 1983-1984 fiscal year without any fee authority for this purpose until January 1, 1988.

In 1987, the Legislature amended former Education Code section 72246, operative January 1, 1988, to incorporate and extend the maintenance of effort provisions of former Education Code section 72246.5, which became inoperative by its own terms as of January 1, 1988.[6] In addition, Statutes 1987, chapter 1118 restated that the fee would be reestablished at not more than $7.50 for each semester, or $5 for each quarter or summer semester.[7] As a result, beginning January 1, 1988 all community college districts were required to maintain the same level of health services they provided in the 1986-1987 fiscal year each year thereafter, with limited fee authority to offset the costs of those services. In 1992, section 72246 was amended to provide that the health fee could be increased by the same percentage as the Implicit Price Deflator whenever that calculation would produce an increase of one dollar.[8]

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

[3] Statutes 1984, 2nd Extraordinary Session, chapter 1, section 4 [repealing Education Code section 72246].

[4] Statutes 1984, 2nd Extraordinary Session, chapter 1, section 4.5.

[5] Education Code section 72246.5 (Stats. 1984, 2d. Ex. Sess., ch. 1, § 4.7).

[6] Education Code section 72246 (as amended, Stats. 1987, ch. 1118). See also former Education Code section 72246.5 (Stats. 1984, 2d Ex. Sess., ch. 1, § 4.7).

[7] Education Code section 72246 (as amended, Stats. 1987, ch. 1118).

[8] Education Code section 72246 (as amended, Stats. 1992, ch. 753). In 1993, former Education Code section 72246, was renumbered as Education Code section 76355. (Stats. 1993, ch. 8).

**Procedural History**

Claimant filed its reimbursement claims for fiscal years 1997-1998 and 1998-1999 on January 15, 2000.[9] The reimbursement claim for fiscal year 1999-2000 was filed on December 30, 2000.[10] The reimbursement claim for fiscal year 2000-2001 and 2001-2002 were both filed in 2002.[11] From December 12, 2002 through December 19, 2002, the Controller contacted the claimant to schedule an entrance conference.[12] The entrance conference was held on January 16, 2003.[13] The Controller issued the final audit report on June 24, 2004.[14] The claimant filed this IRC on September 5, 2005.[15] The Controller submitted comments on the IRC on March 12, 2008.[16] The claimant filed rebuttal comments on June 9, 2009.[17] A draft proposed decision was issued for comment on January 30, 2015. The Controller submitted comments on the draft proposed decision on February 20, 2015.

**Commission Responsibilities**

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

Government Code Section 17551(d) requires the Commission on State Mandates (Commission) to hear and decide a claim that the Controller has incorrectly reduced payments to the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.9 of the Commission's regulations requires the Commission to send the decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of parameters and guidelines, de novo, without consideration of conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[18] The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable

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[9] Exhibit A, IRC, at p. 28 (all page number citations reference the PDF page number).

[10] *Ibid.*

[11] Exhibit B, Controller's Comments on IRC, p. 190, 201.

[12] Exhibit A, IRC, pp. 82-90; Exhibit B, Controller's Comments on IRC, p. 42.

[13] Exhibit A, IRC, p. 28; Exhibit B, Controller's Comments on IRC, p. 2.

[14] Exhibit B, Controller's Comments on IRC, p. 116.

[15] Exhibit A, IRC.

[16] Exhibit B, Controller's Comments on IRC.

[17] Exhibit C, Claimant's Rebuttal Comments.

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

remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[19]

With regard to the Controller's audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support. This standard is similar to the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.[20]

The Commission must also review the Controller's audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.[21] In addition, sections 1185.1(f)(3) and 1185.2(c) of the Commission's regulations require that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Commission's ultimate findings of fact must be supported by substantial evidence in the record.[22]

**Claims**

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

| Issue | Description | Staff Recommendation |
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| Statutory deadlines applicable to the audit of claimant's 1997-1998, 1998-1999 and 1999-2000 annual reimbursement claims. | At the time the underlying reimbursement claims were filed, Government Code section 17558.5 stated: A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to audit by the Controller no later than two years after the end of the calendar year in which the reimbursement claim is filed or last amended. However, if no funds are appropriated for the program for the fiscal year for which the claim is made, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.<br><br>Claimant asserts that the claim was no longer *subject to audit* at the time the final audit | *The audit of the 97-98 through 99-00 reimbursement claims was timely initiated and the audit was timely completed.*<br><br>Staff finds that the plain language of section 17558.5, at the time the reimbursement claims were filed, did not require the Controller to complete an audit within any specified period of time, and that a subsequent amendment to the statute demonstrates that "subject to audit" means "subject to the initiation of an |

[19] *County of Sonoma*, supra, 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[20] *Johnston v. Sonoma County Agricultural* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

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

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

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| | report was issued. | audit." These reimbursement claims were filed in 2000 and, therefore, the audit had to be initiated by December 31, 2002.<br><br>Based on the evidence in the record, the goals of finality and predictability in the operation of a limiting statute such as section 17558.5 are best served by applying section 17558.5 to the Controller's entrance conference letter, dated December 23, 2002, to the extent that the execution of that letter is an independent, objectively determined and verifiable event. Here, the record shows that the letter was mailed within the statutory deadline, and the claimant had actual knowledge of the audit before the December 31, 2002 deadline. Thus, the audit was timely initiated in this case.<br><br>In addition, the audit was timely completed one and a half years later. |
| Reduction based on offsetting student health fee authority. | Claimant asserts that the Controller incorrectly reduced the costs claimed based on health fees authorized to be charged, rather than health fees actually collected. Since the claimant does not impose a health fee on its students, it collected $0 in health service fees during the fiscal years at issue. Claimant therefore asserts that no offsetting revenues were required to be identified. | *Correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.*<br><br>This issue has been conclusively decided by *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, in which the court held that to the extent a local agency or school district "has the authority" to charge for the mandated program or increased level of service, the |

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| | | costs cannot be recovered as a state-mandated cost.<br><br>In addition, the Controller's calculation of authorized health service fees, based on enrollment data provided by the claimant, is not arbitrary, capricious, or entirely lacking in evidentiary support. |

**Staff Analysis**

**A. The Audit of the Fiscal Year 1997-1998, 1998-1999, and 1999-2000 Reimbursement Claims was Timely Under Government Code Section 17558.5 and is Not Barred.**

Claimant alleges that the audit of the fiscal year 1997-1998, 1998-1999, and 1999-2000 reimbursement claims was not timely and is therefore void.

At the time these reimbursement claims were filed in 2000, Government Code section 17558.5, as added in 1995, provided in relevant part that "[a] reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to audit by the Controller no later than two years after the end of the calendar year in which the reimbursement claim is filed or last amended."

The claimant asserts that "subject to audit" requires the Controller to complete the audit no later than two years after the end of the calendar year that the reimbursement claim was filed. In this case, the claimant contends that the audit of the reimbursement claims for fiscal years 1997-1998 and 1998-1999, filed on January 15, 2000, and for fiscal year 1999-2000, filed on December 30, 2000, were subject to audit and had to be completed by December 31, 2002. The claimant reasons that since the final audit report was issued on June 24, 2004, eighteen months after the deadline, the audit of these reimbursement claims is barred.

The Controller contends that Government Code section 17558.5 requires that an audit of a reimbursement claim must be "initiated" within two years after the end of the calendar year in which the claim was filed, and that there is no statutory deadline to complete the audit.

Staff finds that the phrase "subject to audit" does not require the completion of the audit, but sets a time during which a claimant is on notice that an audit of a claim may occur. This is consistent with the 2002 amendment to the statute, which clarified that "subject to audit" means "subject to the initiation of an audit." [23] The reimbursement claims for fiscal years 1997-1998, 1998-1999, and 1999-2000 were all filed in 2000 and, thus the audit had to be initiated by December 31, 2002.

The record, however, shows that the Controller has taken different views with respect to when the audit in this case was actually initiated. As described in the proposed decision, the Controller contacted the claimant to schedule an entrance conference for the audit before the December 31, 2002 deadline, but the entrance conference did not occur until January 16, 2003, after the deadline. The Controller filed conflicting comments, asserting that the audit was initiated when

[23] Statutes 2002, chapter 1128.

the initial contact was made in December 2002, and the opposite conclusion that the audit was initiated when the entrance conference occurred.

Thus, the Commission must interpret when the audit of the 1997-1998, 1998-1999, and 1999-2000 reimbursement claims was initiated based on the evidence in the record. This presents an issue of first impression for the Commission. Prior IRCs have relied on a finding that the audit was initiated "no later than" the date of the entrance conference, or have not been required to squarely address the question when an audit was initiated at all. In this IRC, the Commission is called upon to make a finding whether the entrance conference itself or some earlier occurrence constitutes the initiation of an audit for purposes of section 17558.5, because the difference between the December 2002 and January 16, 2003 dates is dispositive of the question whether the Controller met the two-year deadline to initiate the audit pursuant to Government Code section 17558.5.

1. Based on the evidence in the record, the audit of the 1997-1998, 1998-1999, and 1999-2000 reimbursement claims was timely initiated by December 31, 2002.

The Legislature did not specifically define the event that initiates the audit and, thus, a phone call, a confirming letter, or an entrance conference, are all events that could reasonably be viewed as the initiation date under the statute. However, unlike other agencies that conduct audits and have adopted formal regulations to make it clear when the audit begins, the Controller has not adopted a regulation for the audits of state-mandate reimbursement claims. Nor has the Controller's position been clear in this case. Under these circumstances, the Commission is not required to give the Controller's assertions about when an audit is initiated any weight.

