STATE OF CALIFORNIA GRAY DAVIS, *Governor*

COMMISSION ON STATE MANDATES
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January 8, 2003

Mr. Keith Petersen
SixTen and Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: **Draft Staff Analysis and Hearing Date**
Enrollment Fee Collection, 99-TC-13
Los Rios Community College District, Claimant
Education Code Section 76300, Statutes 1984xx, Chapter 1 et al.; California Code of Regulations, Title 5, Sections 58500 – 58508.
Enrollment Fee Waivers, 00-TC-15
Glendale Community College District, Claimant
Education Code Section 76300, Statutes 1984xx, Chapter 1 et al.; California Code of Regulations, Title 5, Sections 58600, 58601, 58610 – 58613, 58620, 58630; Board of Governors Fee Waiver Program Manual for 2000/2001.

Dear Mr. Petersen:

The draft staff analysis for this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **Wednesday, January 29, 2003**. You are advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties on the mailing list, and to be accompanied by a proof of service on those parties. If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is tentatively set for hearing on Thursday, **February 27, 2003** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about Febuary 14, 2003. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

If you have any questions on the above, please contact Eric Feller at (916) 323-8224.

Sincerely,

Paula Higashi
Executive Director

Enc. Draft Staff Analysis
cc. Mailing List (current mailing list attached)

MAILED: ✓ FAXED: _____
DATE: 1/8/02 INITIAL: _____
CHRON: _____ FILE: ✓
WORKING BINDER: _____

ITEM

TEST CLAIM
DRAFT STAFF ANALYSIS

Education Code Section 76300;
Statutes 1984xx, Chapter 1; Statutes 1984, Chapters 274 and 1401;
Statutes 1985, Chapters 920 and 1454; Statutes 1986, Chapters 46 and 394;
Statutes 1987, Chapter 1118; Statutes 1989, Chapter 136; Statutes 1991, Chapter 114;
Statutes 1992, Chapter 703; Statutes 1993, Chapters 8, 66, 67, and 1124;
Statutes 1994, Chapters 153 and 422; Statutes 1995, Chapter 308;
Statutes 1996, Chapter 63; and Statutes 1999, Chapter 72;
California Code of Regulations, Title 5, Sections 58500 – 58508

Enrollment Fee Collection

and

Education Code Section 76300
Statutes 1984xx, Chapter 1; Statutes 1984, Chapters 274 and 1401;
Statutes 1985, Chapters 920 and 1454; Statutes 1986, Chapters 46 and 394;
Statutes 1987, Chapter 1118; Statutes 1989, Chapter 136;
Statutes 1993, Chapters 8, 66, 67, and 1124; Statutes 1994, Chapters 153 and 422;
Statutes 1995, Chapter 308; Statutes 1996, Chapter 63; and Statutes 1999, Chapter 72;
California Code of Regulations, Title 5, Sections 58600, 58601, 58610 – 58613, 58620, 58630
Board of Governors Fee Waiver Program Manual for 2000/2001

Enrollment Fee Waivers

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN THE FINAL ANALYSIS

STAFF ANALYSIS

Claimants

Los Rios Community College District (99-TC-13)
Glendale Community College District (00-TC-15)

Chronology

6/22/00	Claimant Los Rios Community College District (LRCCD) files *Enrollment Fee Collection* test claim with the Commission (99-TC-13)
8/2/00	Department of Finance (DOF) files request for extension to submit comments
8/4/00	California Community Colleges (CCC) Chancellor's Office files comments on the test claim with the Commission
9/1/00	DOF files request for extension to submit comments
10/13/00	DOF files comments on the test claim with the Commission
11/9/00	Claimant LRCCD files response to DOF and CCC comments.
6/4/01	Claimant Glendale Community College District (GCCD) files *Enrollment Fee Waivers* test claim with the Commission (00-TC-15)
7/6/01	DOF requests an extension of time to file comments (00-TC-15)
8/8/01	DOF requests an extension of time to file comments (00-TC-15)
9/25/01	DOF files comments on the test claim (00-TC-15) with the Commission
7/5/02	Commission issues draft staff analysis for *Enrollment Fee Collection* (99-TC-13)
7/9/02	LRCCD claimant's representative faxes a statement that claimant will not respond to the draft staff analysis
7/24/02	DOF requests extension of time to submit comments on the draft staff analysis
7/25/02	Commission approves time extension for DOF to submit comments on the draft staff analysis
8/30/02	DOF submits comments on the draft staff analysis for *Enrollment Fee Collection* (99-TC-13)
8/30/02	Commission issues notice of consolidation of test claims (99-TC-13) *Enrollment Fee Collection* and (00-TC-15), *Enrollment Fee Waivers*
1/8/03	Commission issues new draft staff analysis for *Enrollment Fee Collection and Enrollment Fee Waivers.*

Background Information

There are currently 72 community college districts governing 108 community colleges in California, serving over 2.9 million students.[1]

[1] California Community College Chancellor's Office website <http://www.cccco.edu> [as of Jan. 7, 2003].

Claimant LRCCD filed the *Enrollment Fee Collection* test claim (99-TC-13) in June 2000. Originally enacted in 1984 and amended throughout the 1980s and 1990s, the original test claim legislation and regulations[2] authorize and require community colleges to implement enrollment fees and adopt regulations for their collection. Although the amount of the enrollment fee has been amended various times, the two percent of the fee retained by the community colleges[3] has remained constant.

Claimant GCCD filed the *Enrollment Fee Waivers* (00-TC-15) test claim in May 2001 in which claimant pled fee-waiver statutes and regulations[4] that specify the groups of students for which fees are waived and for whom Board of Governors Grants (BOGGs) are available. A BOGG is an instrument used by a community college district to process financial assistance to a low-income student.[5]

In August 2002, the *Enrollment Fee Collection* (99-TC-13) and *Enrollment Fee Waiver* (00-TC-15) test claims were consolidated.[6]

Claimant's Contentions

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514.

In the *Enrollment Fee Collection* (99-TC-13) test claim, claimant requests reimbursement for the following activities:

> (1) determining the number of credit courses for each student subject to the student enrollment fees;
>
> (2) calculating and collecting student enrollment fees for each nonexempt student enrolled, and providing a waiver of student enrollment fees for exempt students;
>
> (3) calculating, collecting, waiving or refunding student enrollment fees due to subsequent timely program changes or withdrawal from school;
>
> (4) entering the student enrollment fee collection and waiver information into the district cashier system and data processing and accounting systems;
>
> (5) processing all agency billings for students whose student enrollment fees are waived;

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[2] Reference to the test claim legislation hereafter includes all of the following: Education Code section 76300. Statutes 1984xx, chapter 1; Statutes 1984, chapters 274 and 1401; Statutes 1985, chapters 920 and 1454; Statutes 1986, chapters 46 and 394; Statutes 1987, chapter 1118; Statutes 1989, chapter 136; Statutes 1991, chapter 114; Statutes 1992, chapter 703; Statutes 1993, chapters 8, 66, 67, and 1124; Statutes 1994, chapters 153 and 422; Statutes 1995, chapter 308; Statutes 1996, chapter 63; and Statutes 1999, chapter 72. California Code of Regulations, title 5, sections 58500 – 58508.

[3] Education Code Section 76300, subdivision (c). This is called a "revenue credit" by the Community College Chancellor's Office.

[4] Education Code section 76300; California Code of Regulations, Title 5, Sections 58600, 58601, 58610 – 58613, 58620, 58630, Executive Orders of the California Community Colleges Chancellor's Office.

[5] California Code of Regulations, title 5, section 58601.

[6] California Code of Regulations, title 2, section 1183.06.

(6) preparing and submitting reports on student enrollment fees collected and waived as required by the Board of Governors and other state agencies. Claimant states that failure to implement this mandate would reduce the total district revenue by up to ten percent pursuant to Education Code section 76300, subdivision (d).

In the *Enrollment Fee Waivers* (00-TC-15) test claim, claimant seeks reimbursement for:

(1) determining and classifying students eligible for Board of Governors grants ("BOGG") according to the eligibility criteria;

(2) determining at the time of enrollment whether fees should be waived because the student is a recipient of benefits under the Aid to Families with Dependent Children (AFDC)[7] program or the Supplemental Security Income/State Supplementary program (SSI) or a beneficiary under a general assistance program;

(3) determining at the time of enrollment whether fees should be waived for a student due to demonstration of financial need in accordance with federal methodology for determining expected family contribution of students seeking financial aid;

(4) determining at the time of enrollment whether fees should be waived for a student because he or she is a dependent, or surviving spouse who has not remarried, of any member of the California National Guard who, in the line of duty and while in the active service of the state, was killed, died of a disability resulting from an event that occurred while in the active service of the state, or is permanently disabled as a result of an event that occurred while in active service to the state;

(5) entering the enrollment fee waiver information into the district cashier system and data processing and accounting systems, and processing all agency billings for students whose fees are waived;

(6) separately documenting and accounting for the funds allocated for collection of enrollment fees and financial assistance in order to enable an independent determination regarding the accuracy of the District's certification of need for financial assistance;

(7) preparing and submitting reports regarding the number and amounts of the enrollment fees waived as required by the Board of Governors and other state agencies.

Claimant contends that state funds allocated pursuant to Education Code section 76300, subdivision (i), currently calculated at .91 per credit unit waived, are not sufficient to fund the mandate.[8]

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[7] On August 22, 1996, President Clinton signed into law H.R. 3734 --The Personal Responsibility and Work Opportunity Reconciliation Act of 1996. This federal legislation eliminated the AFDC program and replaced it with the Temporary Assistance for Needy Families (TANF) program. This federal welfare reform offered states flexibility to redesign their programs, and subjected states to financial penalties for failing to meet work participation and other requirements. In response, California created the California Work Opportunity and Responsibility to Kids (CalWORKs) program—(Stats. 1997, ch. 270; AB 1542, Ducheny, Ashburn, Thompson, and Maddy). These programs are referenced in the test claim legislation, so they are used interchangeably in this analysis.

[8] Declaration of Carrie Bray, Director of Accounting Services, Los Rios Community College District, June 22, 2000.

Department of Finance's Contentions

In its original comments on the *Enrollment Fee Collection* (99-TC-13) test claim, the DOF agrees that the test claim statutes constitute a new program or higher level of service because the community college districts had not previously been required to collect enrollment fees from students. But DOF asserts the test claim should be denied because the statutory scheme sets up a mechanism whereby community college districts are automatically provided with funding for their costs of administering the program.[9] According to DOF, since the collection of enrollment fees is entwined with the entire admission process it would be extremely difficult, if not impossible, to accurately isolate the specific tasks involved with collecting enrollment fees. DOF submits that the Legislature has validly determined that two percent of the revenue from fees is adequate to compensate community college districts for administering the test claim statutes. DOF further notes that the costs associated with fee waivers should not be included in this claim because a statutory compensation mechanism currently exists for those costs. Finally, DOF states that processing refunds does not result in state mandated costs because the districts have preexisting regulatory authority to charge up to $10 per semester or quarter for refunding a student's enrollment fees.

In its original (9/25/01) comments on the *Enrollment Fee Waivers* test claim (00-TC-15), DOF argues that all activities are fully compensated by funds provided to the district and fees levied. Regarding determining and classifying whether a student is eligible for a BOGG, DOF asserts that much of the infrastructure for determining whether a student is eligible to have fees waived already existed prior to 1975, and that the grants are only available to those who are eligible and apply for assistance. DOF also disputes the claimant's staffing for making BOGG eligibility determinations, and asserts that claimant received ample funds for student financial aid administration and fee waiver administration. DOF also commented on the claim for determining fee waivers for recipients of AFDC, SSI, general assistance, federal financial aid, or a fee waiver due to being the dependent or surviving spouse of a California National Guard member killed or permanently disabled as a result of active service to the state. DOF asserts that these activities do not constitute a higher level of service because they are alternative methods for determining student eligibility for a BOGG rather than additional requirements.

In its 8/30/02 comments on the draft staff analysis of *Enrollment Fee Collection* (99-TC-13), DOF concurs with staff's finding that preparation and submittal of reports on enrollment fees collected and waived is not a state-reimbursable mandated activity. DOF does not concur, however, that the rest of the activities discussed in the draft staff analysis are mandates. DOF argues that the only state-mandated program is calculating and collecting the student enrollment fee for each nonexempt student enrolled (Ed. Code, § 76300 subds. (b) & (c)), which is not reimbursable due to sufficient state funding and other reasons. DOF argues that community college districts were already required to determine the credit course load for every student before enactment of the test claim legislation. On providing a fee waiver for exempt students, DOF asserts that this activity is not reimbursable, but is merely the preclusion of participation in the new program of collecting enrollment fees. DOF also disagrees that calculating, collecting, waiving or refunding enrollment fees due to program changes or withdrawal from school is a reimbursable activity because permission to add or drop courses is at the discretion of the

[9] Education Code section 76300, subdivision (c). All further statutory references are to the Education Code unless otherwise indicated.

community college district. As to processing agency billings, DOF asserts that this activity is not required or even necessary to comply with Education Code section 76300 because for a fee waiver, tuition is not charged by the college to qualifying students, precluding the need for an agency billing for that student. Finally, DOF asserts that calculating and collecting the enrollment fee is not a state-mandated program because community college districts have fee authority under Education Code section 76902, subdivision (b)(9).

Community Colleges Chancellor's Office Contentions

In its comments on the *Enrollment Fee Collection* (99-TC-13), the CCC concludes that the test claim statute was "clearly a higher level of service for community colleges." The CCC provides a bill analysis from the Legislative Analyst quoting its conclusion that the two percent revenue credit is an insufficient reimbursement for the locally mandated fee-collection program. The CCC also provided a letter from its president to the author of the fee legislation.

The CCC stresses that although the amount of the enrollment fee has varied, the two percent revenue credit for community colleges has remained constant. Finally, the CCC states that, for fiscal year 1998-99, the claimant LRCCD collected $6.98 million in fees pursuant to section 76300, of which two percent, or $139,610 was a revenue credit. Statewide, enrollment fees totaled over $164 million, of which the two percent revenue credit totaled $3.28 million.

The CCC did not provide comments on *Enrollment Fee Waivers* (00-TC-15).

Discussion

In order for the test claim legislation to impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514, the statutory language must mandate a new program or create an increased or higher level of service over the former required level of service. "Mandates" as used in article XIII B, section 6, is defined to mean "orders" or "commands."[11] The California Supreme Court has defined "program" subject to article XIII B, section 6 of the California Constitution as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[12] To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.[13] Finally, the new program or increased level of service must impose "costs mandated by the state."[14]

This test claim presents the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

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[11] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 174.

[12] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[13] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[14] Government Code section 17514.