The draft proposed decision in this case concluded, based on the Controller's letter dated December 23, 2002, that the audit was initiated when the entrance conference was conducted on January 16, 2003, beyond the statutory deadline in section 17558.5 and, thus, the audit was barred.[24] That letter states that the audit "*will commence* … beginning with an entrance conference."[25]

In response to the draft proposed decision, the Controller filed comments strenuously asserting that that the audit of the claims filed for fiscal years 1997-1998, 1998-1999, and 1999-2000 was timely initiated "no later than the date of the audit letter" on December 23, 2002.[26] The Controller argues that this interpretation is consistent with other statutes of limitations provisions, which are satisfied by the lodgment of a document with the reviewing authority. The Controller also states that relying on the entrance conference to define when the audit is initiated is in conflict with the finality and predictability goals of a statute of limitations. The Controller states that entrance conferences can be delayed or continued by scheduling conflicts, and are only certain once they occur. In addition, the Controller contends that it actually begins reviewing reimbursement claims and the supporting documentation before the Controller contacts the claimant to schedule an entrance conference. In this respect, the Controller submits

[24] Exhibit D, Draft Proposed Decision.

[25] Exhibit A, IRC, pp. 88-90.

[26] Exhibit E.

a declaration from Jim Spano, Bureau Chief for the Controller, identifying the steps taken to by the Controller before the initial contact with the claimant occurs.[27]

Upon further review of the statute, relevant case law, and evidence in the record, staff finds that the Controller's audit of the claimant's reimbursement claims for fiscal years 1997-1998, 1998-1999, and 1999-2000 is timely.

An audit of mandate reimbursement claims is not a civil action subject to a statute of limitations, and in any event the California Supreme Court has held that "the statutes of limitations set forth in the Code of Civil Procedure…do not apply to administrative proceedings."[28] The initiation provisions of section 17558.5 require the Controller to initiate an audit within two years after the end of the calendar year in which the reimbursement claim is filed or last amended, or within two years of the date the claim is first paid. The requirement to timely initiate an audit requires a unilateral act of the Controller. And failure to timely initiate the audit within the two-year deadline is a jurisdictional bar to any reductions made by the Controller of claimant's reimbursement claims.[29] In this respect, the initiation provisions of Government Code section 17558.5 are better characterized as a statute of repose, rather than a statute of limitations. The statute provides a period during which an audit may be initiated, and after which the claimant may enjoy repose, dispose of any evidence or documentation to support their claims, and assert a defense that the audit is not timely and therefore void. The courts have described a statute of repose as the period that "begins when a *specific event occurs*, regardless of whether a cause of action has accrued or whether any injury has resulted." [citations] A statute of repose thus is harsher than a statute of limitations in that it cuts off a right of action after a specified period of time, irrespective of accrual or even notice that a legal right has been invaded."[30] The characteristics of a statute of repose include that it is "not dependent upon traditional concepts of accrual of a claim, but is tied to an independent, objectively determined and verifiable event…"[31]

Based on the evidence in this case, the goals of finality and predictability in the operation of a limiting statute are best served by applying section 17558.5 to the Controller's entrance conference letter, dated December 23, 2002 (to the extent that the execution of that letter is an independent, objectively determined and verifiable event) and not the entrance conference on January 16, 2003, the date of which was selected by the parties based on schedules. That entrance conference letter represents a unilateral act by the Controller to exercise its audit authority before that authority is barred, which is consistent with the plain language of section

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[27] Exhibit E, pp. 5-6.

[28] *Coachella Valley Mosquito and Vector Control District v. Public Employees' Retirement System* (2005) 35 Cal.4th 1072, 1088.

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

[30] *Giest v. Sequoia Ventures, Inc*. (2000) 83 Cal.App.4th 300, 305.

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

17558.5, and consistent with the application of a procedural requirement to avoid delay in prosecution of claims. Because it is the Controller's authority to audit that must be exercised within a specified time, it must be within the Controller's exclusive control to meet or fail to meet the deadline imposed. To the extent an entrance conference letter exists and was sent to the claimant, that letter provides verification to a claimant that an audit is in progress, and that the claimant may be required to produce documentation to support its claims. In this way, the entrance conference letter serves the goals of finality and predictability, and ensures that a claimant will not prematurely dispose of needed evidence to support its claim.

Here, the Controller contends that it initiated the audit no later than December 23, 2002, the date on the entrance conference letter. However, unlike a plaintiff filing a complaint in court within a statutory time period to protect against a statute of limitations defense barring the matter, Government Code section 17558.5 does not require the Controller to lodge a document to *prove* it timely initiated an audit. The entrance conference letter is on the Controller's letterhead, and is addressed to Carrie Bray, the claimant's Director of Accounting Services. The letter was stamped "received" by the claimant "with an incoming mail stamp" on January 2, 2003, after the December 31, 2002 deadline.[32] Thus, since the claimant did not receive the letter until after the deadline, there is an issue whether the date of the letter can properly be verified as the initiation of the audit. The letter does not contain a proof of service, certificate of mailing, or an affidavit by the Controller's Office to verify the date of mailing before the December 31st deadline. The letter, alone, is an out of court document being used for the truth of the matter asserted (i.e. that the date of the letter provides evidence that the Controller timely initiated the audit) and is considered unreliable hearsay.[33] Nor can the declaration of Jim Spano of the Controller's Office, which generally describes the Controller's audit procedures and states that "[t]he Auditor-in-Charge processed a formal start letter, dated December 23, 2002," be used to authenticate the letter and verify the initiation of the audit on that date since the entrance conference letter was not signed or prepared by Mr. Spano. And there is no indication that Mr. Spano witnessed the writing being made.[34]

However, the initiation of the audit can be verified by extrinsic evidence in the record. The substance of the letter dated December 23, 2002 confirms a telephone conversation on December 19, 2002, between claimant's Director of Accounting Services and the Controller scheduling the entrance conference. The declaration submitted by claimant's Director of Accounting admits the telephone conversation on December 19, 2002, and that the entrance

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[32] Exhibit A, IRC, pp. 84 and 88, Declaration of Carrie Bray, para. 15; and the December 23, 2002 letter.

[33] *People v. Zunis* (2005) 134 Cal.App.4th Supp. 1, 5.

[34] Evidence Code section 1401 states that "authentication of a writing is required before it may be received in evidence." Evidence Code sections 1411 and 1413 provide that the subscribing witness is not required to authenticate the writing, but that the writing may be authenticated by anyone who saw the writing made or executed."

The declaration of Jim Spano is in Exhibit E, Controller's Comments on Draft Proposed Decision, p. 6. The entrance conference letter was signed by Chris Prasad, Audit Manager, (Exhibit A, IRC, p. 88.)

conference for the audit was scheduled during that phone call.[35] Thus, the claimant had actual notice before the December 31st deadline that the Controller was auditing its reimbursement claims and, thus, would not have prematurely disposed of any supporting records. In addition, based on the Controller's statement that the entrance conference letter "was sent in December" and the claimant's statement that the letter was stamped received "with an incoming mail stamp on January 2, 2003," it is presumed that the confirming letter was deposited in the mailbox and sent by the United States Post Office.[36] The Commission can take official notice that the date the letter was received, January 2, 2003, was a Wednesday, and that Tuesday, January 1, 2002, was a holiday with no mail service.[37] Thus, the letter dated December 23, 2002 was mailed *at the latest* on Monday, December 31, 2002, within the statutory deadline, for a January 2, 2003 receipt.

Based on the foregoing analysis and the evidence in this record, the Commission finds that the audit of the claimant's reimbursement claims for fiscal years 1997-1998, 1998-1999, and 1999-2000 was initiated no later than December 31, 2002 and is therefore timely initiated within the meaning of Government Code section 17558.5.

2. The Controller's audit of all reimbursement claims at issue was completed within a reasonable period of time.

Government Code section 17558.5 was amended in 2004 to establish, for the first time, the requirement to "complete" the audit two years after the audit is commenced. However, the 2004 amendment became effective *after* the completion of the audit on June 24, 2004, when the final audit report was issued and, thus, does not apply to the audit in this case.

Although the statute in effect at the time the reimbursement claims were filed did not expressly fix the time for which an audit must be completed, the Controller was still required under common law to complete the audit within a reasonable period of time. Under appropriate circumstances, the defense of laches may operate to bar a claim by a public agency if there is evidence of unreasonable delay by the agency and resulting prejudice to the claimant.[38] Claimant was on notice of the audit after the telephone conference on December 19, 2002, the entrance conference letter was mailed on or before December 31, 2002; the draft audit report was issued May 5, 2004; and the final audit report was issued June 24, 2004. There is no evidence that claimant here was prejudiced by the audit process. The audit was completed less than one year and a half after it was started and, under the facts of this case, within a reasonable period of time.

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[35] Exhibit A, IRC, pp. 82-83, paragraphs 8 and 11.

[36] Exhibit B, Controller's Comments on IRC, p. 2; Exhibit A, IRC, p. 84.

[37] Evidence Code section 452(h); Rules of Court, Rule 1.10(b); and California Code of Regulations, title 2, section 1187.5(c).

[38] *Cedar-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 985-986; *Steen v. City of Los Angeles* (1948) 31 Cal.2d 542, 546, where the court held that laches applies in quasi-adjudicative proceedings.

**B. The Controller's Reductions for Unreported Offsetting Health Service Fee Authority Pursuant to *Clovis Unified* and the Health Fee Rule were Correct as a Matter of Law, and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

The Controller reduced all amounts claimed in fiscal years 1997-1998 through 2001-2002 ($3,205,600), finding that the claimant had fee authority during the audit period of $6,101,947 that should have been deducted as offsetting revenue. Because the district does not collect a health services fee, no offsetting revenue was identified by claimant in the reimbursement claims. The Controller calculated health fees authorized to be charged by using student enrollment data provided by the claimant's Institutional Research Office.

After the claimant filed its IRC, the Third District Court of Appeal issued its opinion in *Clovis Unified School Dist. v. Chiang*, which specifically addressed the Controller's practice of reducing claims of community college districts by the maximum fee amount that districts are statutorily authorized to charge students, whether or not a district chooses to charge its students those fees. As cited by the court, the "Health Fee Rule" states in pertinent part:

> Eligible claimants will be reimbursed for health service costs at the level of service provided in the 1986/87 fiscal year. The reimbursement will be reduced by the amount of student health fees authorized per the Education Code [section] 76355.[39]

The court in *Clovis Unified* upheld the Controller's use of the Health Fee Rule to reduce reimbursement claims based on the fee districts are *authorized* to charge. In making its decision the court noted that the concept underlying the state mandates process that Government Code sections 17514 and 17556(d) embody is:

> To the extent a local agency or school district "has the authority" to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost.[40]

The court also noted that, "this basic principle flows from common sense as well. As the Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'"[41] Since the *Clovis* case is a final decision of the court addressing the merits of the issue presented here, the Commission, under principles of stare decisis, is required to apply the rule set forth by the court.[42]

Therefore, staff finds the Controller's adjustment is correct as a matter of law. Staff further finds that the Controller's calculation of the claimant's total authorized offsetting fee revenue is not arbitrary, capricious, or entirely lacking in evidentiary support since the Controller used the enrollment data available and reported by the claimant.

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[39] *Clovis Unified School Dist. v. Chiang, supra*, 188 Cal.App.4th 811.

[40] *Id*. at p. 812.

[41] *Ibid.*

[42] *Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 596.

## Conclusion

Staff concludes that the Controller conducted the audit within the deadlines imposed by Government Code section 17558.5. Staff further finds that the Controller's reduction of all costs claimed on the ground that claimant had sufficient fee authority to pay for the costs incurred, is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

## Staff Recommendation

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

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

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| IN RE INCORRECT REDUCTION CLAIM ON:<br><br>Former Education Code Section 72246 (Renumbered as §76355)[43]<br><br>Statutes 1984, Chapter 1 (1983-1984 2nd Ex. Sess.) (AB2X 1) and Statutes 1987, Chapter 1118 (AB 2336)<br><br>Fiscal Years 1997-1998 through 2001-2002<br><br>Los Rios Community College District, Claimant. | Case No.: 05-4206-I-06<br><br>*Health Fee Elimination*<br><br>DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5. ARTICLE 7<br><br>(*Adopted March 27, 2015*) |

## DECISION

The Commission on State Mandates (Commission) heard and decided this incorrect reduction claim (IRC) during a regularly scheduled hearing on March 27, 2015. [Witness list will be included in the adopted decision.]

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

The Commission [adopted/modified] the proposed decision to [approve/partially approve/deny] the IRC at the hearing by a vote of [vote count will be included in the adopted decision].

### Summary of the Findings

This decision addresses reductions totaling $3,205,600 by the State Controller's Office (Controller) to reimbursement claims filed by Los Rios Community College District (claimant) for costs incurred during fiscal years 1997-1998 through 2001-2002 under the *Health Fee Elimination* program.

The Commission denies this incorrect reduction claim (IRC). The Commission finds that the Controller conducted the audit within the deadlines imposed by Government Code section 17558.5. The Commission further finds that the Controller's reduction of all costs claimed during the audit period on the ground that claimant had sufficient fee authority to pay for the program is consistent with the *Clovis Unified School District* decision. That decision upheld the Controller's reduction of reimbursement claims based on the health service fees districts are authorized to charge, and not simply the fees actually collected, and thus, the reduction is correct

[43] Statutes 1993, chapter 8.

as a matter of law.[44] In addition, the Controller's calculation of authorized health service fees based on enrollment data provided by the claimant is not arbitrary, capricious, or entirely lacking in evidentiary support.

Since the amount authorized to be charged and required to be identified as offsetting revenue ($6,101,947) exceeds the total amount claimed ($3,205,600), the remaining substantive issues challenging the reduction of costs claimed for salaries and benefits, services and supplies, and indirect costs are not addressed.

# COMMISSION FINDINGS

## I. Chronology

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|---|---|
| 01/15/2000 | Claimant filed a reimbursement claim for fiscal year 1997-1998.[45] |
| 01/15/2000 | Claimant filed a reimbursement claim for fiscal year 1998-1999.[46] |
| 12/30/2000 | Claimant filed a reimbursement claim for fiscal year 1999-2000.[47] |
| 01/09/2002 | Claimant filed a reimbursement claim for fiscal year 2000-2001.[48] |
| 12/27/2002 | Claimant filed a reimbursement claim for fiscal year 2001-2002.[49] |
| 12/10/2002 – 12/19/2002 | Controller contacted claimant to schedule an entrance conference.[50] |
| 01/16/2003 | The entrance conference was held.[51] |
| 06/24/2004 | Controller issued the final audit report for fiscal years 1997-1998 through 2001-2002.[52] |
| 09/05/2005 | Claimant filed this IRC.[53] |
| 03/12/2008 | The Controller submitted comments on the IRC.[54] |
| 06/09/2009 | Claimant submitted rebuttal comments.[55] |

[44] *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 812.

[45] Exhibit A, IRC, at p. 28 (all page number citations reference the PDF page number).

[46] *Ibid*.

[47] *Ibid.*

[48] Exhibit B, Controller's Comments on IRC, p. 190.

[49] Exhibit B, Controller's Comments on IRC, p. 201.

[50] Exhibit A, IRC, pp. 82-90; Exhibit B, Controller's Comments on IRC, p. 42.

[51] Exhibit A, IRC, p. 28; Exhibit B, Controller's Comments on IRC, p. 2.

[52] Exhibit B, Controller's Comments on IRC, p. 116.

[53] Exhibit A, IRC.

[54] Exhibit B, Controller's Comments on IRC.

[55] Exhibit C, Claimant's Rebuttal Comments.

01/30/2015 Commission staff issued the draft proposed decision.[56]

02/20/2015 The Controller submitted comments on the draft proposed decision.[57]

## II. Background

*Health Fee Elimination* Program

Prior to 1984, former Education Code section 72246 authorized community college districts to charge almost all students a general fee (health service fee) for th**e** purpose of voluntarily providing health supervision and services, direct and indirect medical and hospitalization services, and operation of student health centers.[58] In 1984, the Legislature repealed the community colleges' fee authority for health services.[59] However, the Legislature also reenacted section 72246, to become operative on January 1, 1988, in order to reauthorize the fee at $7.50 for each semester (or $5 for quarter or summer semester).[60]

In addition to temporarily repealing community college districts' authority to levy a health services fee, the 1984 enactment required any district that provided health services during the 1983-1984 fiscal year, for which districts were previously authorized to charge a fee, to maintain health services at the level provided during the 1983-1984 fiscal year for every subsequent fiscal year until January 1, 1988.[61] As a result, community college districts were required to maintain health services provided in the 1983-1984 fiscal year without fee authority for this purpose until January 1, 1988.

In 1987, the Legislature amended former Education Code section 72246, operative January 1, 1988, to incorporate and extend the maintenance of effort provisions of former Education Code section 72246.5, which became inoperative by its own terms as of January 1, 1988.[62] In addition, Statutes 1987, chapter 1118 restated that the fee would be reestablished at not more than $7.50 for each semester, or $5 for each quarter or summer semester.[63] As a result, beginning January 1, 1988 all community college districts were required to maintain the same level of health services they provided in the 1986-1987 fiscal year each year thereafter, with limited fee authority to offset the costs of those services. In 1992, section 72246 was amended to

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[56] Exhibit D, Draft Proposed Decision.

[57] Exhibit E, Controller's Comments on Draft Proposed Decision.

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

[59] Statutes 1984, 2nd Extraordinary Session, chapter 1, section 4 [repealing Education Code section 72246].

[60] Statutes 1984, 2nd Extraordinary Session, chapter 1, section 4.5.

[61] Education Code section 72246.5 (Stats. 1984, 2d. Ex. Sess., ch. 1, § 4.7).

[62] Education Code section 72246 (as amended, Stats. 1987, ch. 1118). See also former Education Code section 72246.5 (Stats. 1984, 2d Ex. Sess., ch. 1, § 4.7).

[63] Education Code section 72246 (as amended, Stats. 1987, ch. 1118).

provide that the health fee could be increased by the same percentage as the Implicit Price Deflator whenever that calculation would produce an increase of one dollar.[64]

On November 20, 1986, the Commission determined that Statutes 1984, chapter 1 imposed a reimbursable state-mandated new program on community college districts. On August 27, 1987, the Commission adopted parameters and guidelines for the *Health Fee Elimination* program. On May 25, 1989, the Commission adopted amendments to the parameters and guidelines to reflect amendments made by Statutes1987, chapter 1118.

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

Controller's Audit and Summary of the Issues

The Controller reduced all costs claimed totaling $3,205,600 in fiscal years 1997-1998 through 2001-2002 under the *Health Fee Elimination* program. The following issues disputed by the parties:

- The statute of limitations applicable to the Controller's audit of the reimbursement claims;
- Reduction of salary, benefit, and related indirect costs claimed, based on the scope of services provided during fiscal years 1997-1998 through 2001-2002 that allegedly exceed the services provided by claimant in the 1986-1987 base year;
- Reduction of costs for services and supply costs, including those costs claimed for student athletic costs, which the Controller asserts go beyond the scope of the mandate, were not provided by claimant in the 1986-1987 base year, and are not supported by source documentation;
- Reduction of indirect costs based on asserted faults in the development and application of indirect cost rates; and
- The amount of offsetting revenue to be applied from student health fee authority.