- Does the test claim legislation impose a new program or higher level of service on community college districts within the meaning of article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

These issues are addressed as follows.

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program," defined as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. [15] Only one of these findings is necessary to trigger article XIII B, section 6.[16]

The test claim legislation concerns collecting community college enrollment fees and determining eligibility for fee waivers and financial aid. Collecting enrollment fees and providing waivers and financial aid is a peculiarly governmental function administered by community college districts as part of their mission to provide educational services to the students. Moreover, the test claim legislation imposes unique fee collection, fee waiver, and BOGG eligibility determination requirements on community college districts that do not apply generally to all residents or entities in the state. Therefore, staff finds that community college enrollment fees, fee waivers, and Board of Governors grants constitute a "program" within the meaning of article XIII B, section 6 of the California Constitution.

Issue 2: Does the test claim legislation impose a new program or higher level of service on community college districts within the meaning of article XIII B, section 6 of the California Constitution?

Article XIII B, section 6 of the California Constitution states, "whenever the Legislature or any state agency *mandates* a new program or higher level of service on any local government, the state shall provide a subvention of funds." (Emphasis added.) This provision was specifically intended to prevent the state from forcing programs on local government that require them to spend their tax revenues.[17] To implement article XIII B, section 6, the Legislature enacted Government Code section 17500 et seq. Government Code section 17514 defines "costs mandated by the state" as "any increased costs which a local agency or school district is *required* to incur . . . as a result of any statute. . . .which *mandates* a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." (Emphasis added.) "Mandates" as used in article XIII B, section 6 has been defined to mean "orders" or "commands."[18] If the test claim legislation does not mandate

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[15] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[16] *Carmel Valley Fire Protection Dist., supra,* 190 Cal.App.3d at page 537.

[17] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Los Angeles, supra,* 43 Cal.3d 46, 56; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283-1284.

[18] *Long Beach Unified School District, supra,* 225 Cal.App.3d 155, 174.

the school district to perform a task, then compliance is within the discretion of the school district and a state-mandated program does not exist. The state has no duty under article XIII B, section 6 to reimburse the school district for costs of programs or services incurred as a result of the exercise of local discretion or choice.[19]

To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.[20]

Collection of enrollment fees: Education Code section 76300 governs collection of enrollment fees as follows:

- Subdivision (a) requires the governing board of each community college district to charge each student a fee.
- Subdivision (b) prescribes the fee amount of $12 per unit per semester for 1998-99, and $11 per unit per semester effective fall 1999-2000,[21] and requires the chancellor to proportionally adjust the fee for term lengths based on a quarter system.
- Subdivision (c) requires the chancellor, for computing apportionments to districts, to subtract from the total revenue owed to each district, 98 percent of the revenues received by districts from charging the fee.
- Subdivision (d) requires the chancellor to reduce apportionments by up to 10 percent to any district that does not collect the fee.

Under preexisting law, community colleges were authorized but not required to impose various student fees for the following: physical education courses using nondistrict facilities,[22] health services,[23] parking services,[24] transportation services,[25] program changes,[26] and late applications.[27]

Prior to the test claim statute, there was no requirement to collect student fees except from nonresident students.[28] Therefore, because it is not a new activity, staff finds that collecting fees from nonresident students is not a new program or higher level of service.

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[19] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783.

[20] *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d 830, 835.

[21] Statutes 1999, chapter 72 lowered the school year 1999-2000 fees from $12 to $11. Because chapter 72 became effective July 6, 1999 to be applied in fall 1999, it does not affect claimant's reimbursement period.

[22] Former Education Code section 72245 and current Education Code section 76395.

[23] Former Education Code section 72246 and current Education Code section 76355.

[24] Former Education Code section 72247 and current Education Code section 76360.

[25] Former Education Code section 72248 and current Education Code section 76361.

[26] Former Education Code sections 72250 – 72250.5 and current California Code of Regulations, title 5, section 58507.

[27] Former Education Code section 72251.

[28] Education Code section 76140.

Education Code section 76300, subdivision (f) authorizes but does not require the governing board of a community college district to exempt special part-time students admitted pursuant to section 76001 from the student enrollment fee. This refers to students who attend a community college while still in high school. Since admitting these students is discretionary, collecting fees from them is not a new program or higher level of service within the meaning of article XIII B, section 6.

In sum, staff finds that collecting enrollment fees constitutes a new program or higher level of service within the meaning of article XIII B, section 6 for all students except for nonresidents, and except for special part-time students (pursuant to Ed. Code, § 76300, subd. (f)).

Refunds for program changes: California Code of Regulations, title 5, sections 58500 through 58508,[29] also pertain to community college student fees. Section 58500 defines the enrollment fee, section 58501 states the semester, quarter or fractional unit fee, section 58501.1 discusses the differential enrollment fee, section 58502 states the enrollment fee shall be charged at the time of enrollment, and section 58503 requires students to be charged for variable unit classes at the time of enrollment, based on the number of units in which the college enrolls the student. Section 58507 authorizes students to add or drop classes during the term pursuant to district policy, and requires the enrollment fee to be adjusted accordingly. Section 58508 governs refunds for program changes made during the first two weeks of instruction for a primary term-length course, or by the 10 percent point of the length of the course for a short-term course.

Prior law did not address enrollment fee refunds because there were no fees. Prior law did, however, require community colleges to impose a fee of $10 per course, not to exceed $20, for a student program change consisting of dropping one or more courses any time after two weeks from the commencement of instruction in any term. In 1987, this fee was made permissive and was not to exceed one dollar ($1) "for the actual pro rata cost for services relative to a program change consisting of adding or dropping one or more courses any time after two weeks from the commencement of instruction in any term."[30]

In disputing that program changes constitute a new program or higher level of service, DOF points out that California Code of Regulations, title 5, section 58507 authorizes, but does not require community colleges to allow students to add or drop classes during the term. This section reads as follows:

> A community college district may allow a student to add or drop classes during the term pursuant to district policy. The enrollment fee or differential enrollment fee shall be adjusted to reflect added or dropped courses as allowed by district policy.

DOF is correct that the first activity, allowing a student to add or drop courses, is not required. However, the fee adjustment (a separate activity) is mandatory upon request. Section 58508 states:

> (a) A community college district governing board shall refund upon request any enrollment fee paid by a student pursuant to Sections 58501 or 58501.1 for program

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[29] California Code of Regulations, title 5, section 58509 was not pled by claimant. This analysis does not address section 58509.

[30] Former Education Code sections 72250 and 72250.5. Both statutes excused the fee for changes initiated or required by the community college.

changes made during the first two weeks of instruction for a primary term – length course, or by the 10 percent point of the length of the course for a short-term course.

(b) A student shall be allowed at least two weeks from the final qualifying date of the program change specified in Subsection (a) [sic] to request an enrollment fee refund.

(c) A community college district shall not refund any enrollment fee paid by a student for program changes made after the first two weeks of instruction for a primary term-length course, or after the 10 percent point of the length of the course for a short-term course, unless the program change is a result of action by the district to cancel or reschedule a class or to drop a student pursuant to section 55202 (g) where the student fails to meet a prerequisite.

(d) When refunding an enrollment fee pursuant to subsection (a), a community college district may retain once each semester or quarter an amount not to exceed $10.00.

Allowing the student program changes pursuant to section 58507 is an activity that is not required. The statute states that a "community college **may** allow a student to add or drop classes" (emphasis added). Use of the word "may" is permissive.[31] Thus, changing programs is an activity within the discretion of the community college district to allow. The court of appeal has concluded that discretionary actions of local agencies are not new programs or higher levels of service within the meaning of article XIII B, section 6 of the California Constitution.[32] In *City of Merced,* the court found that the exercise of eminent domain was discretionary and therefore not a cost which plaintiff was required or mandated to incur. The same is true in section 58507, which authorizes but does not require community colleges to allow program changes. Therefore, staff finds that section 58507 of title 5 of the California Code of Regulations is not a new program or higher level of service because the community college district is authorized but not required to allow a student to add or drop classes.

However, refunding the enrollment fee on request (within the first two weeks of instruction for a primary term – length course, or by the 10 percent point of the length of the course for a short-term course) is a required activity, separate from the program change, pursuant to section 58508. These two sections are reconcilable in that section 58508 requires a refund within the first two weeks of instruction, but section 58507 authorizes but does not require community college districts to allow program changes after that two-week period, or 10 percent point of length of the course for a short-term course. The fee refund is triggered by the state regulation in section 58508, not by the community college district.

Thus, staff finds that subdivisions (a) and (b) of section 58508 of title 5 of the California Code of Regulations is a new program or higher level of service because it expressly requires a refund upon request of any enrollment fee for program changes made during the first two weeks of instruction, or 10 percent point of length of the course for a short-term course; and requires allowing at least two weeks from the final qualifying date of the program change for students to request an enrollment fee refund.

Staff also finds that subdivisions (c) and (d) are not new programs or higher levels of service because they do not require a community college activity. Subdivision (c) is a prohibition,

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[31] Education Code section 75.

[32] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783.

because it prohibits the community college from making refunds except under certain circumstances, and subdivision (d) merely allows the community college to retain $10 from the student fees refunded.

Subdivision (e) governs refunds for students in active or reserve military service who withdraw from courses due to military orders. This subdivision requires a refund "if the district has adopted a withdrawal policy pursuant to section 55758." Therefore, it is not required. Subdivision (f) authorizes the district to determine if the student received federal Title IV funds during enrollment prior to refunding the enrollment fee or tuition. This subdivision is also not required. Therefore, staff finds subdivisions (e) and (f) of section 58508 of title 5 of the California Code of Regulations do not constitute a new program or higher level of service.

Fee waivers: The fee waiver provisions of Education Code section 76300 provide as follows:

- Subdivision (e) exempts the enrollment fee for (1) students enrolled in noncredit courses designated by section 84757; (2) California State University (CSU) or University of California (UC) students enrolled in remedial classes provided on a CSU or UC campus for whom the district claims an attendance apportionment pursuant to an agreement between the district and the CSU or UC; (3) student enrolled in credit contract education courses under certain conditions.
- Subdivision (f) authorizes (but does not require) fee exemption for special part-time students admitted pursuant to Education Code section 76001.
- Subdivision (g) requires fees to be waived for recipients of Aid to Families with Dependent Children (AFDC) or Supplemental Security Income/State Supplementary Program (SSI), or a general assistance program, or those who demonstrate financial need in accordance with federal methodology. The fee waiver is also required for students who demonstrate eligibility according to income standards established by the Board of Governors and section 58620 of title 5 of the California Code of Regulations.
- Subdivision (h) requires a fee waiver for dependents or unmarried surviving spouses of members of the California National Guard who die or become permanently disabled as a result of an event that occurred during active service of the state.
- Subdivision (i) states legislative intent to fund fee waivers for students who demonstrate eligibility pursuant to subdivisions (g) and (h), and requires the Board of Governors to allocate to districts two percent of the fees waived pursuant to those subdivisions. Subdivision (i) also requires the Board of Governors, from funds provided in the annual Budget Act, to allocate to districts $.91 per credit unit waived pursuant to subdivisions (g) and (h) for determination of financial need and delivery of student financial aid services.

Prior law did not require fee waivers because there were no enrollment fees.

The DOF, in its 8/30/02 comments on 99-TC-13, contends that waiving fees is not an "activity," but the preclusion of participation in the new program of collecting enrollment fees. DOF cites language in the Board of Governors Fee Waiver Program Manual for 2001/2002, stating that waivers are simply a transaction in which no money is received. DOF argues that upon proof of eligibility for a waiver, the community colleges neither provide anything to, nor collect anything from, the student. DOF concludes that since fee waivers prohibit colleges from participation in

the new program of enrollment fees, for this particular test claim, providing fee waivers for exempt students is not a state-mandated activity. DOF admits that the fee waiver is granted "upon proof of eligibility."[33]

In comments of 9/25/01, DOF notes that the determinations for fee waiver eligibility required by Education Code sections (g) and (h) are alternative methods for determining student eligibility for BOGGs and not additional requirements. As students receive Board of Governors fee waivers without achieving any of the criteria listed above, by meeting income limits, an eligibility determination is not necessarily contingent on performance of any of these activities and they should not be considered higher levels of service. Furthermore, according to DOF the analysis of BOGG determinations pursuant to California Code of Regulations, title 5, section 58620 focuses on every activity, requirement, and criteria for determining Board of Governors eligibility, so any costs identified with section 58620 would include these activities. BOGG determination is discussed below.

The new activity for community colleges is not waiving the fee; rather it is determining the student's eligibility for the fee waiver required (not authorized) in section 76300 for students who belong to one of the following groups:

(1) Those enrolled in noncredit courses designated by section 84757 (e.g., courses on parenting, English as a second language, those for immigrants eligible for educational services in citizenship, etc.);

(2) CSU or UC students enrolled in remedial classes provided on a CSU or UC campus for whom the district claims an attendance apportionment pursuant to an agreement between the district and the CSU or UC;

(3) Students enrolled in credit contract education courses pursuant to section 78021, if the entire cost of the course, including administrative costs, is paid by the public or private agency, corporation, or association with which the district is contracting and if these students are not included in the calculation of the average daily attendance of that district;

(4) A recipient of benefits under the AFDC, SSI, or a general assistance program, or has demonstrated financial need in accordance with the methodology set forth in federal law or regulation for determining the expected family contribution of students seeking financial aid.

(5) Any student who demonstrates eligibility according to income standards established by the Board of Governors and contained in section 58620 of title 5 of the California Code of Regulations (this section governs eligibility for BOGGs, discussed below).

(6) A student who, at the time of enrollment is a dependent, or surviving spouse who has not remarried, of any member of the California National Guard who, in the line of duty and while in the active service of the state (as defined), was killed, died of a

[33] Education Code section 76300, subdivision (g) reads in pertinent part, "The governing board of a community college district also shall waive the fee requirements of this section for any student **who demonstrates eligibility** according to income standards established by the Board of Governors and contained in section 58620 of Title 5 of the California Code of Regulations." (Emphasis added.) Education Code section 76300, subdivision (i)(1) reads in pertinent part "It is the intent of the Legislature that sufficient funds be provided to support the provision of a fee waiver for every student **who demonstrates eligibility** pursuant to subdivisions (g) and (h). (Emphasis added.)

disability resulting from an event that occurred while in the active service of the state, or is permanently disabled as a result of an event that occurred while in the active service of the state.

The test claim legislation requires community colleges to grant fee waivers for the groups of students specified above "for any student who demonstrates eligibility."[34] Thus, the community colleges must determine if a student is eligible for the waivers through an application process. A student qualifies for a waiver by being a member of only one of the groups specified above. Therefore, staff finds that determining eligibility for a fee waiver for each student applicant by determining which one of the groups to which the student belongs, of the groups listed in Education Code section 76300, subdivisions (e), (g) and (h), is a new program or higher level of service.