This decision addresses the statute of limitations and offsetting revenue issues only. As described further below, the Commission finds that the Controller timely initiated the audit of the 1997-1998, 1998-1999, and 1999-2000 fiscal year claims. Since the amount authorized to be charged and required to be identified as offsetting revenue in fiscal years 1997-1998 through 2001-2002 ($6,101,947) exceeds the total amount claimed in those years ($3,205,600), the remaining substantive issues challenging the reduction of costs claimed for salaries and benefits, services and supplies, and indirect costs are not addressed.

[64] Education Code section 72246 (as amended, Stats. 1992, ch. 753). In 1993, former Education Code section 72246 was renumbered as Education Code section 76355. (Stats. 1993, ch. 8).

## III. Positions of the Parties

Los Rios Community College District

Claimant asserts that the Controller missed the statute of limitations applicable to audits of reimbursement claims for fiscal years 1997-1998, 1998-1999, and 1999-2000 and that the audit for these years is void. Claimant also argues that the Controller inappropriately reduced reported costs of salaries and benefits, and other indirect costs claimed. Claimant argues that the Controller's reduction of salaries and benefits was improper because the Controller's audit did not demonstrate if the enumerated services allegedly 'not provided' in FY 1986-87 were actually available to students. Claimant also disagrees with the Controller's disallowance costs of services and supplies on the grounds that the services and supplies were not reimbursable under the mandate or provided during the base year. In addition, claimant asserts that the reduction of $361,689 in overstated indirect costs on the basis that the claimant did not obtain federal approval for its indirect cost rates is incorrect. Claimant argues that there is no requirement in law that indirect cost rate must be federally' approved, and the Controller did not make findings that the claimant's rate was excessive or unreasonable. Claimant also asserts that a reduction of $6,101,947, based on unreported authorized health service fees is incorrect because the parameters and guidelines require claimants to state offsetting revenues "experienced," and claimant did not experience offsetting revenues for fees that it did not charge to students.[65]

State Controller's Office

The Controller contends that the reductions are correct as a matter of law and in accordance with the parameters and guidelines. The Controller argues that that the audit of these reimbursement claims was timely pursuant to Government Code section 17558.5, based on a number of assertions described below.

The Controller disallowed salaries, benefits, and related indirect costs on the basis that claimant provided health services in fiscal years 1997-1998 through 2001-2002 that exceeded those services provided by in the base year. The Controller also reduced amounts claimed for "services and supplies" on the grounds that physical exams for intercollegiate athletics and Hepatitis B vaccinations are beyond the scope of the mandate. The Controller further asserts that the claimant overstated its indirect costs, because claimant did not obtain federal approval for its indirect cost rate proposals, as required by the Controller's claiming instructions. The Controller asserts that since the claimant did not have a current approved rate (via the OMB Circular A-21 method), the auditors utilized the FAM-29C and determined that the allowable rate was much less than claimed. In addition, the Controller found that the claimant understated its authorized health service fees for the audit period in the amount of $6,101,947. Using enrollment and exemption data, the Controller recalculated the health fees that the claimant was authorized to collect, and reduced the claim by the amount not stated as offsetting revenues. The Controller argues that the relevant amount of offsetting revenues is not the amount charged or the amount collected, but the amount authorized by law.[66]

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[65] Exhibit A, IRC; Exhibit C, Claimant's Rebuttal Comments.

[66] Exhibit B, Controller's Comments on IRC; Exhibit E, Controller's Comments on Draft Proposed Decision.

## IV. Discussion

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

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.9 of the Commission's regulations requires the Commission to send the statement of decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of the parameters and guidelines, *de novo*, without consideration of legal conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[67] The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[68]

With regard to the Controller's audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support. This standard is similar to the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.[69] Under this standard, the courts have found that:

> When reviewing the exercise of discretion, "[t]he scope of review is limited, out of deference to the agency's authority and presumed expertise: 'The court may not reweigh the evidence or substitute its judgment for that of the agency. [Citation.]'" ... "In general ... the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. . . ." [Citations.] When making that inquiry, the " ' "court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." [Citation.]' "[70]

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

[68] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[69] *Johnston v. Sonoma County Agricultural* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

[70] *American Bd. of Cosmetic Surgery, Inc, supra,* 162 Cal.App.4th at pgs. 547-548.

The Commission must review the Controller's audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant. [71] In addition, sections 1185.1(f)(3) and 1185.2(c) of the Commission's regulations require that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Commission's ultimate findings of fact must be supported by substantial evidence in the record. [72]

### A. The Audit of the Fiscal Year 1997-1998, 1998-1999, and 1999-2000 Reimbursement Claims was Timely Under Government Code Section 17558.5 and is Not Barred.

The claimant asserts that the statute of limitations applicable to the Controller's audit of mandate reimbursement claims bars the audit of the reimbursement claims for fiscal years 1997-1998, 1998-1999, and 1999-2000. Claimant therefore seeks reinstatement of all costs reduced for those years. [73]

The time to audit a reimbursement claim is provided in Government Code section 17558.5. At the time the three reimbursement claims at issue were filed in 2000, Government Code section 17558.5, as added in 1995, stated the following:

> A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to audit by the Controller no later than two years after the end of the calendar year in which the reimbursement claim is filed or last amended. However, if no funds are appropriated for the program for the fiscal year for which the claim is made, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. [74]

The parties disagree about the interpretation of section 17558.5 as applicable to this case. The claimant argues that the first sentence in Government Code section 17558.5, as added by Statutes 1995, chapter 945 (operative July 1, 1996), applies and requires that a reimbursement claim "is subject to audit by the Controller no later than two years after the end of the calendar year in which the reimbursement claim is filed or last amended..." The claimant asserts that "subject to audit" requires the Controller "to complete" the audit no later than two years after the end of the calendar year that the reimbursement claim was filed. In this case, the claimant contends that the audit of the reimbursement claims for fiscal years 1997-1998 and 1998-1999, filed on January 15, 2000, and for fiscal year 1999-2000, filed on December 30, 2000, were subject to audit and had to be completed by December 31, 2002. The claimant reasons that since the final audit

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

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

[73] See, Exhibit B, Controller's Comments on IRC, Final Audit Report, at p. 124.

[74] Government Code section 17558.5 (Stats. 1995, ch. 945, (SB11)). Former Government Code section 17558.5 was originally added by the Legislature by Statutes 1993, chapter 906, effective January 1, 1994. The 1993 statute became inoperative on July 1, 1996, and was repealed on January 1, 1997 by its own terms.

report was issued on June 24, 2004, eighteen months after the deadline, the audit of these reimbursement claims is barred.[75]

The Controller contends that the first sentence in the 1995 version of Government Code section 17558.5 requires that an audit of a reimbursement claim must be "initiated" within two years after the end of the calendar year in which the claim was filed, and that there is no statutory deadline to complete the audit.[76] The record, however, shows that the Controller has taken different views with respect to when the audit in this case was actually initiated.

As described below, the Controller contacted the claimant to schedule an entrance conference for the audit before the December 31, 2002 deadline, but the entrance conference did not occur until January 16, 2003, after the deadline. Thus, the Commission must interpret the legal requirements of Government Code section 17558.5(a), as added in 1995, and determine if the Controller complied with the statutory deadlines in that section.

1. The Commission finds that the provisions of Government Code section 17558.5, as added in 1995, mean that a reimbursement claim is subject to the initiation of an audit within two years after the end of the calendar year in which the claim is filed.

Government Code section 17558.5, as added in 1995, stated the following:

> A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to audit by the Controller no later than two years after the end of the calendar year in which the reimbursement claim is filed or last amended. However, if no funds are appropriated for the program for the fiscal year for which the claim is made, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.

The plain language of the statute provides that reimbursement claims are "subject to audit" within two years after the end of the calendar year that the reimbursement claim was filed. The phrase "subject to audit" does not require the completion of the audit, but sets a time during which a claimant is on notice that an audit of a claim may occur. This reading is consistent with the plain language of the second sentence, which establishes a longer period of time to initiate the audit when no funds are appropriated for the program as follows:

> . . . . However, if no funds are appropriated for the program for the fiscal year for which the claim is made, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.

While one rule of statutory construction states that the use of differing language in otherwise parallel statutory provisions (like the use of the word "initiate" in the second sentence, but not in the first sentence) supports an inference that a difference in meaning was intended by the Legislature, the Commission finds that this inference does not apply to this statute.[77]

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[75] Government Code section 17558.5 (Stats. 1995, ch. 945 (SB 11)); Exhibit A, IRC, at pp. 28-32; Exhibit C, Claimant's Rebuttal Comments, at pp. 4-5.

[76] Exhibit B, Controller's Comments on IRC, pp. 1-2.

[77] *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 62.

Section 17558.5(a) is not a model of clarity. However, a careful reading of the language of the first and second sentences reveals that the primary difference between the two is whether an appropriation has been made for the program. The use of the word "however" to begin the second sentence, signals the contrast between when funds are appropriated versus when they are not. There is nothing about the structure or language of the two sentences to suggest that the Legislature intended any other substantive differences between these two parallel sentences. In each situation, when there is an appropriation and when there is not, the Controller must perform some activity within a two-year period. The use in the second sentence of the phrase "the time for the Controller to initiate an audit" refers back to "the time" defined in the first sentence, namely two years. Similarly, the use of "initiate" in the second sentence refers to what the Controller is required to do within the two-year period. Read in this way, the two sentences are parallel. In the first sentence, when there is an appropriation, the time to initiate an audit is two years. In the second sentence, when there is no appropriation, the time to initiate an audit is also within two years of the first appropriation. The only difference is the triggering event of an appropriation, which determines when the two-year period to initiate an audit begins to run.

The Commission further finds that this interpretation is consistent with the 2002 amendment to the first sentence of section 17558.5, which clarified that "subject to audit" means "subject to the initiation of an audit" as follows:[78]

> A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to the initiation of an audit by the Controller no later than ~~two~~ three years after the ~~end of the calendar year in which the~~ date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is ~~made~~ filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.[79]

Moreover, section 17558.5 was amended in 2004 to establish, for the first time, the requirement to "complete" the audit two years after the audit is commenced. As amended and effective beginning January 1, 2005, it reads as follows in underline and strikeout:

> A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced.[80]

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[78] See, *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471, where the court stated that an amendment to a statute that clarifies the law is merely a statement of what the law has always been.

[79] Statutes 2002, chapter 1128.

[80] Statutes 2004, chapter 313.

The 2004 amendment became effective *after* the completion of the audit of the reimbursement claims for fiscal years 1997-1998, 1998-1999, and 1999-2000 on June 24, 2004 (with the issuance of the final audit report) and, thus, does not apply to the audit in this case. However, the 2004 amendment demonstrates the Legislature's intent that the initiation of an audit and the completion of an audit are subject to different statutory time frames.

The reimbursement claims for fiscal years 1997-1998, 1998-1999, and 1999-2000 were all filed in 2000[81] and, thus, were subject to the initiation of an audit by December 31, 2002.[82]

2. Based on the evidence in the record, the audit of the 1997-1998, 1998-1999, and 1999-2000 reimbursement claims was timely initiated by December 31, 2002.

As stated above, the Controller's audit of the 1997-1998, 1998-1999, and 1999-2000 reimbursement claims was subject to the initiation of an audit by December 31, 2002. The undisputed facts show that the Controller contacted the claimant to schedule an entrance conference before December 31, 2002, but the entrance conference did not occur until January 16, 2003, after the deadline.[83] The parties do not agree, however, about the event that constitutes the initiation of the audit for purposes of Government Code section 17558.5.

In this respect, the Controller's comments on this IRC contain conflicting assertions about when the audit was initiated, with some statements alleging that the audit was initiated at the entrance conference on January 16, 2003, and other statements alleging that the audit was initiated at the initial contact with the claimant in December 2002. For example, the affidavit of the Controller's Chief of the Compliance Audit Bureau, dated April 14, 2006, states in paragraph seven that "[a] field audit of the claims for fiscal year (FY) 1997-98, FY 1998-99, FY 1999-00, FY 2000-01, and FY 2001-02, *commenced on January 16, 2003*, and ended on March 11, 2004."[84] (Emphasis added.)

However, the Controller's analysis and response to the IRC asserts that the audit was timely initiated in December 2002 when the Controller contacted the claimant by phone to request an entrance conference. These comments state the following:

> Government Code section 17558.5(a), effective July 1, 1996, states that a district's reimbursement claim is subject to audit no later than two years after the end of the calendar year in which the claim is filed or last amended. The district filed its FY 1997-1998 and 1998-99 claims on January 18, 2000, and filed its FY 1999-2000 claim on December 29, 2000. The SCO made several attempts to contact the district and conduct an entrance conference during December 2000. Ultimately, at the district's request, the SCO delayed the entrance conference until January 16, 2003 (Tab 6). Therefore the SCO notified the district that it would conduct an audit within the period that all claims were subject to audit.[85]

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[81] Exhibit B, Controller's Comments on IRC, at pp. 155, et seq..

[82] *Mudd v. McColgan* (1947) 30 Cal.2d 463, 468.

[83] Exhibit A, IRC, p. 28; Exhibit B, Controller's Comments on IRC, p. 2.

[84] Exhibit B, Controller's Comments on IRC, p. 8.

[85] Exhibit B, Controller's Comments on IRC, p. 27. This is also the position expressed in the Final Audit Report (Exhibit B, p. 132).

In support of this position, the Controller filed a declaration of Mary Khoshmashrab, Staff Management Auditor-Specialist in the Division of Audits, stating that "the district requested that the entrance conference be delayed until January 2003 based on the availability of staff."[86] A contact log prepared by Ms. Khoshmashrab is attached, which states the following:

> 12/10/02 – called district to set up entrance meeting for week of December 16, 2002. Left message for Carrie to call me about meeting and gave the mandate and fiscal years we were going to audit.
>
> 12/12/02 – called district to follow up on entrance conference. Left message for Carrie to call regarding meeting. Asked for Vice Chancellor's name. Jon Sharpe's name was provided.
>
> 12/16/02 – called district to set up an entrance conference for this week. Still no call back from Carrie requested her to call as soon as possible. Noted to secretary that I have left several messages.
>
> 12/19/02 – called district Carrie answered phone. Requested meeting with her she stated that December would not work because Kim Sayles needed to attend and she would not be in. Carrie would call me back.
>
> 12/19/02 – Carrie called back set entrance for January 16, 2003 at 9:30 a.m.
>
> 12/19/02 – Called left message with Carrie for fax number to fax copy of Contract Letter.[87]

Similarly, the Controller's analysis and response to the IRC asserts that although it normally "initiates an audit by conducting the audit entrance conference… [,] for this audit the district denied the SCO's request to conduct an entrance conference in December 2002."[88] The Controller cites Government Code section 17558.5(c), as added in 1995 (currently codified in section 17558.5(e)), which provides in part that nothing shall be construed to limit the adjustment of payments "when delay in the completion of an audit is the result of willful acts by the claimant." The Controller contends that the district delayed the audit completion by willfully denying the SCO's request to conduct an audit entrance conference in December 2002. Thus, the audit should be considered initiated when the Controller initially contacted the claimant in December 2002.

The Controller's staff counsel also filed a response to the IRC offering another interpretation of when the audit was initiated; that the audit is initiated no later than the date of the letter confirming the entrance conference. In this response, the Controller assumes that the claimant's version of the facts are accurate (i.e., that the claimant did not willfully deny the request to conduct the entrance conference), and asserts that the audit of the claims filed for fiscal years 1997-1998, 1998-1999, and 1999-2000 was timely initiated "no later than the date of the audit letter" on December 23, 2002, "reiterating the intent to audit the identified mandated programs for the fiscal years indicated." The letter states that this interpretation "is consistent with other

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[86] Exhibit B, Controller's Comments on IRC, p. 42.

[87] Exhibit B, Controller's Comments on IRC, p. 43.

[88] *Id*., at p. 29.

statutes of limitations provisions, which are satisfied by the lodgment of a document with the reviewing authority, indicating a concrete intent to proceed against the identified party."[89]

The claimant factually disputes the Controller's assertions about when the audit was "initiated." The claimant argues that an audit is initiated when the entrance conference is held, and that the Controller's position (that the audit was initiated *before* the entrance conference) is new and conflicts with prior positions of the Controller, including the position taken in the body of the Controller's response to the IRC, which states that the "SCO initiates an audit by conducting the audit entrance conference."[90]

The claimant also strongly disagrees with the Controller's factual assertion that the claimant willfully caused the delay of the entrance conference.[91] In this respect, the claimant filed a declaration, signed under penalty of perjury, from Carrie Bray, Director of Accounting Services for Los Rios Community College District, describing the communication with the Controller that began with a message left for Ms. Bray on December 12, 2002.[92] Ms. Bray declares that she worked with Mary Khoshmashrab of the Controller's Office to set up a date for the entrance conference. Ms. Bray states that Ms. Khoshmashrab stated "that [Ms. Khoshmashrab] assumed that we were too busy to meet in December, so she requested a meeting during the first or second week of January." On January 2, 2003, Ms. Bray received a letter from the Controller's audit manager, dated December 23, 2002, stating that "as discussed during a telephone conversation on December 19, 2002, SCO auditor Mary Khoshmashrab will commence the audit of the subject programs on Thursday, January 16, 2003, beginning with an entrance conference at 9:30 a.m." Attached to the letter is a list of records requested by the Controller for the audit, including copies of the claims and related documents, organization charts for the division handling the mandated programs, chart of accounts, audit period annual budgets for each college claimed, a list of employees, and worksheets supporting productive hourly rates.[93] Ms. Bray's declaration is also supported by written telephone messages dated December 12 and December 17, showing that Mary Khoshmashrab left messages regarding an audit of the Health Fee Elimination claims that she wanted to schedule in December and that Ms. Khoshmashrab "was very anxious to hear from [Ms. Bray]." Also attached is a calendar for the week of January 13-19, 2003, with the following handwritten notes made by Ms. Bray:

> 12/18 Talked to Mary. She requested mtg in 1st/2nd wk. of Jan.
>
> 12/19, 2:45, rcv'd msg from Mary to return call. Rcv'd voice mail. Left another msg.
>
> 12/19, 2:50 – scheduled mtg. Jan 16 9:30
>
> 12/20/02, 10:23, Mary, State Controller's Office needs fax #

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[89] *Id*., at pp. 2-3.

[90] Exhibit C, Claimant's Rebuttal Comments, pp. 4-5.

[91] *Id*., at pp. 16-17.

[92] Exhibit A, IRC, pp. 82-90.

[93] *Id*., pp. 88-90.

12/20 rcv'd call from Mary for fax #, called and left on recorder, 1:39.[94]

*a) There is no evidence in the record to support the Controller's assertion that the claimant willfully delayed the audit pursuant to Government Code section 17558.5(c).*

First, the Commission finds that there is no evidence in the record to support the Controller's assertion that the claimant willfully delayed the audit pursuant to section 17558.5(c). That section provides that "Nothing in this section shall be construed to limit the adjustment of payments when inaccuracies are determined to be the result of the intent to defraud, or when a delay in the completion of an audit is the result of willful acts by the claimant or inability to reach agreement on terms of final settlement." The statute does not define "willful acts" by the claimant. However, the courts, when reviewing insurance policies containing exclusionary clauses to deny coverage for willful acts, have defined "willful" as a deliberate action which causes harm that the insured intended and expected.[95] Although the Controller asserts that the entrance conference was delayed until January 16, 2003 because of the claimant's willful act to delay the audit, the Controller's argument is not supported by the evidence in the record. Instead, the declaration of Ms. Khoshmashrab filed in support of the Controller's position, and the declaration of Ms. Bray for the claimant, indicate that the claimant cooperated with the Controller and that, at most, made a reasonable request, given the short notice provided to prepare for an audit proposed for a date just before the winter holidays, to hold the entrance conference in January 2003 because of the unavailability of a necessary employee in December 2002.[96] And the record equally supports the finding that the January date was not proposed by Ms. Bray at all. The record also does not indicate that Ms. Bray was informed that the entrance conference must be held in December 2002 to meet a statutory deadline, or that holding the entrance conference in January 2003 would affect the statute of limitations applicable to the audit. Therefore, there is no evidence in the record that the audit entrance conference was held on January 16, 2003 because the claimant willfully or deliberately delayed the initiation of the audit until after the December deadline.