Eligibility for a Board of Governors grant is included by reference[35] in Education Code section 76300, subdivision (g), which states, in pertinent part:

> The governing board of a community college district also shall waive the fee requirements of this section for any student who demonstrates eligibility according to income standards established by the Board of Governors and contained in Section 58620 of the California Code of Regulations.

Since claimant also pled section 58620 of title 5 of the California Code of Regulations, it is discussed separately below.

Board of Governors Grants ("BOGGs")

BOGG regulations: California Code of Regulations, title 5, sections 58600 - 58630 govern the distribution of a BOGG, which is "an instrument used by a community college district to process the financial assistance provided to a low-income student."[36]

Section 58611 requires community college districts to report to the CCC the number of and amounts provided for BOGGs. Section 58612 requires a district to provide BOGGs "to all students who are eligible and who apply for this assistance." This section also states a presumption of student eligibility for the remainder of the academic year until the beginning of the following fall term, and states that nothing in the chapter prohibits community college districts from establishing an application deadline for BOGGs. Section 58613 requires BOGGS to be made in the amount of enrollment fees calculated after program changes (pursuant to section 58507, discussed above). Section 58620 lists the eligibility criteria for a BOGG, which is California residency and one of the criteria under the rubric of either (1) income standards;[37] (2)

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[34] *Ibid.*

[35] California Code of Regulations, title 5, section 58620.

[36] California Code of Regulations, title 5, section 58601.

[37] The income standards are: (A) be single and independent student having no other dependents and whose total income in the prior year was equal to or less than 150% of the U.S. Department of Health and Human Services (HHS) Poverty Guidelines for a family of one. Or be a married, independent student having no dependents other than a spouse, whose total income of both student and spouse in the prior year was equal to or less than 150% of the HHS Poverty Guidelines for a family of two. (B) Be a student who is dependent in a family having a total income in the prior year equal to or less than 150% of the HHS Poverty Guidelines for a family of that size, not including the student's income, but including the student in the family size. (C) Provide documentation of taxable or untaxed income. (D) Be a student who is married or a single head of household in a family having a total income in the prior

recipient of benefits described in Education Code section 76300, subdivision (g);[38] or (3) need-based financial aid eligibility.[39]

Prior law did not require community colleges to determine or document eligibility for or provide BOGGs to students.

In its 9/25/01 comments, DOF asserts that much of the infrastructure for determining whether a student is eligible to have fees waived already existed prior to 1975. For example, Education Code section 76355[40] requires the governing board of a community college district to adopt rules and regulations that either exempt low-income students from any health service fee or provide for the payment of the fee from other sources. Education Code section 69648 requires the community colleges to adopt rules and regulations to, among other activities, identify students who would be eligible for extended opportunity programs and services (EOPS) based on socioeconomic disadvantages. Both of these sections existed when enrollment fee waivers were implemented in 1984 and still exist. DOF argues that section 58620 of the California Code of Regulations merely clarifies the process for identifying low-income students and does not constitute a higher level of service.

Claimant argues that the legislation enacting the health fee merely required adoption of rules and regulations that either exempt "low-income" students or provide for payment of fees from other sources. But the legislation provided no guidance or direction as to the method or means to determine whether a student was "low-income," and said nothing of the BOGG factors of section 58620 of the California Code of Regulations. Claimant states that DOF's argument fails because there was no "infrastructure" to determine the specific requirements of section 58620 until 1987. Claimant also notes that the existence of "infrastructure," or lack thereof, is not one of the statutory exceptions set forth in Government Code section 17556, and therefore irrelevant.

Staff finds that determining eligibility for BOGGs is a new program or higher level of service.

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year equal to or less than 150% of the HHS Poverty Guidelines for a family of that size. (E) Be an independent student whose estimated family contribution as determined by federal methodology is equal to zero or a dependent student for whom the parent portion of the estimated family contribution as determined by federal methodology is equal to or less than zero. (F) For purposes of this subsection HHS Poverty guidelines used each year shall be the most recently published guidelines immediately preceding the academic year for which a fee waiver is requested.

[38] The benefits described in Education Code section 76300, subdivision (g) are for recipients of Aid to Families with Dependent Children, the general assistance program, or demonstration of financial need in accordance with the methodology set forth in federal law or regulation for determining the expected family contribution of students seeking financial aid. Subsection (2) also lists: (A) At the time of enrollment be a recipient of benefits under the Temporary Assistance to Needy Families (TANF) program. A dependent student whose parents(s) or guardian(s) are recipients of TANF shall be eligible if the TANF program grant includes a grant for the student or if the TANF grant is the sole source of income for the parent or guardian. (B) At the time of enrollment be a recipient of benefits under the Supplemental Security Income (SSI) program. A dependent student whose parent(s) or guardian(s) are recipients of SSI shall be eligible if the SSI program grant is the sole source of income for the parent or guardian(s). (C) At the time of enrollment be a recipient of benefits under the General Assistance program. (D) Provide documentation that the student if [sic] a recipient of benefits under one of the programs identified in Education Code section 76300(g) and (h) at the time of enrollment. Documentation sufficient to meet the requirements of this subdivision shall provide official evidence of these benefits.

[39] Need-Based Financial Aid Eligibility means any student who has been determined financially eligible for federal and/or state needed [sic] based financial aid.

[40] Former Education Code section 72246.

DOF's argument is unconvincing. The health fee promulgated in Education Code section 76355, cited by DOF, is not mandatory. Subdivision (b) states that the governing board "may decide whether the fee shall be mandatory or optional." Since the health fee is optional, the "infrastructure" cited by DOF is also optional. More importantly, nothing in the record indicates that a "BOGG" determination, or even a substantially similar determination, must be made for waiver of the optional health fee pursuant to section 76355, or the student's "social or economic disadvantages" to determine eligibility for the extended opportunity program pursuant to section 69648.[41]

Determination of eligibility for a BOGG, however, partially overlaps with determining eligibility for a fee waiver. In fact, anyone eligible for a BOGG is eligible for a fee waiver,[42] but eligibility for a BOGG includes other non-fee-waiver criteria as well. Therefore, staff finds that determining eligibility for and providing BOGGs to students who apply is a new program or higher level of service. Staff finds that the exception to this activity is determinations that must already be performed for fee waivers that must also be performed for BOGGs, such as determining whether the student receives AFDC, general assistance, and SSI. In other words, determination of AFDC, general assistance and SSI qualifies a student for both a fee waiver and a BOGG, so those determinations are not a new program or higher level of service, but are already encompassed in the fee waiver determinations described above.

Because districts are required to report to the CCC the number of and amounts provided for BOGGs, which is a new requirement, staff also finds that this reporting is a new program or higher level of service. (Cal. Code Regs., tit. 5, § 58611).

BOGG Executive Orders: Claimant alleges that the *Board of Governors Fee Waiver Program and Special Programs, 2000-2001 Program Manual* ("BOGG Program Manual")[43] is a state mandate. The BOGG Program Manual is issued by the CCC to assist community college financial aid staff,[44] and includes requirements for financial aid office staff. It contains interpretations of the student financial aid sections of title 5 of the California Code of Regulations, and requires community college financial aid offices to perform documentation and training duties. Because the CCC enforces the title 5 regulations, the CCC's interpretation of the title 5 regulations is entitled to some consideration.[45] Therefore, staff finds that the BOGG Program Manual constitutes an executive order within the meaning of Government Code section 17516 to the extent that it contains requirements issued by a state agency.

The 2000-2001 BOGG Program Manual requires the following activities:

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[41] Eligibility for EOPs is stated in title 5, section 56220 of the California Code of Regulations, which were adopted in 1987. Eligibility criteria include California residency, less than 70 units of degree-credit completion, eligibility for a BOGG pursuant to section 58620 (1) or (2), and be educationally disadvantaged as determined by the EOPS director or designee, who must consider specific factors.

[42] Education Code section 76300, subdivision (g).

[43] California Community Colleges Chancellor's Office, Board of Governors Fee Waiver Program and Special Programs, 2000-2001 Program Manual, effective July 1, 2000 – June 30, 2001.

[44] A copy of the BOGG Program Manual and other forms are available at the California Community College Chancellor's Office website: <http://www.cccco.edu/divisions/ss/financial%20assistance/financial%5F assistance.htm.> [as of Jan. 7, 2003].

[45] *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal. 4th 1, 15.

(1) Documenting public benefits for recipients of Temporary Assistance to Needy Families (TANF), SSI/SSP, and General Assistance, (Section 4.2.2), or

(2) Documenting those eligible under income standards (Section 4.3.4); and

(3) Attending training offered by the Chancellor's Office within the first year of appointment for new directors/managers/ coordinators/officers in charge of day-to-day operations of the financial aid office (Section 11.3).

These are new requirements that were unnecessary before the test claim legislation because there were no enrollment fees for which BOGGs were needed.

Staff finds therefore, pursuant to the BOGG Program Manual, the following are new programs or higher levels of service: (1) documenting public benefits for recipients of Temporary Assistance to Needy Families (TANF), SSI/SSP, and General Assistance, or documenting those eligible under income standards; and (2) for new directors/managers/coordinators/officers in charge of day-to-day operations of the financial aid office, attending training offered by the Chancellor's Office within the first year of their appointment. (Cal. Community Colleges Chancellor's Office, Board of Governors Fee Waiver Program and Special Programs, 2000-2001 Program Manual, effective July 1, 2000 – June 30, 2001, Sections 4.2.2, 4.3.4 and 11.3). Staff finds that the remainder of the BOGG Program Manual is not a new program or higher level of service.

District reporting and accountability: Claimant pled California Code of Regulations, title 5, section 58630, which requires districts to identify separately in district accounts dollars allocated for financial assistance, and requires adoption of procedures to document all financial assistance provided on behalf of students pursuant to chapter 9 of title 5 of the California Code of Regulations. The procedures must include rules for retention of support documentation that will enable an independent determination regarding accuracy of the district's certification of need for financial assistance.

Prior to adoption of section 58630, there was no requirement for community colleges to account for financial assistance funds separately in district accounts.

Therefore, staff finds that the following activities constitute a new program or higher level of service pursuant to section 58630 of title 5 of the California Code of Regulations: identifying dollars for financial assistance in separate district accounts; adopting procedures that will document all financial assistance provided on behalf of students pursuant to chapter 9 of title 5 of the California Code of Regulations; and including in the authorized procedures rules for retention of support documentation which will enable an independent determination regarding accuracy of the district's certification of need for financial assistance.

In summary, staff finds the following activities constitute new programs or higher levels of service on community college districts within the meaning of article XIII B, section 6 for all students except nonresidents and special part-time students:[46]

- Calculating and collecting the student enrollment fee for each student enrolled except for nonresidents, and except for special part-time students cited in section 76300, subdivision (f). (Ed. Code, § 76300, subds. (a) & (b); Cal. Code Regs., tit. 5, §§ 58501, 58502 & 58503.);

[46] Education Code sections 76300, subdivision (f), and 76001.

- Issuing refunds upon request for any enrollment fee for program changes made during the first two weeks of instruction for a primary term-length course, or by the 10 percent point of the length of the course for a short-term course, and allowing at least two weeks from the final qualifying date of the program change to request an enrollment fee refund. (Cal. Code Regs., tit. 5, § 58508.);
- Determining eligibility for a fee waiver for each student applicant by determining which one of the groups to which the student belongs, of the groups listed in Education Code section 76300, subdivisions (e), (g) and (h);
- Determining eligibility for and providing BOGGs to students who apply, except for determinations that must already be performed for fee waivers that must also be performed for BOGGs, such as determining whether the student receives AFDC, general assistance, or SSI. (Cal.Code Regs., tit. 5, §§ 58612, 58613 & 58620.);
- Reporting to the CCC the number of and amounts provided for BOGGs. (Cal. Code Regs., tit. 5, § 58611.);
- (1) Documenting public benefits for recipients of Temporary Assistance to Needy Families, SSI/SSP, and General Assistance, or (2) Documenting those eligible for BOGGs under income standards; and (3) for new directors/managers/coordinators/ officers in charge of day-to-day operations of the financial aid office, attending training offered by the Chancellor's Office within the first year of their appointment. (Cal. Community Colleges Chancellor's Office, Board of Governors Fee Waiver Program and Special Programs, 2000-2001 Program Manual, effective July 1, 2000 – June 30, 2001, Sections 4.2.2, 4.3.4 & 11.3);
- Identifying dollars for financial assistance in separate district accounts; adopting procedures that will document all financial assistance provided on behalf of students pursuant to chapter 9 of title 5 of the California Code of Regulations; and including in the procedures the rules for retention of support documentation which will enable an independent determination regarding accuracy of the district's certification of need for financial assistance. (Cal. Code Regs., tit. 5, § 58630.)

Staff also finds that all other test claim statutes, regulations, and executive orders (including the remainder of the BOGG Program Manual) not cited above are not new programs or higher levels of service within the meaning of article XIII B, section 6.[47]

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

In order for the activities listed above to impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution, two criteria must apply. First, the activities must impose costs mandated by the state.[48] Second, no statutory exceptions as listed in

[47] The additional activities pled by claimant include: "entering the student enrollment fee collection and waiver information into the district cashier system and data processing and accounting systems," and "determination of credit courses." These activities do not appear in the test claim statute or regulations and therefore would be more appropriately discussed in the parameters and guidelines should the Commission approve this test claim.

[48] *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 835. Government Code section 17514.

Government Code section 17556 can apply. Government Code section 17514 defines "costs mandated by the state" as follows:

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

Government Code section 17556, subdivision (d) precludes finding costs mandated by the state if after hearing, the Commission finds that the "local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

Government Code section 17556, subdivision (e) precludes findings costs mandated by the state if the test claim statute provides for offsetting savings which result in no net costs, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund it.

Collection of enrollment fees (Ed. Code, § 76300, subds. (a) & (b); Cal. Code Regs., tit. 5, §§ 58501, 58502 & 58503.): In response to the *Enrollment Fee Collection* test claim, the DOF originally commented as follows: "For the most part, DOF agrees that the test claim statutes constitute a new program or higher level of service because community college districts had not previously been required to collect enrollment fees from students." However, DOF concludes that reimbursement should be denied because the statutory scheme sets up a mechanism whereby community college districts are automatically provided with funding for their costs of administering the program.[49] Since collection of enrollment fees is entwined with the entire admission process it would be extremely difficult or impossible to accurately isolate the tasks involved with collecting enrollment fees. DOF submits that the Legislature has validly determined that two percent of the revenue from fees is adequate to compensate community college districts for administering the test claim statutes.

In its response, claimant first quotes the Community College Chancellor's Office comments, which like the test claim, note that colleges are compensated in the amount of two percent of the enrollment fees collected for the cost of collecting the enrollment fee. Claimant cites the legislative history provided by the CCC that quoted the Legislative Analyst's conclusion that the two percent revenue credit was an insufficient reimbursement. Claimant goes on to quote the applicable provisions of Government Code section 17556, subdivisions (d) and (e), as follows:

> The Commission shall not find costs mandated by the state, as defined in section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the Commission finds that: [¶]...[¶]
> (d) The local agency or school district has the **authority to levy** services charges, fees, or assessments **sufficient to pay** for the mandated program or increased level of service.

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[49] Education Code, section 76300, subdivision (c) states that for purposes of computing apportionments to community college districts, the Chancellor shall subtract 98% of the revenues received by districts from enrollment fees from the total revenue owed to each district.

(e) **The statute or executive order provides for offsetting savings** to local agencies or school districts **which result in no net costs** to the local agencies or school districts, or includes **additional revenue that was specifically intended to fund the costs** of the state mandate in an **amount sufficient** to fund the cost of the state mandate. (Emphasis added by claimant).

Claimant asserts these two Government Code subdivisions require the Commission to make findings of law and fact. Regarding subdivision (d), it can be determined that as a matter of law, neither the test claim statutes nor other laws provide the "authority to levy service charges, fees, or assessments" for the collection of enrollment fees. The "revenue credit" is not a service fee, charge, or assessment upon the consumer (student) of a service provided by the college district. Regarding subdivision (e), as a matter of law, the test claim statutes do not include "offsetting savings" which result in no net costs. A new program was added, and no other mandated program was removed by the statute. However, as a matter of law, the test claim statutes did include "additional revenue that specifically intended to fund the costs of the mandate" in the form of the revenue credit. According to claimant, this begs the question of fact of whether the additional revenue is "sufficient to fund the cost of the state mandate." The entire cost to implement the mandate will vary from district to district, so it cannot be determined as a matter of fact that the revenue credit is sufficient for any or all districts. The revenue credit can in the usual course of the mandate process be addressed by the annual claiming process whereby the claimants are required by law to report their cost of implementing the mandate from which they must deduct other reimbursement and funds, in this case, the two-percent revenue credit.

Regarding DOF's statement that the collection of enrollment fees is entwined with the entire admission process making it extremely difficult, if not impossible to accurately isolate the specific tasks involved with collecting enrollment fees, claimant notes this is without foundation, and is neither a statutory exception to reimbursement of costs mandated by the state, nor a practical argument. The parameters and guidelines determine which activities are reimbursable and the cost accounting methods to be used, and the claimants have the burden of complying with the parameters and guidelines, not the state. Also, enrollment fee collection involves a high volume of uniform transactions (collecting the fee) comprised of identifiable direct costs (staff time and forms to collect the fee). After several years of data are accumulated, claimant asserts that this mandate would be a candidate for a uniform cost allowance.

Staff finds the community colleges' revenue credit does not preclude reimbursement for the fee collection activities specified. Government Code section 17556, subdivision (d), by its express terms, only applies to "fees, or assessments **sufficient to pay** for the mandated program or increased level of service" (emphasis added). Likewise, subdivision (e) only applies to "revenue ...in an amount **sufficient to fund** the cost of the state mandate" (emphasis added). As set forth below, the record indicates that the revenue credit is insufficient to fund these activities.

The test claim statute reads in pertinent part as follows:

> **76300**. (a) The governing board of each community college district shall charge each student a fee pursuant to this section. [¶]...[¶]
> (c) For the purposes of computing apportionments to community college districts pursuant to Section 84750, the chancellor shall subtract from the total revenue owed to each district, 98 percent of the revenues received by districts from charging a fee pursuant to this section.

Claimant submitted a declaration that it incurred about $677,640 (or $4.60 per student) in staffing and other costs in excess of the two percent of the enrollment fees retained during July 1998 to June 1999.[50] The assertion of insufficient fee authority is not only undisputed, but is supported by the LAO's legislative history submitted by the CCC.[51] Thus, staff finds that Government Code section 17556, subdivision (d) does not preclude reimbursement because the record indicates that the fee is not sufficient to pay for the program.

Similarly, staff finds that Government Code section 17556, subdivision (e) does not preclude reimbursement because there is nothing in the record to indicate that the offsetting savings or additional revenue is sufficient to fund the mandate. Specifically, there is nothing in the record to indicate the two percent revenue credit is sufficient to fund the mandate.[52]

Regarding DOF's assertion regarding the Legislature's valid determination that two percent of the revenue from fees is adequate to compensate community college districts for administering the test claim statutes, staff disagrees. DOF cites no authority for this, nor is there statutory language in the test claim statute to support it. In fact, the Legislature did not make a determination that two percent of the enrollment fee is adequate to compensate community colleges.

Even if the Legislature had expressly determined the fee adequate, the determination would not prevent finding the existence of a mandate. Two cases have held legislative declarations unenforceable that attempt to limit the right to reimbursement. In *Carmel Valley Fire Protection District v. State of California,*[53] the court held that "Legislative disclaimers, findings and budget control language are no defense to reimbursement." The *Carmel Valley* court called such language "transparent attempts to do indirectly that which cannot lawfully be done directly."[54] Similarly, in *Long Beach Unified School District v. State of California,*[55] the Legislature deleted requested funding from an appropriations bill and enacted a finding that the executive order did not impose a state-mandated local program. The court held that "unsupported legislative disclaimers are insufficient to defeat reimbursement. ...[The district,] pursuant to Section 6, has a constitutional right to reimbursement of its costs in providing an increased service mandated by the state. The Legislature cannot limit a constitutional right."[56] If the Legislature could not prevent a mandate explicitly as the authorities indicate, it certainly could not prevent one implicitly.

In its 8/30/02 comments on the draft staff analysis on the *Enrollment Fee Collection* test claim, DOF asserts that the community colleges have sufficient fee authority pursuant to Education

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[50] Declaration of Carrie Bray, Director, Accounting Services, Los Rios Community College District, June 22, 2000.

[51] Office of the Legislative Analyst, analysis of Assembly Bill No. 1 (1983-1984 2d Ex. Sess.) January 23, 1984.

[52] Should the Commission approve staff's recommendation, the two percent fee would be determined to be an offset in the parameters and guidelines per California Code of Regulations, title 2, section 1183.1, subdivision (a), paragraphs (8) and (9).

[53] *Carmel Valley, supra,* 190 Cal.App.3d at page 521.

[54] *Id.* at page 541.

[55] *Long Beach Unified, supra,* 225 Cal.App.3d 155.

[56] *Id.* at page 184.

Code section 70902, subdivision (b) (9), for enrollment fee collection. This statute covers fees of a governing board "as it is required to establish by law," or "as it is authorized to establish by law." The fees in existing law that fall within the authorization provided in section 70902, subdivision (b) (9) are for the following purposes: apprenticeship courses, health, parking and transportation, instructional materials, course auditing, student body center building and operations, fees for classes not eligible for state apportionments, and fees for physical education courses requiring use of nondistrict facilities.[57]

For fee authority pursuant to Education Code section 70902, subdivision (b) (9) to apply, it must be "required or authorized by law." There is nothing in the record to indicate the existence of any fee authority "required or authorized by law," however, for collecting enrollment fees other than that listed in Education Code section 76300. The record indicates this section 76300 authority is not "sufficient to pay for the mandated program" within the meaning of Government Code section 17556, subdivision (d). Therefore, staff finds that the fee authority in Education Code section 70902, subdivision (b) (9) does not preclude reimbursement under this test claim.

Refunds for program changes (Cal. Code Regs., tit. 5, § 58508, subd. (d)): According to DOF, costs for processing refunds do not constitute state mandated costs because community college districts have preexisting regulatory authority to charge up to $10 per semester or quarter for refunding a student's enrollment fees pursuant to California Code of Regulations, title 5, section 58508, subdivision (d). The regulations provide that governing boards shall refund enrollment fees when a student makes a request within a specified time and, when the district does refund fees, it may retain once each semester or quarter a maximum of $10. Therefore, according to DOF, claimant has the "authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service." (Gov. Code, § 17556, subd. (d).) Consequently, DOF argues that the Commission cannot find costs mandated by the State with respect to the claimant's cost of processing fee refunds. The applicable parts of section 58508 read as follows:

> (a) A community college district governing board shall refund upon request any enrollment fee paid by a student pursuant to Section 58501 or 58501.1 for program changes made during the first two weeks of instruction for a primary term-length course, or by the 10 percent point of the length of the course for a short-term course. [¶]...[¶]
> (d) When refunding an enrollment fee pursuant to Subsection (a), a community college district may retain once each semester or quarter an amount not to exceed $10.00.

Claimant asserts that this regulation did not "pre-exist" the collection of enrollment fees, but was adopted as a result of the establishment of enrollment fees. There were no enrollment fees to refund until there were enrollment fees. The need to refund fees is a foreseeable consequence of collecting them and is properly an activity to be included in the cost mandated by the state subject to reimbursement. There is no statutory assertion that the $10 is adequate for the refunding process. As with the two percent revenue credit, it will be a reduction of the total cost of implementing the mandate.

Staff recognizes the colleges' authority to retain up to $10 of the enrollment fee, and that the regulations cap the amount at $10. Staff finds, as with the enrollment fee revenue credit and fee waiver allocation discussed above, that the $10 retention does not preclude reimbursement so

[57] Education Code sections 76350 through 76395.

long as the authority is insufficient to cover the cost of providing the service. Therefore, staff finds that Government Code section 17556, subdivision (d), does not apply to the activity of refunding enrollment fees for program changes.

Fee waivers & BOGGs (Ed. Code, § 76300, subds. (e), (g) & (h); Cal. Code Regs., tit. 5, §§ 58612, 58613 & 58620.): DOF argues that costs associated with fee waivers should not be included in this claim because a statutory compensation mechanism currently exists for those costs. Education Code section 76300, subdivision (i), states legislative intent to provide sufficient funds for fee waivers for every student who demonstrates eligibility pursuant to subdivisions (g) and (h) (referring to students who receive AFDC, SSI or other general assistance or dependents or surviving spouses of members of the California National Guard who are killed or permanently disabled in the line of duty). This section also requires the Community Colleges Board of Governors, from funds in the annual budget act, to allocate to community colleges two percent of the fees waived under subdivisions (g) and (h) of section 76300. Finally, this section requires the Board of Governors to allocate from funds in the annual budget act ninety-one cents ($0.91) per credit unit waived pursuant to subdivisions (g) and (h) for determination of financial need and delivery of student financial aid services, on the basis of the number of students for whom fees are waived.

Thus, DOF argues that costs associated with fee waivers should not be included in the test claim.

In its 9/25/01 comments on the *Enrollment Fee Waivers* test claim, 00-TC-15, DOF argued that funding is provided to cover costs associated with determining eligibility for fee waivers. DOF disputes the number of fee waiver determinations pled by claimant, estimating it to be roughly 36 percent of the number asserted by claimant. DOF also asserts that the average time to make a fee waiver is overstated by claimant, since students only need to demonstrate that they meet one of the seven criteria. DOF says it believes that the total cost of the fee waiver determination is less than $70,000, and that the Glendale Community College District received $66,000 for Student Financial Aid Administration and $22,888 for Fee Waiver Administration, both allocated as authorized by Education Code section 76300, subdivision (i). DOF believes that eligibility determination is fully funded and not a reimbursable mandate.

In its 11/12/01 rebuttal to DOF's comments on *Enrollment Fee Waivers* (00-TC-15), claimant objects to DOF's comments as legally incompetent and in violation of California Code of Regulations, title 2, section 1183.02(d) because (1) they are not signed under penalty of perjury by an authorized representative that they are true and complete to the best of the representative's personal knowledge or information and belief, and (2) they are not supported by documentary evidence authenticated by declarations under penalty of perjury (Cal. Code Regs., tit. 2, § 1183.02 (c)(2).). Claimant argues that DOF's comments constitute hearsay.

Claimant also disputes DOF's assertion of revenue sufficient to fund any requirements for determining eligibility for fee waivers or BOGGs. Claimant asserts that Government Code section 17556, subdivision (e), indicates that test claim statutes must include the offsetting revenue in the same legislation, and that claimant already identified the offsetting revenue in the test claim as 7% of the fees waived from July 1, 1999 through July 4, 2000 and at ninety-one cents ($0.91) per credit unit waived thereafter pursuant to Education Code section 76300, subdivision (i)(2). Claimant asserts that the cost to implement the mandate will vary from district to district so it cannot be determined if this identified revenue is sufficient for any or all of them.

Staff finds that Education Code section 76300, subdivision (i), does not preclude finding a mandate for determining fee waivers. Claimant's assertion in the record indicates that legislative allocations are not sufficient to pay for the waivers under the fee collection program. In sum, staff finds that neither Government Code section 17556, subdivisions (d) and (e), nor the statute's reimbursement mechanism, precludes reimbursement for costs associated with fee waivers or BOGGs. Revenue as a result of Education Code section 76300, subdivision (i), or any other source, would be determined as offsetting revenue in the parameters and guidelines for this test claim.[58]

District reporting and accountability (Cal. Code Regs., tit. 5, § 58630): In its 9/25/01 comments, DOF argues that the reporting and accounting activities do not constitute reimbursable mandates because claimant seeks reimbursement to document and account for funds allocated for collection of enrollment fees, but section 58630 only refers to identification and documentation of financial assistance, not enrollment fee collection. Therefore, any attempt to claim reimbursement for the accounting and documentation of enrollment fees should be denied. DOF also asserts that this activity receives funding from both the two percent funds for fee waiver administration and the seven percent fund for Student Financial Aid Administration.

DOF is correct in observing that section 58630 only pertains to financial assistance. As to prior receipt of funding, Education Code section 76300, subdivision (i)(2) states, "From funds provided in the annual Budget Act, the Board of Governors shall allocate to community college districts, pursuant to this subdivision, an amount equal to ninety-one cents ($0.91) per credit unit waived pursuant to subdivision (g) and (h) **for determination of financial need and delivery of student financial aid services**, on the basis of the number of students for whom fees are waived." (Emphasis added.) This funding would be considered as an offset in the parameters and guidelines for this test claim should the Commission adopt this analysis.

In summary, there is nothing in the record to indicate that the Legislature repealed other programs or appropriated sufficient funds for enrollment fee collection or fee waivers or BOGGs.

Conclusion

Based on the foregoing analysis, staff concludes that the test claim legislation imposes a partial reimbursable state-mandated program on community college districts within the meaning of

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[58] California Code of Regulations, title 2, section 1183.1, subdivision (a), paragraphs (8) and (9).