*b) The audit of the claimant's reimbursement claims for fiscal years 1997-1998, 1998-1999, and 1999-2000 was timely initiated by the December 23, 2002 entrance conference letter.*

The issue remains, however, what section 17558.5(a) means when it requires the Controller to initiate the audit within two years after the end of the calendar year in which the reimbursement claim is filed or last amended. Some of the Controller's comments in this case have interpreted the statute to mean that the audit is initiated either when the initial phone contact with the claimant was made or when the letter confirming the date of the audit entrance conference is sent. These interpretations benefit the Controller here because it leads to the conclusion that the

[94] *Id*., p. 87.

[95] *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 743.

[96] Exhibit B, Controller's Comments on IRC, pp. 42-43.

Controller's audit was timely initiated before the December 31, 2002 deadline. Other interpretations suggest that the entrance conference initiates the audit.

The Legislature did not specifically define the event that initiates the audit and, thus, a phone call, a confirming letter, or an entrance conference, are all events that could reasonably be viewed as the initiation date under the statute. However, unlike other agencies that conduct audits and have adopted formal regulations to make it clear when the audit begins (which can be viewed as the controlling interpretation of a statute) the Controller has not adopted a regulation for the audits of state-mandate reimbursement claims.[97] Nor has the Controller's position been clear in this case. Under these circumstances, the Commission is not required to give the Controller's assertions about when an audit is initiated any weight. In this respect, the courts have stated the following:

> Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative. To quote the statement of the Law Revision Commission in a recent report, "The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action."[98]

In addition, the Commission cannot read words into a statute that are not there or clearly part of the Legislature's intent.[99] Since section 17558.5 is silent with respect to the act or event that constitutes an initiation of an audit, the Commission cannot, as a matter of law, state the act or event that initiates an audit in all cases.

Thus, the Commission must interpret when the audit of the 1997-1998, 1998-1999, and 1999-2000 reimbursement claims was initiated based on the evidence in the record. This presents an issue of first impression for the Commission. Prior IRCs have relied on a finding that the audit was initiated "no later than…" the date of the entrance conference, or have not been required to squarely address the question when an audit was initiated at all.[100] In this IRC, the Commission

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

[98] *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4 th 1, 7-8 [Citing *Traverso v. People ex rel. Dept. of Transportation* (1996) 46 Cal.App.4th 1197, 1206 as an example of an agency interpretation "of little worth," and quoting Judicial Review of Agency Action (Feb.1997) 27 Cal. Law Revision Com. Rep. (1997) p. 81].

[99] *Department of Corrections v. Workers' Comp. Appeals Bd.* (1999) 76 Cal.App.4th 810, 815.

[100] See, e.g., *Health Fee Elimination* Decisions, 05-4206-I-03; 05-4206-I-05; 05-4206-I-04 and 08; *Collective Bargaining* Decisions 08-4425-I-15; 08-4425-I-16.

is called upon to make a finding whether the entrance conference itself or some earlier occurrence constitutes the initiation of an audit for purposes of section 17558.5, because the difference between the December 2002 and January 16, 2003 dates is dispositive of the question whether the Controller met the two-year deadline to initiate the audit pursuant to Government Code section 17558.5.

The draft proposed decision in this case concluded, based on the Controller's letter dated December 23, 2002, that the audit was initiated when the entrance conference was conducted on January 16, 2003.[101] That letter states that the audit "will commence … beginning with an entrance conference" as follows:

> This letter is to confirm that the State Controller's Office (SCO) has scheduled an audit of Los Rios Community College's legislatively mandated Health Fee Elimination program claims for fiscal year (FY) 1997-98 through FY 2000-2001, and legislatively mandated Mandate Reimbursement Process program claims for FY 1998-99 through FY 2000-2001.
>
> As discussed during a telephone conversation on December 19, 2002, *SCO auditor Mary Khoshmashrab* ***will commence the audit*** *of the subject programs* ***on Thursday, January 16, 2003, beginning with an entrance conference*** *at 9:30 a.m.*
>
> We would appreciate your furnishing working accommodations for and providing the necessary records (see attachment) available to Ms. Khoshmashrab. (Emphasis added.)[102]

The Controller's letter dated December 23, 2002 also requests that the claimant provide the "necessary records" to the auditor during the entrance conference. Black's Law Dictionary defines an audit as "[a] formal examination of an individual's or organization's accounting records…"[103] And, "initiate" means to "begin."[104] Thus, the draft proposed decision concluded that the audit and the formal review of the records did not start until the entrance conference was conducted on January 16, 2003, at the earliest. Since the deadline to initiate the audit in this case expired on December 31, 2002, the Controller did not timely initiate the audit of the 1997-1998, 1998-1999, and 1999-2000 reimbursement claims within the deadline imposed by Government Code section 17558.5, as added in 1995.

In response to the draft proposed decision, the Controller filed comments strenuously asserting that that the audit of the claims filed for fiscal years 1997-1998, 1998-1999, and 1999-2000 was timely initiated "no later than the date of the audit letter" on December 23, 2002.[105] The Controller argues that this interpretation is consistent with other statutes of limitations provisions, which are satisfied by the lodgment of a document with the reviewing authority. The Controller also states that relying on the entrance conference to define when the audit is initiated

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[101] Exhibit D, Draft Proposed Decision.

[102] Exhibit A, IRC, pp. 88-90.

[103] Black's Law Dictionary, Seventh Edition, p. 126.

[104] Webster's II New College Dictionary, p. 570.

[105] Exhibit E.

is in conflict with the finality and predictability goals of a statute of limitations. The Controller states that entrance conferences can be delayed or continued by scheduling conflicts, and are only certain once they occur. In this respect, the Controller states the following:

> Use of the entrance conference is even more questionable when we compare the application of the statutes of limitation in other areas of law. In civil and criminal law (misdemeanor), the event that ends the running of the statute is the filing of a complaint. For administrative law, the Continuing Education of the Bar, California Administrative Hearing Guide states that "[i]n practice, the accusation or statement of issues is considered filed on the date when it was signed and dated by the executive officer or other employee of an agency." (§3.26, page 3-19.) Each of these processes relies at its core on a written document, not a face to face meeting between the parties. Another characteristic in common is that the filing is accomplished by a unilateral act of the plaintiff/complainant, no contact or coordination with the opposing party is required. The conclusion of the DPD would create a statute of limitations procedure that is unlike any other, essentially requiring the consent of the auditee and a face to face meeting, before an audit could be initiated. There is nothing in Section 17558.5(a) that suggests such a departure from other statute of limitation procedures. In light of the purposes of statutes of limitations, as well as the common characteristics of other statutes of limitation schemes, we believe that the formal audit letter should constitute the initiating act, and the date thereon, the date of initiation of the audit. In this case the audit letter was dated December 23, 2002, which should be when the audit is considered initiated. Since the statute didn't run until December 31, 2002, the audit of fiscal years 1997-98 through 1999-2000 should be considered timely.[106]

In addition, the Controller contends that it actually begins reviewing reimbursement claims and the supporting documentation before the Controller contacts the claimant to schedule an entrance conference. In this respect, the Controller submits a declaration from Jim Spano, Bureau Chief for the Controller, identifying the steps taken to by the Controller before the initial contact with the claimant occurs.[107]

Upon further review of the statute, relevant case law, and evidence in the record, the Commission finds that the Controller's audit of the claimant's reimbursement claims for fiscal years 1997-1998, 1998-1999, and 1999-2000 is timely.

An audit of mandate reimbursement claims is not a civil action subject to a statute of limitations, and in any event the California Supreme Court has held that "the statutes of limitations set forth in the Code of Civil Procedure…do not apply to administrative proceedings."[108] The initiation

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[106] Exhibit E, pp. 3-4.

[107] Exhibit E, pp. 5-6.

[108] *Coachella Valley Mosquito and Vector Control District v. Public Employees' Retirement System* (2005) 35 Cal.4th 1072, 1088 [citing *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29; *Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61 Cal.App.4th 1357, 1361-1362 (finding that Code of Civil Procedure sections 337 and 338 were not applicable to an administrative action to recover overpayments made to a Medi-Cal provider); *Little Co. of Mary Hospital v. Belshe* (1997) 53 Cal.App.4th 325, 328-329

provisions of section 17558.5 require the Controller to initiate an audit within two years after the end of the calendar year in which the reimbursement claim is filed or last amended, or within two years of the date the claim is first paid. These alternate triggering events are unrelated to the accrual of any cause of action, or the discovery of wrongdoing by the claimant. The requirement to initiate an audit within two calendar years from the date the reimbursement claim is filed requires a unilateral act of the Controller. And failure to timely initiate the audit within the two-year deadline is a jurisdictional bar to any reductions made by the Controller of claimant's reimbursement claims.[109] In this respect, the initiation provisions of Government Code section 17558.5 are better characterized as a statute of repose, rather than a statute of limitations. The statute provides a period during which an audit may be initiated, and after which the claimant may enjoy repose, dispose of any evidence or documentation to support their claims, and assert a defense that the audit is not timely and therefore void.