[59] Declaration of Carrie Bray, Director, Accounting Services, Los Rios Community College District, June 22, 2000.

[60] Should the Commission approve staff's recommendation, the two percent and $10 fees may be determined to be offsets when the parameters and guidelines are adopted per California Code of Regulations, title 2, section 1183.1, subdivision (a), paragraphs (8) and (9).

[61] *Carmel Valley, supra*, 190 Cal.App.3d at page 521.

[62] *Id.* at page 541.

[63] *Long Beach Unified, supra,* 225 Cal.App.3d 155.

[64] *Id.* at page 184.

article XIII B, section 6 of the California Constitution and Government Code section 17514 for all students except nonresidents and special part-time students[65] for the following activities:

- Calculating and collecting the student enrollment fee for each student enrolled except for nonresidents, and except for special part-time students cited in section 76300, subdivision (f). (Ed. Code, § 76300, subds. (a) & (b); Cal. Code Regs., tit. 5, §§ 58501, 58502 & 58503.);
- Issuing refunds upon request for any enrollment fee for program changes made during the first two weeks of instruction for a primary term-length course, or by the 10 percent point of the length of the course for a short-term course, and allowing at least two weeks from the final qualifying date of the program change to request an enrollment fee refund. (Cal. Code Regs., tit. 5, § 58508.);
- Determining eligibility for a fee waiver for each student applicant by determining which one of the groups to which the student belongs, of the groups listed in Education Code section 76300, subdivisions (e), (g) and (h);
- Determining eligibility for and providing BOGGs to students who apply, except for determinations that must already be performed for fee waivers that must also be performed for BOGGs, such as determining whether the student receives AFDC, general assistance, or SSI. (Cal.Code Regs., tit. 5, §§ 58612, 58613 & 58620.);
- Reporting to the CCC the number of and amounts provided for BOGGs. (Cal. Code Regs., tit. 5, § 58611.);
- (1) Documenting public benefits for recipients of Temporary Assistance to Needy Families, SSI/SSP, and General Assistance, or (2) Documenting those eligible for BOGGs under income standards; and (3) for new directors/managers/coordinators/ officers in charge of day-to-day operations of the financial aid office, attending training offered by the Chancellor's Office within the first year of their appointment. (Cal. Community Colleges Chancellor's Office, Board of Governors Fee Waiver Program and Special Programs, 2000-2001 Program Manual, effective July 1, 2000 – June 30, 2001, Sections 4.2.2, 4.3.4 & 11.3.);
- Identifying dollars for financial assistance in separate district accounts; adopting procedures that will document all financial assistance provided on behalf of students pursuant to chapter 9 of title 5 of the California Code of Regulations; and including in the procedures the rules for retention of support documentation which will enable an independent determination regarding accuracy of the district's certification of need for financial assistance. (Cal. Code Regs., tit. 5, § 58630.)

Staff also finds that all other test claim statutes, regulations, and executive orders (including the remainder of the BOGG Program Manual) not cited above are not new programs or higher levels of service within the meaning of article XIII B, section 6.

[65] Education Code sections 76300, subdivision (f), and 76001.

Recommendation

Staff recommends that the Commission adopt the staff analysis and approve the test claim for the activities listed above.

Should the Commission adopt staff's recommendation to approve this test claim, the enrollment fee, fee waiver compensation, and refund-processing fee would be identified as offsets[66] in the parameters and guidelines.

[66] California Code of Regulations, title 2, section 1183.1, subdivision (a), paragraphs (8) and (9).

1983 Ed Code

Authority to Operate Student Health Centers and Provide Health Supervision and Service

72244. The governing board of any community college district may provide health supervision and services, including direct or indirect medical and hospitalization services, and operate a student health center or centers wherein students in grades 13 and 14 and other persons authorized by the governing board may be diagnosed and treated. School physicians shall be authorized to provide medical treatment at such centers.

(Enacted by Stats. 1976, Ch. 1010.)

Fee for Physical Education Courses Requiring Use of Nondistrict Facilities

72245. The governing board of a community college district may impose a fee on a participating student for the additional expenses incurred when physical education courses are required to use nondistrict facilities.

(Enacted by Stats. 1976, Ch. 1010.)

Health Fees

72246. (a) 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 seven dollars and fifty cents ($7.50) for each semester, and five dollars ($5) for summer school, or five dollars ($5) 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, authorized by Section 72244, or both.

(b) If pursuant to this section a fee is required, the governing board of a district shall decide the amount of the fee, if any, that a part-time student is required to pay. The governing board may decide whether the fee shall be mandatory or optional.

(c) The governing board of a district maintaining a community college shall adopt rules and regulations that either exempt low-income students from any fee required pursuant to subdivision (a) or provide for the payment of the fee from other sources.

(d) The governing board of a district maintaining a community college shall adopt rules and regulations that exempt from any fee required pursuant to subdivision (a): (1) students who depend exclusively upon prayer for healing in accordance with the teachings of a bona fide religious sect, denomination, or organization; (2) students who are attending a community college under an approved apprenticeship training program.

(e) All fees collected pursuant to this section shall be deposited in the fund of the district designated by the California Community Colleges Budget and Accounting Manual. These fees shall be expended only for the purposes for which they were collected.

Authorized expenditures shall not include, among other things, athletic trainers' salaries, athletic insurance, medical supplies for athletics, physical examinations for intercollegiate athletics, ambulance services and the salaries of health professionals for athletic events, any deductible portion of accident claims filed for athletic team members, or any other expense that is not available to all students. No student shall be denied a service supported by student health fees on account of participation in athletic programs.

(Amended by Stats. 1981, Ch. 930, Sec. 10.1.)

Parking Service Fees

72247. The governing board of a community college district may require of students in attendance in grades 13 and 14 and employees of the district, the payment of a toll, in an amount not to exceed twenty dollars ($20) per semester

forty dollars ($40) per regular school year to be fixed by the board, for parking services.

Such toll shall only be required of students and employees using such services. All such tolls collected shall be deposited in the designated fund of the district in accordance with the California Community Colleges Budget and Accounting Manual and shall be expended only for parking services or for purposes of reducing the costs to students and faculty of the college of using public transportation to and from the college.

Tolls collected for use of parking services provided for by investment of student body funds under the authority of Section 76064 shall be deposited in a designated fund in accordance with the California Community Colleges Budget and Accounting Manual for repayment to the student organization.

"Parking services," as used in this section, means the purchase, construction, and operation and maintenance of parking facilities.

(Amended by Stats. 1981, Ch. 930.)

Transportation Service Fees

72248. (a) The governing board of a community college district may require of students in attendance in grades 13 and 14 and employees at a campus of the district the payment of a fee for purposes of reducing fares for services provided by common carriers or municipally owned transit systems to such students and employees, as provided in subdivision (b).

(b) Fees authorized by subdivision (a) for transportation services may be required only of students and employees using such services, or, in the alternative, of either of the following groups of people:

(1) Upon the favorable vote of a majority of the students and a majority of the employees of a campus of the district, voting at an election on the question of whether or not the governing board should require all students and employees at the campus to be assessed fees for transportation services for a two-year period, the fees may be required of all students and all employees of a campus of the community college district; or

(2) Upon the favorable vote of a majority of the students at a campus of the district voting at an election on the question of whether or not the governing board should require all students to be assessed fees for transportation services for a two-year period, the fees may be required of all students at the campus of the community college district; provided that the employees shall not be entitled to use such services.

(c) In the event that fees are required to be assessed to all students and employees or all students as provided in subparagraphs (1) and (2) of subdivision (b) for a two-year period, such authorization may be continued for additional two-year periods by the governing board maintaining the campus, upon the favorable vote of a majority of the students and a majority of the employees or, in the case of subdivision (b) (2), upon the favorable vote of a majority of the students of such campus, voting in an election on the question of whether or not such required fees should be continued.

(d) If pursuant to this section a fee is required of students for transportation services, any fee required of a part-time student shall be a pro rata lesser amount than full-time students, depending on the number of units for which such part-time student is enrolled. In addition, a governing board maintaining transportation services shall adopt rules and regulations governing the exemption of low-income students from required fees, and may adopt rules and regulations that provide for the exemption of others.

(e) The total fees to be fixed by the governing board of a community college

1983 Ed Code

district pursuant to this section and Section 72247 shall not exceed the amount prescribed in Section 72247.

(Enacted by Stats. 1976, Ch. 1010.)

Program Changes: Imposition of Fee

Text of section effective August 1, 1983 until July 1, 1987

72250. (a) The governing board of a community college district shall impose a fee of ten dollars ($10) per course, not to exceed a total amount of twenty dollars ($20), for a student program change consisting of dropping one or more courses any time after two weeks from the commencement of instruction in any term. The fee shall not be charged for changes due to special circumstances affecting the student's ability to complete the course or for changes initiated or required by the community college.

(b) Each community college district shall submit a report to the Chancellor of the California Community Colleges which provides information regarding all of the following:

(1) The number of students who drop courses after the second week.

(2) Revenues derived from fees assessed pursuant to subdivision (a).

(3) The number of fee waivers granted students due to a request initiated by the community college on the basis of special circumstances affecting the student's ability to complete the course.

(c) This section shall become inoperative on July 1, 1987, and, as of January 1, 1988, is repealed, unless a later enacted statute which becomes effective on or before January 1, 1988, deletes or extends the dates on which it becomes inoperative and is repealed.

(Amended and repealed by Stats. 1983, Ch. 565. Effective August 1, 1983. Inoperative July 1, 1987. Repeal operative January 1, 1988. See section of same number below.)

Program Changes: Imposition of Fee

Text of section effective August 1, 1983 until September 27, 1983

72250. The governing board of a community college district may impose a fee, not to exceed one dollar ($1), for the actual pro rata cost for services relative to a program change consisting of adding or dropping one or more courses any time after two weeks from the commencement of instruction in any term. Such fee shall not be charged for changes initiated or required by the community college.

This section shall become operative July 1, 1987.

(Added by Stats. 1983, Ch. 565. Effective August 1, 1983. Operative July 1, 1987. See section of same number above.)

Program Changes: Imposition of Fee

Text of section effective September 27, 1983

72250.5. The governing board of a community college district may impose a fee, not to exceed one dollar ($1), for the actual pro rata cost for services relative to a program change consisting of adding one or more courses any time after two weeks from the commencement of instruction in any term. Such fee shall not be charged for changes initiated or required by the community college.

(Added by renumbering Section 72250, as added by Stats. 1983, Ch. 565, Sec. 1.5, by Stats. 1983, Ch. 1095. Effective September 27, 1983.)

Charge for Late Application Fee

72251. The governing board of any community college district may impose a late application fee of not to exceed two dollars ($2) for any application for admission or readmission which is filed after the date established by the governing board for the filing of applications for admission or readmission to the community college.

(Enacted by Stats. 1976, Ch. 1010.)

Limitation on Campaign Expenditures and Contributions

72254. The governing board of a community college district may by resolution limit campaign expenditures or contributions in elections to district offices.

(Enacted by Stats. 1976, Ch. 1010.)

Use of Funds for Membership or Participation in Discriminatory Organizations

72255. No funds under the control of a community college district shall ever be used for membership or for any participation involving a financial payment or contribution, on behalf of the district or any individual employed by or associated therewith, in any private organization whose membership practices are discriminatory on the basis of race, creed, color, sex, religion, or national origin. This section does not apply to any public funds which have been paid to an individual officer or employee of the district as salary, or to any funds which are used directly or indirectly for the benefit of student organizations.

(Added by Stats. 1978, Ch. 1099.)

Report on Part-Time Employment Patterns and Practices

72256. The Board of Governors of the California Community Colleges shall publish a statewide report on part-time employment patterns and practices in each community college district to be submitted to the Legislature no later than January 1, 1982. At the least, the report shall include a comparison of full-time and part-time faculty in the areas of teaching workload, related academic activities, remuneration, types of certificates, types of classes taught, length of employment, and whether or not the faculty members are evaluated. Information on assignments performed by full-time instructors which is in addition to their full-time assignment and for which additional compensation is provided shall be included in the report.

(Added by Stats. 1980, Ch. 1177.)

Article 3. Delineation of Functions

(Article 3 enacted by Stats. 1976, Ch. 1010)

Legislative Intent

72280. By enacting this article the Legislature declares its intent to more specifically delineate the powers, duties, and functions of the community college district governing boards and the powers, duties, and functions of the Board of Governors of the California Community Colleges.

(Amended by Stats. 1981, Ch. 470.)

Definitions

72281. As used in this article, "board of governors" means the Board of Governors of the California Community Colleges. "District governing board" means the governing board of a community college district. "District" means a community college district.

(Enacted by Stats. 1976, Ch. 1010.)

Rules and Regulations

72282. The district governing board shall establish rules and regulations not inconsistent with the regulations of the board of governors and the laws of this state for the government and operation of one or more community colleges in the

(a) Loans, with or without interest, to any student body organization established in another community college of the district for a period not to exceed three years.

(b) Invest money in permanent improvements to any community college district property including, but not limited to, buildings, automobile parking facilities, gymnasiums, swimming pools, stadia and playing fields, where such facilities, or portions thereof, are used for conducting student extracurricular activities or student spectator sports, or when such improvements are for the benefit of the student body. Such investment shall be made on condition that the principal amount of the investment plus a reasonable amount of interest thereon shall be returned to the student body organization as provided herein. Any community college district approving such an investment shall establish a fund in accordance with the California Community Colleges Budget and Accounting Manual in which moneys derived from the rental of community college district property to student body organizations shall be deposited. Moneys collected by the governing board for automobile parking facilities as authorized by Section 72247 shall be deposited in the fund designated by the California Community Colleges Budget and Accounting Manual if the parking facilities were provided for by investment of student body funds under this section. Moneys shall be returned to the student body organization as contemplated by this section exclusively from such special fund and only to the extent that there are moneys in such special fund. Whenever there are no outstanding obligations against the special fund, all moneys therein may be transferred to the general fund of the school district by action of the local governing board.

Two or more student body organizations of the same community college district may join together in making such investments in the same manner as is authorized herein for a single student body. Nothing herein shall be construed so as to limit the discretion of the local governing board in charging rental for use of community college district property by student body organizations as provided in Section 76060.

(Amended by Stats. 1981, Ch. 930.)

Supervision and Audit of Student Funds

76065. The governing board of any community college district shall provide for the supervision of all funds raised by any student body or student organization using the name of the college.

The cost of supervision may constitute a proper charge against the funds of the district.

The governing board of a community college district may also provide for a continuing audit of student body funds with community college district personnel.

(Enacted by Stats. 1976, Ch. 1010.)

Student Political Organization Activity

76067. Any student political organization which is affiliated with the official youth division of any political party that is on the ballot of the State of California may hold meetings on a community college campus and may distribute bulletins and circulars concerning its meetings, provided that there is no endorsement of such organization by the school authorities and no interference with the regular educational program of the school.

(Enacted by Stats. 1976, Ch. 1010.)

Article 7. Exercise of Free Expression

(Article 7 enacted by Stats. 1976, Ch. 1010)

Exercise of Free Expression by Students: Adoption of Rules and Regulations

76120. The governing board of a community college district shall adopt rules and regulations relating to the exercise of free expression by students upon the premises of each community college maintained by the district, which shall include reasonable provisions for the time, place, and manner of conducting such activities.

Such rules and regulations shall not prohibit the right of students to exercise free expression including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, and the wearing of buttons, badges, or other insignia, except that expression which is obscene, libelous or slanderous according to current legal standards, or which so incites students as to create a clear and present danger of the commission of unlawful acts on community college premises, or the violation of lawful community college regulations, or the substantial disruption of the orderly operation of the community college, shall be prohibited.

(Enacted by Stats. 1976, Ch. 1010.)

Article 8. Administration of Punishment to Students

(Article 8 enacted by Stats. 1976, Ch. 1010)

Administration of Punishment to Students

76130. The governing board of any community college district shall adopt rules and regulations authorizing instructors, supervisors, and other certificated personnel to administer reasonable punishment to students when such action is deemed an appropriate corrective measure.

(Amended by Stats. 1981, Ch. 470.)

Article 9. Nonresident Tuition

(Article 9 enacted by Stats. 1976, Ch. 1010)

Nonresident Tuition

76140. A community college district may admit and shall charge a tuition fee to nonresident students. The district may exempt from all or parts of the fee:

(a) All nonresidents who enroll for six or fewer units. Exemptions made pursuant to this subdivision shall not be made on an individual basis; or

(b) Any nonresident who is both a citizen and resident of a foreign country, provided that the nonresident has demonstrated a financial need for the exemption and not more than 10 percent of the nonresident foreign students attending any community college district may be so exempted. Exemptions made pursuant to this subdivision may be made on an individual basis.

A district may contract with a state, a county contiguous to California, the federal government, a foreign country, or an agency thereof, for payment of all or a part of a nonresident student's tuition fee.

Attendance of nonresident students shall not be reported as resident average daily attendance for state apportionment purposes, except as provided by statute in which case a nonresident tuition fee may not be charged.

The nonresident tuition fee shall be set by the governing board of each community college district not later than February 1 of each year for the succeeding fiscal year. Such fee may be paid in installments, as determined by the governing board of the district.

The fee established by the governing board pursuant to the preceding paragraph shall represent for nonresident students enrolled in 30 semester units or 45 quarter units of credit per fiscal year (a) the amount which was expended by the district for the current expense of education as defined by the California Community College Budget and Accounting Manual in the preceding fiscal year increased by the projected percent increase in the United States Consumer Price Index as determined by the Department of Finance for the current fiscal year and succeeding fiscal year and divided by the average daily attendance of all students (including nonresident students) attending in the district in the preceding fiscal year, or (b) the current expense of education in the preceding fiscal year of all districts increased by the projected percent increase in the United States Consumer Price Index as determined by the Department of Finance for the current fiscal year and succeeding fiscal year and divided by the average daily attendance of all students (including nonresident students) attending all districts during the preceding fiscal year, or (c) an amount not to exceed the fee established by the governing board of any contiguous district. However, should the district's preceding fiscal year average daily attendance of all students attending in the district in noncredit courses be equal to or greater than 10 percent of the district's total average daily attendance of all students attending in the district, the district in calculating (a) above may substitute instead the data for current expense of education in grades 13 and 14 and average daily attendance in grades 13 and 14 of all students attending in the district.

The governing board of each community college district shall also adopt a tuition fee per unit of credit for nonresident students enrolled in more or less than 15 units of credit per term by dividing the fee determined in the preceding paragraph by 30 for colleges operating on the semester system and 45 for colleges operating on the quarter system and rounding to the nearest whole dollar. The same rate shall be uniformly charged nonresident students attending any terms or sessions maintained by the community college. The rate charged shall be the rate established for the fiscal year in which the term or session ends.

Any loss in district revenue generated by the nonresident tuition fee shall not be offset by additional state funding.

The provisions of this section which require a mandatory fee for nonresidents shall not apply to any district which borders on another state and has fewer than 500 average daily attendance.

(Amended by Stats. 1983, Ch. 317. Effective July 19, 1983.)

Apprentices Exemption from Nonresident Fee

76142. No fee may be charged to any apprentice who is not a resident of California for attendance in a California community college in classes of related and supplemental instruction as provided under Section 3074 of the Labor Code and in accord with the requirements as set forth in subdivision (d) of Section 3078 of that code.

(Enacted by Stats. 1976, Ch. 1010.)

Nonresident Tuition Fee: Residence Determination

76143. For purposes of the nonresident tuition fee, a community college district shall disregard the time during which a student living in the district resided outside the state, if:

(1) The change of residence to a place outside the state was due to a job transfer and was made at the request of the employer of the student or the employer of the student's spouse or, in the case of a student who resided with, and was a dependent of, the student's parents, the change of residence was made at the request of an employer of either of the student's parents.

(2) Such absence from the state was for a period of not more than four years.

(3) At the time of application for admission to a college maintained by the district, the student would qualify as a resident if the period of the student's absence from the state was disregarded.

A nonresident tuition fee shall not be charged to a student who meets each of the conditions specified in subdivisions (1) to (3), inclusive.

(Amended by Stats. 1977, Ch. 36.)

Article 10. Miscellaneous

(Article 10 enacted by Stats. 1976, Ch. 1010)

Certain Students' Residences More Than 60 Miles From Nearest Attendance Center

76160. Any student under 21 years of age, and any student under 25 years of age who has been honorably discharged or is otherwise returning from active or inactive military service with the armed forces of the United States, who resides in this state and more than 60 miles from the nearest public community college measured by the usual vehicular route between the student's home and the college, may request to attend credit courses at any public community college in the state, whether or not the student's residence is in a district maintaining a community college. The governing board of the district maintaining the community college designated by the student shall admit the student provided all requirements for admission are met.

The provisions of this section shall not apply to any student residing in a district maintaining a community college if that district maintains adequate dormitories or housing facilities or provides adequate transportation for the student between the student's home and the community college attendance center.

If the student resides within territory not included within any community college district and resides more than 60 miles from the nearest community college, measured by the usual vehicular route between the student's home and the attendance center, there shall be paid to the parents or other persons having charge or control of the student and directly to adult students and married minors, by the district in which the student attends, a maintenance allowance not to exceed four dollars ($4) per calendar day, including weekends and school holidays, for the portion of a semester, quarter, or other session or term in which the student is enrolled full time in credit classes in a community college under this section. Community college districts shall receive reimbursement from the chancellor's office for allowances paid to students from nondistrict territory for the prior fiscal year not to exceed the maximum amount as provided in Section 84604.9.

No later than 60 days after the close of each fiscal year the chancellor shall determine the daily allowance rate for the prior fiscal year. If claims made by community colleges exceed total funds raised by nondistrict territories for that purpose prior to July 1, 1978, the chancellor shall prorate the allowances made under this section. No later than 90 days after the close of each fiscal year the community college districts shall pay eligible students at the rate prescribed by the chancellor.

The chancellor shall prescribe procedures for the submission of claims by community college districts and verification of the claims by the appropriate county superintendent of schools.

For the purpose of this section, a person shall be deemed to be honorably discharged from the armed forces (a) if he or she was honorably discharged from the armed forces of the United States or (b) if he or she was inducted into the armed forces of the United States under the "Universal Military Training and Service Act," and (1) satisfactorily completes his or her period of training and service under that act and is issued a certificate to that effect pursuant to that act,

78 Cal.Rptr.2d 1
98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211
(Cite as: 19 Cal.4th 1, 960 P.2d 1031, 78 Cal.Rptr.2d 1)

Supreme Court of California

YAMAHA CORPORATION OF AMERICA,
Plaintiff and Respondent,
v.
STATE BOARD OF EQUALIZATION, Defendant and Appellant.

No. S060145.

Aug. 27, 1998.

Seller of musical instruments sought refund of use taxes assessed on musical instruments that it purchased outside state, stored within state, and ultimately gave away as promotional gifts. The Superior Court, Los Angeles County, No. BC 079 444, Daniel A. Curry, J., ordered refund for gifts to out-of-state recipients, and State Board of Equalization appealed. The Court of Appeal reversed. The Supreme Court granted review, superseding opinion of Court of Appeal. The Supreme Court, Brown, J., held that Board's interpretation of sales and use tax statutes, set out in its Business Taxes Law Guide opinion summaries, were not entitled to degree of judicial deference given to quasi- legislative rules.

Reversed and remanded.

Mosk, J., filed concurring opinion, which George, C.J., and Werdegar, J., joined.

Opinion, 61 Cal.Rptr.2d 244, vacated.

West Headnotes

[1] Administrative Law and Procedure 796
15Ak796 Most Cited Cases

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.

[2] Statutes 219(1)
361k219(1) Most Cited Cases

Agency interpretation of a statute does not carry the same weight, and it is not reviewed under the same standard, as a quasi-legislative regulation; disapproving *Rizzo v. Board of Trustees*, 27 Cal.App.4th 853, 32 Cal.Rptr.2d 892; *DeYoung v. City of San Diego*, 147 Cal.App.3d 11, 194 Cal.Rptr. 722; *Rivera v. City of Fresno*, 6 Cal.3d 132, 98 Cal.Rptr. 281, 490 P.2d 793.

[3] Administrative Law and Procedure 797
15Ak797 Most Cited Cases

When a court assesses the validity of quasi-legislative rules, the scope of its review is narrow; if the court is satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end.

[4] Administrative Law and Procedure 416.1
15Ak416.1 Most Cited Cases

Because interpretation is an agency's legal opinion, however "expert," rather than the exercise of a delegated legislative power tomake law, it commands a commensurably lesser degree of judicial deference than quasi-legislative rule.

[5] Statutes 219(1)
361k219(1) Most Cited Cases

Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent is fundamentally situational; court must consider complex factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command.

[6] Administrative Law and Procedure 416.1
15Ak416.1 Most Cited Cases

If an agency has adopted an interpretive rule in accordance with Administrative Procedure Act (APA) provisions, that circumstance weighs in favor of judicial deference; however, even formal interpretive rules do not command the same weight as quasi-legislative rules. 5 U.S.C.A. § 551 et seq.

[7] Taxation 1336
371k1336 Most Cited Cases

State Board of Equalization's interpretation of sales and use tax statutes, set out in its Business Taxes Law Guide opinion summaries, were entitled to some consideration by court in use tax refund case, but not degree of judicial deference given to quasi-legislative rules.

***2*4**1032** Daniel E. Lungren, Attorney General, Carol H. Rehm, Jr., David S. Chaney and Philip C. Griffin, Deputy Attorneys General, for Defendant and Appellant.

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Daniel Kostenbauder, Lawrence V. Brookes, Berkeley, Wm. Gregory Turner and Dean F. Andal as Amici Curiae on behalf of Plaintiff and Respondent.

BROWN, Justice.

For more than 40 years, the State Board of Equalization (Board) has made available for publication as the Business Taxes Law Guide summaries of opinions by its attorneys of the business tax effects of a wide range of transactions. Known as "annotations," the summaries are prompted by actual requests for legal opinions by the Board, its field auditors, and businesses subject to statutes within its jurisdiction. The annotations are *5 brief statements -- often only a sentence or two -- purporting to state definitively the tax consequences of specific hypothetical business transactions. [FN1] More extensive analyses, called "back-ups," are available to those who request them.

> FN1. Two examples, drawn at random, illustrate the annotation form: "Beer Can Openers, furnished by breweries to retailers with beer, are not regarded as 'self consumed' by the breweries. 10/2/50." (2A State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Tax Annots. (1998) Annot. No. 280.0160, p. 3731.) "Bookmarks Sold For $2.00 'Postage And Handling'. A taxpayer located in California offers a bookmark to customers for a $2.00 charge, designated as postage and handling. Most of the orders received for the bookmark are from out of state. [¶] Assuming that the charge for the bookmark is 50 percent or more of its cost, the taxpayer is considered to be selling the bookmarks rather than consuming them (Regulation 1670(b)). Accordingly, when a bookmark is sent to a California customer through the U.S. Mail, the amount of postage shown on the package is considered to be a nontaxable transportation charge. For example, when a bookmark is sent to a California customer, if the postage on the envelope is shown as 25 cents, then the taxable gross receipts from the transfer is $1.75. If the bookmark is mailed to a customer located outside California, tax does not apply to any of the $2.00 charge. 12/5/88." (*Id.*, Annot. No. 280.0185, pp. 3731-3732.)

FACTS

The taxpayer here, Yamaha Corporation of America (Yamaha), sells musical instruments nationwide. It purchased a quantity of these outside California without paying tax ("extax"), stored them in its resale inventory in a California warehouse, and eventually gave them away to artists, musical equipment dealers and media representatives as promotional gifts. Delivery was made by shipping the instruments via common carrier, either inside or outside California. Yamaha made similar gifts of brochures and other advertising material. Following an audit, the Board determined Yamaha had used the musical instruments and promotional materials *in* California and was thus subject to the state's use tax, an impost levied as a percentage of the property's purchase price. (See Rev. & Tax.Code, § 6008 et seq.) Yamaha paid the taxes determined by the Board to be due (about $700,000) under protest and then brought this refund suit. Although it did not contest the tax assessed on property given to California residents, Yamaha contended no tax was due on the gifts to *out-of-state* recipients.

The superior court decided Yamaha's out-of-state

gifts were excluded from California's use tax, and ordered a refund. That disposition, however, was overturned by the Court of Appeal. Casting the issue as whether Yamaha's promotional gifts had occurred in California or in the state of the donee, the Court of Appeal looked to an annotation in the Business Taxes Law Guide. According to the guide, gifts are subject to California's use tax *6 "[w]hen the donor divests itself of control over the property in this state ..." [FN2] ***3 (2A State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Tax Annots., *supra,* Annot. No. 280.0040, p. 3731.) **1033 Adopting that annotation as dispositive, the Court of Appeal reversed the judgment of the superior court and reinstated the Board's tax assessment. We granted Yamaha's petition for review and now reverse the Court of Appeal's judgment and order the matter returned to that court for further proceedings consistent with our opinion.