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

> Indeed, "the injury need not have occurred, much less have been discovered. Unlike an ordinary statute of limitations which begins running upon accrual of the claim, [the] period contained in a statute of repose begins when a *specific event occurs*, regardless of whether a cause of action has accrued or whether any injury has resulted." [citations] A statute of repose thus is harsher than a statute of limitations in that it cuts off a right of action after a specified period of time, irrespective of accrual or even notice that a legal right has been invaded.[110]

Described by another court in *Inco Development Corp. v. Superior Court,*[111] the characteristics of a statute of repose include that it is "not dependent upon traditional concepts of accrual of a claim, but is tied to an independent, objectively determined and verifiable event…"

However, whether analyzed as a statute of repose, or a statute of limitations, the act or event that must occur before the expiration of the statutory period (which is also the event that begins the procedural limitation period) may be interpreted similarly. That is, the filing of a civil action may be interpreted analogously to the initiation of an audit, to the extent that the initiation of the

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(finding that the three year audit requirement of hospital records is not a statute of limitations, and that the statutes of limitations found in the Code of Civil Procedure apply to the commencement of civil actions and civil special proceedings, "which this was not"); *Bernd v. Eu, supra* (finding statutes of limitations inapplicable to administrative agency disciplinary proceedings)].

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

[110] *Giest v. Sequoia Ventures, Inc.* (2000) 83 Cal.App.4th 300, 305.

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

audit, like the commencement of a civil action, terminates the running of the statutory period, and vests authority in the party to proceed.[112]

The Controller argues that the purpose of a statute of limitations, generally, is "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[113] The Controller further cites *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison,*[114] in which the Court explained that the "legislative goal underlying limitation statutes is to require diligent prosecution of known claims so that legal affairs can have their necessary finality and predictability and so that claims can be resolved while evidence remains reasonably available and fresh." Both of these statements by the Court are consistent with the approach taken by the parameters and guidelines with respect to document retention (i.e., the preservation of evidence for the claim), which state the following:

> For auditing purposes, all costs claimed must be traceable to source documents and/or worksheets that show evidence of the validity of such costs. This would include documentation for the fiscal year 1986-87 program to substantiate a maintenance of effort. These documents must be kept on file by the agency submitting the claim for a period of no less than three years from the date of the final payment of the claim pursuant to this mandate, and made available on the request of the State Controller or his agent.[115]

The Controller further argues that, like a statute of limitations to file a civil action, the act or event that must occur before the expiration of the statutory period must be one that can be completed by the party affected alone, and without the consent or cooperation of the auditee. This view is consistent with the plain language of section 17558.5, in that it clearly requires the *Controller* to initiate an audit, and does not expressly require the action or cooperation of any other party.

The Controller therefore reasons that the goals of finality and predictability, and the preservation of evidence; and the intent that a limitation period may be ended by a unilateral act of the party affected, are served best by applying section 17558.5 to the entrance conference letter, rather than the entrance conference itself.

The Commission agrees. Based on the evidence in this case, the goals of finality and predictability in the operation of a limiting statute are best served by applying section 17558.5 to the Controller's entrance conference letter, dated December 23, 2002 (to the extent that the

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

[113] Exhibit E, p. 3 [quoting *Romano v. Rockwell International, Inc.* (1996) 14 Cal.4th 479, 488].

[114] *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 756,

[115] Exhibit B, Controller's Comments on IRC, p. 104.

execution of that letter is an independent, objectively determined and verifiable event)[116] and not the entrance conference on January 16, 2003, the date of which was selected by the parties based on schedules. That entrance conference letter represents a unilateral act by the Controller to exercise its audit authority before that authority is barred, which is consistent with the plain language of section 17558.5, and consistent with the application of a procedural requirement to avoid delay in prosecution of claims. Because it is the Controller's authority to audit that must be exercised within a specified time, it must be within the Controller's exclusive control to meet or fail to meet the deadline imposed. To the extent an entrance conference letter exists and was sent to the claimant, that letter provides verification to a claimant that an audit is in progress, and that the claimant may be required to produce documentation to support its claims.[117] In this way, the entrance conference letter serves the goals of finality and predictability, and ensures that a claimant will not prematurely dispose of needed evidence to support its claim.[118]

In this case, the Controller contends that it initiated the audit no later than December 23, 2002, the date on the entrance conference letter. However, unlike a plaintiff filing a complaint in court within a statutory time period to protect against a statute of limitations defense barring the matter, Government Code section 17558.5 does not require the Controller to lodge a document to *prove* it timely initiated an audit. The entrance conference letter is on the Controller's letterhead, and is addressed to Carrie Bray, the claimant's Director of Accounting Services. The letter was stamped "received" by the claimant "with an incoming mail stamp" on January 2, 2003, after the

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[116] *Inco Development Corp. v. Superior Court*, supra, 131 Cal.App.4th 1014

[117] This approach is consistent with the Controller's usual audit policy, which is, as stated by Jim Spano in the declaration attached to Exhibit E, page 5:

> 7) Prior to making telephone contact with the district, the Auditor-in-Charge reviewed all of these claimant-prepared records to ascertain whether to officially initiate an audit…
>
> 8) The Auditor-in-Charge contacted the district . . . stating that the SCO will be initiating an audit of the district's mandated cost claims…and requesting to schedule an entrance conference…
>
> 9) The Auditor-in-Charge made contact with the district's Director of Accounting Services on December 19, 2002. The Auditor-in-Charge informed the Director that the SCO will be initiating an audit [of] the district's mandated cost claims . . . and requested an entrance conference. The Auditor-in-Charge and district's Director of Accounting Services agreed to a January 16, 2003, start date for the fieldwork portion of the audit.
>
> 10) The Auditor-in-Charge processed a formal start letter, dated December 23, 2002, that was addressed to the district's Director of Accounting Services and signed by the Audit Manager. The start letter identified the Auditor-in-Charge, program being audited, telephone contact date, reference to standards being used to perform the audit, the entrance conferences date and time, and a basic records request…

[118] The Commission is not called upon here to determine what event constitutes the initiation of an audit when no notice or "formal start letter" to the claimant is provided.

December 31, 2002 deadline.[119] Thus, since the claimant did not receive the letter until after the deadline, there is an issue whether the date of the letter can properly be verified as the initiation of the audit. The letter does not contain a proof of service, certificate of mailing, or an affidavit by the Controller's Office to verify the date of mailing before the December 31st deadline. The letter, alone, is an out of court document being used for the truth of the matter asserted (i.e. that the date of the letter provides evidence that the Controller timely initiated the audit) and is considered unreliable hearsay.[120] Nor can the declaration of Jim Spano of the Controller's Office, which generally describes the Controller's audit procedures and states that "[t]he Auditor-in-Charge processed a formal start letter, dated December 23, 2002," be used to authenticate the letter and verify the initiation of the audit on that date since the entrance conference letter was not signed or prepared by Mr. Spano. And there is no indication that Mr. Spano witnessed the writing being made.[121]

However, the initiation of the audit can be verified by extrinsic evidence in the record. The substance of the letter dated December 23, 2002 confirms a telephone conversation on December 19, 2002, between claimant's Director of Accounting Services and the Controller scheduling the entrance conference. The declaration submitted by claimant's Director of Accounting admits the telephone conversation on December 19, 2002, and that the entrance conference for the audit was scheduled during that phone call.[122] Thus, the claimant had actual notice before the December 31st deadline that the Controller was auditing its reimbursement claims and, thus, would not have prematurely disposed of any supporting records. In addition, based on the Controller's statement that the entrance conference letter "was sent in December" and the claimant's statement that the letter was stamped received "with an incoming mail stamp on January 2, 2003," it is presumed that the confirming letter was deposited in the mailbox and sent by the United States Post Office.[123] The Commission can take official notice that the date the letter was received, January 2, 2003, was a Wednesday, and that Tuesday, January 1, 2002, was a holiday with no mail service.[124] Thus, the letter dated December 23, 2002 was mailed *at the latest* on Monday, December 31, 2002, within the statutory deadline, for a January 2, 2003 receipt.

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[119] Exhibit A, IRC, pp. 84 and 88, Declaration of Carrie Bray, para. 15; and the December 23, 2002 letter.

[120] *People v. Zunis* (2005) 134 Cal.App.4th Supp. 1, 5.

[121] Evidence Code section 1401 states that "authentication of a writing is required before it may be received in evidence." Evidence Code sections 1411 and 1413 provide that the subscribing witness is not required to authenticate the writing, but that the writing may be authenticated by anyone who saw the writing made or executed."

The declaration of Jim Spano is in Exhibit E, Controller's Comments on Draft Proposed Decision, p. 6. The entrance conference letter was signed by Chris Prasad, Audit Manager, (Exhibit A, IRC, p. 88.)

[122] Exhibit A, IRC, pp. 82-83, paragraphs 8 and 11.

[123] Exhibit B, Controller's Comments on IRC, p. 2; Exhibit A, IRC, p. 84.

[124] Evidence Code section 452(h); Rules of Court, Rule 1.10(b); and California Code of Regulations, title 2, section 1187.5(c).

Based on the foregoing analysis and the evidence in this record, the Commission finds that the audit of the claimant's reimbursement claims for fiscal years 1997-1998, 1998-1999, and 1999-2000 was initiated no later than December 31, 2002 and is therefore timely initiated within the meaning of Government Code section 17558.5.

3. The Controller's audit of all reimbursement claims at issue was completed within a reasonable period of time.

Government Code section 17558.5 was amended in 2004 to establish, for the first time, the requirement to "complete" the audit two years after the audit is commenced. However, the 2004 amendment became effective *after* the completion of the audit on June 24, 2004, when the final audit report was issued and, thus, does not apply to the audit in this case.

Although the statute in effect at the time the reimbursement claims were filed did not expressly fix the time for which an audit must be completed, the Controller was still required under common law to complete the audit within a reasonable period of time. Under appropriate circumstances, the defense of laches may operate to bar a claim by a public agency if there is evidence of unreasonable delay by the agency and resulting prejudice to the claimant.[125] Claimant was on notice of the audit after the telephone conference on December 19, 2002, the entrance conference letter was mailed on or before December 31, 2002; the draft audit report was issued May 5, 2004; and the final audit report was issued June 24, 2004.[126] There is no evidence that claimant here was prejudiced by the audit process. The audit was completed less than one year and a half after it was started and, under the facts of this case, within a reasonable period of time.

Accordingly, the Commission finds that the Controller's audit of the claimant's reimbursement claims for fiscal years 1997-1998 through 2001-2002 was timely completed within the meaning of Government Code section 17558.5.

**B. The Controller's Reductions for Unreported Offsetting Health Service Fee Authority Pursuant to Clovis Unified and the Health Fee Rule were Correct as a Matter of Law, and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

The Controller reduced all amounts claimed in fiscal years 1997-1998 through 2001-2002 ($3,205,600), finding that the claimant had fee authority during the audit period of $6,101,947 that should have been deducted as offsetting revenue.[127] Because the district does not collect a health services fee, no offsetting revenue was identified by claimant in the reimbursement

[125] *Cedar-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 985-986. In that case, the court determined that the hospital failed to establish an unreasonable delay in audits conduct by Department of Health Services, since the Department conducted audits two years or less after the end of the fiscal period that it was auditing, which was less than the three-year period permitted by statute. See also, *Steen v. City of Los Angeles* (1948) 31 Cal.2d 542, 546, where the court held that laches applies in quasi-adjudicative proceedings.

[126] Exhibit B, Controller's Comments on IRC, p. 116.

[127] Exhibit B, Controller's Comments on IRC, pp. 124 and 130.

claims.[128] The Controller calculated health fees authorized to be charged by using student enrollment data provided by the claimant's Institutional Research Office.[129]

Claimant argues that the parameters and guidelines only require a claimant to declare offsetting revenues that the claimant "experiences," and that while the fee amount that claimant was authorized to impose may have increased for the applicable period, nothing in the Education Code made the increase of those fees mandatory.[130] Claimants argue that the issue is the difference between fees collected and fees collectible.[131]

The Commission finds that the correct calculation and application of offsetting revenue from student health fees has been resolved by the *Clovis Unified* decision, and that the reduction is correct as a matter of law.

After the claimant filed its IRC, the Third District Court of Appeal issued its opinion in *Clovis Unified*, which specifically addressed the Controller's practice of reducing claims of community college districts by the maximum fee amount that districts are statutorily authorized to charge students, whether or not a district chooses to charge its students those fees. As cited by the court, the Health Fee Rule states in pertinent part:

> Eligible claimants will be reimbursed for health service costs at the level of service provided in the 1986/87 fiscal year. The reimbursement will be reduced by the amount of student health fees authorized per the Education Code [section] 76355.[132] (Underline in original.)

The Health Fee Rule relies on Education Code section 76355(a), which provides in relevant part:

> (a)(1) The governing board of a district maintaining a community college may require community college students to pay a fee in the total amount of not more than ten dollars ($10) for each semester, seven dollars ($7) for summer school, seven dollars ($7) for each intersession of at least four weeks, or seven dollars ($7) for each quarter for health supervision and services, including direct or indirect medical and hospitalization services, or the operation of a student health center or centers, or both.
>
> (a)(2) The governing board of each community college district may increase [the health service fee] by the same percentage increase as the Implicit Price Deflator for State and Local Government Purchase of Goods and Services. Whenever that calculation produces an increase of one dollar ($1) above the existing fee, the fee may be increased by one dollar ($1).[133]

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[128] Exhibit C, Claimant's Rebuttal Comments, p. 14.

[129] Exhibit B, Controller's Comments on IRC, Final Audit Report, Finding 4, p. 130.

[130] Exhibit A, IRC, at p. 22.

[131] *Id*. at pp. 22-23.

[132] *Clovis Unified School Dist. v. Chiang*, *supra*, 188 Cal.App.4th 794, 811.

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

Pursuant to the plain language of Education Code section 76355(a)(2), the fee authority given to districts automatically increases at the same rate as the Implicit Price Deflator; when that calculation produces an increase of one dollar above the existing fee, the fee may be increased by one dollar.[134] The Chancellor of the California Community Colleges issues a notice to the governing boards of all community colleges when a fee increase is triggered.[135] Here, the Controller asserts that claimant had the authority to increase its health fee in accordance with the notices periodically issued by the Chancellor, stating that the Implicit Price Deflator Index had increased enough to support a one dollar increase in student health fees. The Controller argues that the claimant was required to claim offsetting fees in the amount authorized.[136] Claimant argues that the Controller cannot rely on the Chancellor's notice as a basis to adjust the claim for 'collectible' student health services fees because the fees levied on students are raised by action of the governing board of the community college district.[137] But the *authority* to impose the health service fees increases automatically with the Implicit Price Deflator, as noticed by the Chancellor. Accordingly, the court in *Clovis Unified* upheld the Controller's use of the Health Fee Rule to reduce reimbursement claims based on the fees districts are *authorized* to charge. In making its decision the court notes that the concept underlying the state mandates process that Government Code sections 17514 and 17556(d) embody is:

> To the extent a local agency or school district "has the authority" to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost.[138]

The court also notes that, "this basic principle flows from common sense as well. As the Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'"[139] Additionally, in responding to claimant's argument that, "since the Health Fee Rule is a claiming instruction, its validity must be determined *solely* through the Commission's P&G's",[140] the court held:

> To accept this argument, though, we would have to ignore, and so would the Controller, the fundamental legal principles underlying state-mandated costs. We conclude *the Health Fee Rule is valid*.[141] (Italics added.)

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[134] See Education Code section 76355 (Stats. 1995, ch. 758 (AB 446)). The Implicit Price Deflator for State and Local Purchase of Goods and Services is a number computed annually (and quarterly) by the United States Department of Commerce as part of its statistical series on measuring national income and product, and is used to adjust government expenditure data for the effect of inflation.

[135] See, e.g., Exhibit A, Incorrect Reduction Claim [Letter from Chancellor, pages 69-70].

[136] See Exhibit B, Controller's Comments, pages 16-18; Exhibit A, Incorrect Reduction Claim, pages 69-70.

[137] Exhibit A, Incorrect Reduction Claim, pages 17-18.

[138] *Clovis Unified School Dist. v. Chiang*, *supra*, 188 Cal.App.4th 794, 812.

[139] *Ibid.*

[140] *Ibid.* (Original italics).

[141] *Clovis Unified School Dist. v. Chiang*, *supra*, 188 Cal.App.4th 794, 812.

Thus, pursuant to the court's decision in *Clovis Unified*, the Health Fee Rule used by the Controller to adjust reimbursement claims filed by claimant for the *Health Fee Elimination* program is valid. Since the *Clovis* case is a final decision of the court addressing the merits of the issue presented here, the Commission, under principles of stare decisis, is required to apply the rule set forth by the court.[142] In addition, the *Clovis* decision is binding on the claimant under principles of collateral estoppel.[143] Collateral estoppel applies when (1) the issue necessarily decided in the previous proceeding is identical to the one that is currently being decided; (2) the previous proceeding terminated with a final judgment on the merits; (3) the party against whom collateral estoppel is asserted is a party to or in privity with a party in the previous proceeding; and (4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue.[144] Although the claimant to this IRC was not a party to the *Clovis* action, the claimant is in privity with the petitioners in *Clovis*. "A party is adequately represented for purposes of the privity rule if his or her interests are so similar to a party's interest that the latter was the former's virtual representative in the earlier action."[145]

The Commission further finds that the Controller's calculation of the claimant's total authorized offsetting fee revenue in fiscal years 1997-1998 through 2001-2002 totaling $6,101,947 is not arbitrary, capricious, or entirely lacking in evidentiary support since the Controller used the enrollment data available and reported by the claimant. The Controller obtained student enrollment, Board of Governors Grant (BOGG) recipient, and apprenticeship program enrollment data reported to the Chancellor's Office and maintained by the claimant's Institutional Research Office, and calculated the authorized health service fees using the rates that the Chancellor's Office noticed during the fiscal years at issue.

Therefore, the Commission finds that the Controller's reduction of costs based on the claimant's unreported offsetting fee authority is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support. Since the amount authorized to be charged and required to be identified as offsetting revenue in fiscal years 1997-1998 through 2001-2002 ($6,101,947) exceeds the total amount claimed ($3,205,600), the remaining substantive are not addressed.

## V. Conclusion

The Commission denies this IRC. The Commission finds that the Controller conducted the audit within the deadlines imposed by Government Code section 17558.5. The Commission further finds that the Controller's reduction of all costs claimed on the ground that claimant had sufficient fee authority to pay for the costs incurred, is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

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[142] *Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 596.

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

[144] *Roos v. Red* (2006) 130 Cal.App.4th 870, 879-880.

[145] *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 91.

**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare as follows:

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

On March 12, 2015, I served the:

**Proposed Decision**
*Health Fee Elimination,* 05-4206-I-06
Education Code Section 76355
Statutes 1984, Chapter 1, 2nd E.S.; Statutes 1987, Chapter 1118
Fiscal Years 1997-1998, 1998-1999, 1999-2000, 2000-2001, and 2001-2002
Los Rios Community College District, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 12, 2015 at Sacramento, California.

Heidi J. Palchik
Commission on State Mandates
980 Ninth Street, Suite 300
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# COMMISSION ON STATE MANDATES

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**Claim Number:** 05-4206-I-06

**Matter:** Health Fee Elimination

**Claimant:** Los Rios Community College District

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