FN2. The annotation on which the Board relied -- Annotation No. 280.0040 -- purports to interpret section 6009.1 of the Revenue and Taxation Code, excluding from the definition of storage and use "keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state." Captioned "Advertising Material -- Gifts," the annotation provides that "Advertising or promotional material shipped or brought into the state and temporarily stored here prior to shipment outside state is subject to use tax when a gift of the material [is] made and title passes to the donee in this state. When the donor divests itself of control over the property in this state the gift is regarded as being a taxable use of the property. 10/11/63." (2A State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Tax Annots., *supra,* Annot. No. 280.0040, p. 3731.)

DISCUSSION

I

[1] The question is what legal effect courts must give to the Board's annotations when they are relied on as supporting its position in taxpayer litigation. In the broader context of administrative law generally, the question is what standard courts apply when reviewing an agency's *interpretation* of a statute. In effect, the Court of Appeal held the annotations were entitled to the same "weight" or "deference" as "quasi- legislative" rules. [FN3] The Court of Appeal adopted the following formulation: "[A] long-standing and consistent administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is either 'arbitrary, capricious or without rational basis' [citations], *7 or is 'clearly erroneous or unauthorized.' [Citation.] Opinions of the administrative agency's counsel construing the statute," the court went on to say, "are likewise entitled to consideration. [Citations.] Especially where there has been acquiescence by persons having an interest in the matter," the court added, "courts will generally not depart from such an interpretation unless it is unreasonable or clearly erroneous." As this extract from the Court of Appeal opinion indicates, the court relied on a skein of cases as supporting these several, somewhat inconsistent, propositions of administrative law.

FN3. Throughout, we use the terms "quasi-legislative" and "interpretive" in their traditional administrative law senses; i.e., as indicating both the constitutional source of a rule or regulation and the weight or judicial deference due it. (See, e.g., 1 Davis & Pierce, Administrative Law (3d ed. 1994) § 6.3, pp. 233-248.) Of course, administrative rules do not always fall neatly into one category or the other; the terms designate opposite ends of an administrative continuum, depending on the breadth of the authority delegated by the Legislature. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 575-576, 38 Cal.Rptr.2d 139, 888 P.2d 1268; cf. *Tidewater Marine Western , Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574-575, 59 Cal.Rptr.2d 186, 927 P.2d 296 [comparing the two kinds of rules and suggesting that while interpretive rules are not quasi-legislative in the traditional sense, "an agency would arguably still have to adopt these regulations in accordance with

> [Administrative Procedure Act rulemaking requirements]." The issue is not strictly presented by this case, however: Government Code section 11342, subdivision (g) declares that "[r]egulation" does not include "legal rulings of counsel issued by the ... State Board of Equalization."].)

We reach a different conclusion. An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to "make law," and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves, the binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation. Justice Mosk may have provided the best description when he wrote in *Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th 559, 38 Cal.Rptr.2d 139, 888 P.2d 1268, that " 'The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other.' [Citation.] Quasi-legislative administrative decisions are properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum." ***4**1034(*Id.* at pp. 575-576, 38 Cal.Rptr.2d 139, 888 P.2d 1268; see also *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 325-326, 109 P.2d 935 [An "administrative interpretation ... will be accorded great respect by the courts and will be followed if not clearly erroneous. [Citations.] But such a tentative ... interpretation makes no pretense at finality and it is the duty of this court ... to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction. [Citations.] The ultimate interpretation of a statute is an exercise of the judicial power ... conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body."].)

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 ***8** on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. (See *Traverso v. People* ex rel. *Dept. of Transportation* (1996) 46 Cal.App.4th 1197, 1206, 54 Cal.Rptr.2d 434.) 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." (Judicial Review of Agency Action (Feb.1997) 27 Cal. Law Revision Com. Rep. (1997) p. 81, italics added.)

II

[2] Here, the Court of Appeal relied on language from its prior cases suggesting broadly that an agency interpretation of a statute carries the *same* weight -- that is, is reviewed under the same standard -- as a quasi- legislative regulation. Unlike the annotations here, however, quasi-legislative rules are the substantive product of a delegated *legislative* power conferred on the agency. The formulation on which the Court of Appeal relied is thus apt to lead a court (as it led here) to abdicate a quintessential judicial duty -- applying its independent judgment de novo to the merits of the *legal* issue before it. The fact that in this case the Court of Appeal determined Yamaha's tax liability by giving the Board's annotation a weight amounting to unquestioning acceptance only compounded the error.

We derive these conclusions from long-standing administrative law decisions of this court. Although the web making up that jurisprudence is not seamless, on the whole it is both logical and coherent. In *Culligan Water Conditioning v. State*

Bd. of Equalization (1976) 17 Cal.3d 86, 130 Cal.Rptr. 321, 550 P.2d 593 (*Culligan*), the taxpayer sued for a refund of sales and use taxes paid under protest on ion-exchange equipment used to condition water and leased to residential subscribers: Because it came from a service business rather than the rental of property, the taxpayer contended, the income was not subject to the Sales and Use Tax Law. In refund litigation, the Board relied on an affidavit of its assistant chief counsel characterizing the transactions as leases taxable under the Sales and Use Tax Law. The trial court rejected the Board's position, calling it an unwarranted extension of the words of the statute, and awarded judgment to the taxpayer. (17 Cal.3d at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593.)

Justice Sullivan began his opinion for a unanimous court by asking what was "the appropriate standard of review applicable to the [use tax] assessment against" the taxpayer. (*Culligan, supra,* 17 Cal.3d at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593.) The Board ***9** contended its assessment was based on an "administrative classification" and could be judicially overturned only if it was "arbitrary, capricious or without rational basis." (*Ibid.*) Our opinion pointed out, however, that the basis for the Board's tax assessment "was not embodied in any formal regulation or even interpretative ruling covering the water *****5 **1035** conditioning industry as a whole." (*Ibid.*) Instead, its basis "was nothing more than the Board auditor's interpretation of two existing regulations." (*Ibid.*) "If the Board had promulgated a formal regulation determining the proper classification of receipts derived from the rental of exchange units ... and the regulation had been challenged in the [refund] action," our *Culligan* opinion went on to say, "the proper scope of reviewing such regulation *would* be one of limited judicial review as urged by the Board. [Citations.]" (*Ibid.*, italics added.)

That was not the case in *Culligan,* however. Instead of adopting a formal regulation, the Board and its staff had considered the facts of the taxpayer's particular transactions, interpreted the statutes and regulations they deemed applicable, and "arrived at certain conclusions as to plaintiff's tax liability and assessed the tax accordingly." (17 Cal.3d at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593.) Far from being "the equivalent of a regulation or ruling of general application," the Board's argument was "merely its litigating position in this particular matter." (*Id.* at p. 93, 130 Cal.Rptr. 321, 550 P.2d 593.) In an important footnote to its opinion, the *Culligan* court disapproved language in several Court of Appeal decisions "indicating that the proper scope of review of such litigating positions of the Board (announced either in tax bulletins or merely as the result of an individual audit) is to determine whether the Board's assessment was arbitrary, capricious or had no reasonable or rational basis." (*Id.* at p. 93, fn. 4, 130 Cal.Rptr. 321, 550 P.2d 593.)

Although the Court of Appeal in this case cited *Culligan, supra,* 17 Cal.3d 86, 130 Cal.Rptr. 321, 550 P.2d 593, it regarded *American Hospital Supply Corp. v. State Bd. of Equalization* (1985) 169 Cal.App.3d 1088, 215 Cal.Rptr. 744 (*American Hospital*) as the decisive precedent. The question there was whether disposable paper menus, used for patients' meals in hospitals, were subject to the sales tax. In concluding they were, the Court of Appeal relied on a ruling of Board counsel interpreting a quasi-legislative regulation of the Board. "Interpretation of an administrative regulation," the court wrote, "like [the] interpretation of a statute, is a question of law which rests with the courts. However, the agency's own interpretation of its regulation is entitled to great weight." (*Id.* at p. 1092, 215 Cal.Rptr. 744.) The Board's interpretation could be overturned, the opinion went on to state, only if it was " 'arbitrary, capricious or without rational basis.' " (*Ibid.*)

The *American Hospital* opinion also rejected the taxpayer's contention that because the rule at issue was only an interpretation and not a quasi-legislative rule, it was not entitled to deference. ***10** (*American Hospital, supra,* 169 Cal.App.3d at p. 1092, 215 Cal.Rptr. 744.) Instead, the court read *Culligan* as standing for the *opposite* proposition. Because we had said the rule at issue there did not cover an entire industry, the Court of Appeal reasoned *Culligan* had held in effect that it was nothing more than a " 'litigating position' " and could be ignored. (119 Cal.App.3d at p. 1093, 215 Cal.Rptr. 744.) On that basis, *American Hospital* concluded that because the Board's position on the taxability of paper menus *was* embodied in a "formal regulation" *and* covered the entire hospital industry, it was entitled to same deference as a quasi-legislative rule: "[It] must prevail because it

is neither 'arbitrary, capricious or without rational basis' (*Culligan Water Conditioning v. State Bd. of Equalization, supra,* 17 Cal.3d 86, 92, 130 Cal.Rptr. 321, 550 P.2d 593) nor is it 'clearly erroneous or unauthorized' (*Rivera v. City of Fresno* [(1971)] 6 Cal.3d 132, 140, 98 Cal.Rptr. 281, 490 P.2d 793)." (*Ibid.*)

We think the Court of Appeal in *American Hospital, supra,* 169 Cal.App.3d 1088, 215 Cal.Rptr. 744, and the Court of Appeal in this case by relying on it, failed to distinguish between two classes of rules -- quasi- legislative and interpretive -- that, because of their differing legal sources, command significantly different degrees of deference by the courts. Moreover, *American Hospital* misread our opinion in *Culligan* when it identified the feature that distinguishes one kind of rule from the other. Although the Court of Appeal here did not rely on other prior cases as much as on *American Hospital,* it cited several that appear to perpetuate the same ***6 **1036** confusion. (See *Rizzo v. Board of Trustees* (1994) 27 Cal.App.4th 853, 861, 32 Cal.Rptr.2d 892; *DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18, 194 Cal.Rptr. 722; *Rivera v. City of Fresno* (1971) 6 Cal.3d 132, 140, 98 Cal.Rptr. 281, 490 P.2d 793.)

[3] It is a "black letter" proposition that there are two categories of administrative rules and that the distinction between them derives from their different sources and ultimately from the constitutional doctrine of the separation of powers. One kind -- quasi-legislative rules -- represents an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. (See, e.g., 1 Davis & Pierce, Administrative Law, *supra,* § 6.3, at pp. 233-248; 1 Cooper, State Administrative Law (1965) Rule Making: Procedures, pp. 173-176; Bonfield, StateAdministrative Rulemaking (1986) Interpretive Rules, § 6.9.1, pp. 279- 283; 9 Witkin, Cal. Procedure (4th ed. 1997) Administrative Proceedings, § 116, p. 1160 [collecting cases].) Because agencies granted such substantive rulemaking power are truly "making law," their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it *11 is reasonably necessary to implement the purpose of the statute, judicial review is at an end.

We summarized this characteristic of quasi-legislative rules in *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 65, 219 Cal.Rptr. 142, 707 P.2d 204 (*Wallace Berrie*): " '[I]n reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is "within the scope of the authority conferred" [citation] and (2) is "reasonably necessary to effectuate the purpose of the statute" [citation].' [Citation.] 'These issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with [a] strong presumption of regularity....' [Citation.] Our inquiry necessarily is confined to the question whether the classification is 'arbitrary, capricious or [without] reasonable or rational basis.' (*Culligan, supra,* 17 Cal.3d at p. 93, fn. 4, 130 Cal.Rptr. 321, 550 P.2d 593 [citations].)" [FN4]

> FN4. In one respect, our opinion in *Wallace Berrie* may overstate the level of deference -- even quasi-legislative rules are reviewed independently for consistency with controlling law. A court does not, in other words, defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. The court, not the agency, has "final responsibility for the interpretation of the law" under which the regulation was issued. (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757, 151 P.2d 233; see cases cited, *post,* at p. 7 of 78 Cal.Rptr.2d, at p. 1037 of 960 P.2d; *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1022, 50 Cal.Rptr.2d 892 [Standard of review of challenges to "fundamental legitimacy" of quasi-legislative regulation is " 'respectful nondeference.' "].)

[4] It is the other class of administrative rules, those *interpreting* a statute, that is at issue in this case. Unlike quasi-legislative rules, an agency's

interpretation does not implicate the exercise of a delegated lawmaking power; instead, it represents the agency's view of the statute's legal meaning and effect, questions lying within the constitutional domain of the courts. But because the agency will often be interpreting a statute within its administrative jurisdiction, it may possess special familiarity with satellite legal and regulatory issues. It is this "expertise," expressed as an interpretation (whether in a regulation or less formally, as in the case of the Board's tax annotations), that is the source of the presumptive value of the agency's views. An important corollary of agency interpretations, however, is their diminished power to bind. Because an interpretation is an agency's *legal opinion,* however "expert," rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference. (*Bodinson Mfg. Co. v. Cal. Emp. Com., supra,* 17 Cal.2d at pp. 325-326, 109 P.2d 935.)

In *International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 163 Cal.Rptr. 782, 609 P.2d 1, we contrasted ****1037 ***7** the narrow ***12** standard under which quasi-legislative rules are reviewed -- " limited," we wrote, "to a determination whether the agency's action is arbitrary, capricious, lacking in evidentiary support, or contrary to procedures provided by law" (*id.* at p. 931, fn. 7, 163 Cal.Rptr. 782, 609 P.2d 1) -- with the broader standard courts apply to interpretations. The quasi-legislative standard of review "is *inapplicable* when the agency is not exercising a discretionary rule-making power, but merely *construing* a controlling statute. The appropriate mode of review in such a case is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction. [Citation.]" (*Ibid.,* italics added; see also *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11, 270 Cal.Rptr. 796, 793 P.2d 2 ["courts are the ultimate arbiters of the construction of a statute"]; Dyna-Med, Inc. v. Fair Employment & Housing Com. *(1987) 43 Cal.3d 1379, 1389, 241 Cal.Rptr. 67, 743 P.2d 1323 ["The final meaning of a statute ... rests with the courts."];* Morris v. Williams *(1967) 67 Cal.2d 733, 748, 63 Cal.Rptr. 689, 433 P.2d 697 [" 'final responsibility for the interpretation of the law rests with the courts.' "].)*

[5] Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent -- the "weight" it should be given -- is thus fundamentally *situational.* A court assessing the value of an interpretation must consider complex factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command. Professor Michael Asimow, an administrative law adviser to the California Law Revision Commission, has identified two broad categories of factors relevant to a court's assessment of the weight due an agency's interpretation: those "indicating that the agency has a comparative interpretive advantage over the courts," and those "indicating that the interpretation in question is probably correct." (Cal. Law Revision Com., Tent. Recommendation, Judicial Review of Agency Action (Aug.1995) p. 11 (Tentative Recommendation); see also Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies* (1995) 42 UCLA L.Rev. 1157, 1192-1209.)

[6] In the first category are factors that "assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another." (Tentative Recommendation, *supra,* at p. 11.) The second group of ***13** factors in the Asimow classification -- those suggesting the agency's interpretation is likely to be correct -- includes indications of careful consideration by senior agency officials ("an interpretation of a statute contained in a regulation adopted after public notice and comment is more deserving of deference than [one] contained in an advice letter prepared by a single staff member" (Tentative Recommendation, *supra,* at p. 11)), evidence that the agency "has consistently maintained the interpretation in question, especially if [it] is long-standing" (*ibid.*) ("[a] vacillating position ... is entitled to no deference" (*ibid.*)), and indications that the agency's interpretation was contemporaneous with legislative enactment of the statute being interpreted. If an agency has adopted

an interpretive rule in accordance with Administrative Procedure Act provisions -- which include procedures (e.g., notice to the public of the proposed rule and opportunity for public comment) that enhance the accuracy and reliability of the resulting administrative "product" -- that circumstance weighs in favor of judicial deference. However, even formal interpretive rules do not command the same weight as quasi-legislative rules. Because " 'the ultimate resolution of ... legal questions rests with the courts' " (*Culligan, supra,* 17 Cal.3d at p. 93, 130 Cal.Rptr. 321, 550 P.2d 593), judges play a greater role when reviewing the persuasive value of interpretive rules than they do in determining the validity of quasi-legislative rules.

***8 **1038** A valuable judicial account of the process by which courts reckon the weight of agency interpretations was provided by Justice Robert Jackson's opinion in *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (*Skidmore*), a case arising under the federal Fair Labor Standards Act. The question for the court was whether private firefighters' " waiting time" was countable as "working time" under the act and thus compensable. (323 U.S. at p. 136, 65 S.Ct. 161.) "Congress," the *sKidmore* opinion observed, "did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act." (*Id.* at p. 137, 65 S.Ct. 161.) "Instead, it put this responsibility on the courts. [Citation.] But it did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining [the issue in suit] and a knowledge of the customs prevailing in reference to their solution.... He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it. [Citation.]" (*Id.* at pp. 137-138, 65 S.Ct. 161.)

*14 No statute prescribed the deference federal courts should give the administrator's interpretive bulletins and informal rulings, and they were "not reached as a result of ... adversary proceedings." (*Skidmore, supra,* 323 U.S. at p. 139, 65 S.Ct. 161.) Given those features, Justice Jackson concluded, the administrator's rulings "do not constitute an interpretation of the Act or a standard for judging factual situations which *binds* a ... court's processes, as an authoritative pronouncement of a higher court might do." (*Ibid.,* italics added.) Still, the court held, the fact that "the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect." (*Id.* at p. 140, 65 S.Ct. 161.) "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (*Ibid.*)

[7] The parallels between the statutory powers and administrative practice of the Board in interpreting the Sales and Use Tax Law, and those of the federal agency described in *Skidmore,* are extensive. As with Congress, our Legislature has not conferred adjudicatory powers on the Board as the means by which sales and use tax liabilities are determined; instead, the validity of those assessments is settled in tax refund litigation like this case. (Rev. & Tax.Code, § 6933.) Like the federal administrator in *Skidmore,* the Board has not adopted a formal regulation under its quasi-legislative rulemaking powers purporting to interpret the statute at issue here. As in *Skidmore,* however, the Board and its staff have accumulated a substantial "body of experience and informed judgment" in the administration of the business tax law "to which the courts and litigants may properly resort for guidance." (323 U.S. at p. 140, 65 S.Ct. 161.) Some of that experience and informed judgment takes the form of the annotations published in the Business Taxes Law Guide.

The opinion in the *Skidmore* case and Professor Asimow's account for the Law Revision Commission -- together spanning a half-century of judicial and scholarly comment on the characteristics and role of administrative interpretations -- accurately describe their value and the criteria by which courts judge their weight. The deference due an agency interpretation -- including the Board's annotations at issue here -- turns on a legally informed, commonsense

assessment of their contextual merit. "The weight of such a judgment in a particular case," to borrow again from Justice Jackson's opinion in *Skidmore,* "will depend upon *the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors* ***1039*** ****9*** *which give it power to persuade, if lacking power* ***15*** *to control.* " (*Skidmore, supra,* 323 U.S. at p. 140, 65 S.Ct. 161, italics added.)

As we read the brief filed by the Attorney General, the Board does not contend for any greater judicial weight for its annotations. Its brief on the merits states that "Yamaha is correct that the annotations are not regulations, and they are not binding upon taxpayers, the Board itself, or the Court. Nevertheless, the annotations are digests of opinions written by the legal staff of the Board which are evidentiary of administrative interpretations made by the Board in the normal course of its administration of the Sales and Use Tax Law.... [T]he annotations have substantial precedential effect within the agency. [¶] The interpretation represented in [the] annotations is certainly entitled to some consideration by the Court."

We agree.

CONCLUSION

In deciding this case, the Court of Appeal gave greater weight to the Board's annotation than it warranted. Although the standard used by the Court of Appeal was not the correct one and prejudiced the taxpayer, regard for the structure of appellate decisionmaking suggests the case should be returned to the Court of Appeal. That court can then consider the merits of the use tax issue and the value of the Board's interpretation in light of the conclusions drawn here. To the extent language in *Rizzo v. Board of Trustees, supra,* 27 Cal.App.4th at page 861, 32 Cal.Rptr.2d 892, *DeYoung v. City of San Diego, supra,* 147 Cal.App.3d at page 18, 194 Cal.Rptr. 722, and *Rivera v. City of Fresno, supra,* 6 Cal.3d at page 140, 98 Cal.Rptr. 281, 490 P.2d 793, is inconsistent with the foregoing views, it is disapproved. We express no opinion on the merits of the underlying question of Yamaha's use tax liability.

DISPOSITION

The judgment of the Court of Appeal is reversed and the cause is remanded to that court for further proceedings consistent with this opinion.

GEORGE, C.J., and KENNARD, BAXTER and CHIN, JJ., concur.

MOSK, Justice, concurring.

I concur in the judgment of the majority that the Court of Appeal's formulation of the standard of review for tax annotations, the summaries of tax opinions of the State Board of Equalization's (Board) legal counsel published in the Business Taxes Law Guide, was not quite correct. Specifically the Court of Appeal erred in suggesting that it would defer to ***16*** the Board's or its legal counsel's rule unless that rule is "arbitrary and capricious." The majority do not purport to change the well-established, if not always consistently articulated, body of law pertaining to judicial review of administrative rulings, but merely attempt to clarify that law. I write separately to further clarify the relevant legal principles and their application to the present case.

The appropriate starting point of a discussion of judicial review of administrative regulations is an analysis of quasi-legislative regulations, those regulations formally adopted by an agency pursuant to the California Administrative Procedures Act (APA) and binding on the agency. "The proper scope of a court's review is determined by the *task* before it." (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 679, 170 Cal.Rptr. 484, 620 P.2d 1032, italics added.) In the case of quasi-legislative regulations, the court has essentially two tasks. The first duty is "to determine whether the [agency] exercised [its] quasi-legislative authority within the bounds of the statutory mandate." (*Morris v. Williams* (1967) 67 Cal.2d 733, 748, 63 Cal.Rptr. 689, 433 P.2d 697 (*Morris*).) As the *Morris* court made clear, this is a matter for the independent judgment of the court. "While the construction of a statute by officials charged with its administration, including their interpretation of the authority invested in them to implement and carry out its

provisions, is entitled to *great weight,* nevertheless 'Whatever the force of administrative construction ... *final responsibility for the interpretation of the law rests with the courts.*' [Citation.] Administrative regulations***10 **1040** that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations. [Citations.]" (*Ibid.,* italics added.) This duty derives directly from statute. "Under Government Code [[FN1]] section 11373 [now § 11342.1], '[e]ach regulation adopted [by a state agency], to be effective, must be within the scope of authority conferred....' Whenever a state agency is authorized by statute 'to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, *no regulation adopted is valid or effective unless consistent and not in conflict with the statute....* ' ([§ 11342.2].)" (*Morris, supra,* 67 Cal.2d at p. 748, 63 Cal.Rptr. 689, 433 P.2d 697, fn. omitted, italics added by *Morris* court.)

FN1. All further statutory references are to the Government Code unless otherwise stated.

The court's second task arises once it has completed the first. "If we conclude that the [agency] was empowered to adopt the regulations, we must also determine whether the regulations are 'reasonably necessary to effectuate thepurpose of the statute.' [(§ 11342.2).] In making such a determination, the court will not 'superimpose its own policy judgment upon the *17 agency in the absence of an arbitrary and capricious decision.' [Citations.]" (*Morris, supra,* 67 Cal.2d at pp. 748-749, 63 Cal.Rptr. 689, 433 P.2d 697.)

In *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11, 270 Cal.Rptr. 796, 793 P.2d 2 (*Rank*) we further clarified the two tasks and two distinct standards of review for courts scrutinizing agency regulations. We stated: "As we said in *Pitts v. Perluss* (1962) 58 Cal.2d 824[, 833, 27 Cal.Rptr. 19, 377 P.2d 83], '[a]s to quasi-legislative acts of administrative agencies, "judicial review is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether he has failed to follow the procedure and give the notices required by law." ' [Citations.] When, however, a regulation is challenged as inconsistent with the terms or intent of the authorizing statute, the standard of review is different, because the courts are the ultimate arbiters of the construction of a statute. Thus, [the *Morris* court] in finding that the challenged regulations contravened legislative intent, rejected the agency's claim that the only issue for review was whether the regulations were arbitrary and capricious." (*Ibid.,* fn. omitted.) The *Rank* court then proceeded to reiterate the *Morris* formulation that " '[w]hile the construction of a statute by officials charged with its administration ... is entitled to great weight, ... final responsibility for the interpretation of the law rests with the courts.' " (*Ibid.*) [FN2] (We will henceforth refer to this standard as the "independent judgment/great weight standard.")

FN2. Certain of our own cases have confused the standards of review in this two-pronged test. For example, in *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 65, 219 Cal.Rptr. 142, 707 P.2d 204, after stating the above two-pronged test, declared that neither prong " 'present[s] a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with [a] strong presumption of regularity....' [Citation.] Our inquiry necessarily is confined to the question whether the classification is ' arbitrary, capricious or [without] reasonable or rational basis.' [Citation.]" As the discussion of *Rank* and *Morris* above makes clear, the first prong of the inquiry -- whether the regulation is "within the scope of the authority conferred" -- is *not* limited to the "arbitrary and capricious" standard of review,but employs the independent judgment/great weight standard. (*Rank, supra,* 51 Cal.3d at p. 11, 270 Cal.Rptr. 796, 793 P.2d 2; *Morris, supra,* 67 Cal.2d at pp. 748-749, 63 Cal.Rptr. 689, 433 P.2d 697.) This confusion is in part responsible for the misstatements of the Court of Appeal in the present case.

There is an important qualification to the independent judgment/great weight standard articulated above, when a court finds that the Legislature has *delegated* the task of interpreting or elaborating on a statute to an administrative agency. A court may find that the Legislature has intended to delegate this interpretive or gap-filling power when it employs open-ended statutory language that an agency is authorized to apply or "when an issue of interpretation is heavily freighted with policy choices which the agency is empowered to make." (Asimow, *The Scope of Judicial Review of Decisions of *18 California Administrative Agencies* (1995) ***11**104142 UCLA L.Rev. 1157, 1198-1199 (Asimow).) For example, in *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 9 Cal.Rptr.2d 358, 831 P.2d 798 (*Moore*), we reviewed a regulation by the Board of Accountancy, the agency statutorily chartered to regulate the accounting profession in this state. The regulation provided that those unlicensed by that board could not use the title "accountant," interpreting a statute, Business and Professions Code section 5058, that forbids use of titles "likely to be confused with" the titles of "certified public accountant" and "public accountant." (2 Cal.4th at p. 1011, 9 Cal.Rptr.2d 358, 831 P.2d 798.) As we stated, "the Legislature delegated to the Board the authority to determine whether a title or designation not identified in the statute is likely to confuse or mislead the public." (*Id.* at pp. 1013-1014, 9 Cal.Rptr.2d 358, 831 P.2d 798.)

Thus, the agency's interpretation of a statute may be subject to the most deferential "arbitrary and capricious" standard of review when the agency is expressly or impliedly delegated interpretive authority. Such delegation may often be implied when there are broadly worded statutes combined with an authorization of agency rulemaking power. But when the agency is called upon to enforce a detailed statutory scheme, discretion is as a rule correspondingly narrower. In other words, a court must always make an independent determination whether the agency regulation is "within the scope of the authority conferred," and that determination includes an inquiry into the extent to which the Legislature intended to delegate discretion to the agency to construe or elaborate on the authorizing statute.

The above schema applies to so-called "interpretive" regulations as well as quasi-legislative regulations. As the majority observe, "administrative rules do not always fall neatly into one category or the other...." (Maj. opn., *ante,* at p. 3, fn. 3 of 78 Cal.Rptr.2d, at p. 1033, fn. 3 of 960 P.2d.) Indeed, regulations subject to the formal procedural requirements of the APA include those that "interpret" the law enforced or administered by a government agency, as well as those that "implement" or "make specific" such law. (§ 11342, subd. (b).) As we recently stated: "A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially *legislative* in nature even if it merely *interprets* applicable law." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574-575, 59 Cal.Rptr.2d 186, 927 P.2d 296, italics added.) [FN3] Moreover, all regulations are "interpretive" to some extent, because all ***19** regulations implicitly or explicitly interpret "the authority invested in them to implement and carry out [statutory] provisions...." (*Morris, supra,* 67 Cal.2d at p. 748, 63 Cal.Rptr. 689, 433 P.2d 697.)

> FN3. I note that in federal law, by contrast, the term "interpretive rule" is given a particular significance and legal status. According to statute, "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency" are required to be published in the Federal Register. (5 U.S.C. § 552(a)(1)(D).) But such "interpretive rules," and "general statements of policy" are explicitly exempt from the notice and hearing provisions of the federal APA. (5 U.S.C. § 553(b)(3)(A).) No such distinction exists in California law.

Of course, some regulations may be properly designated "interpretive" inasmuch as they have no purpose other than to interpret statutes. (See, e.g., *International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 163 Cal.Rptr. 782, 609 P.2d 1.) In the case of such regulations, courts will be engaged only in the first of the two

tasks discussed above, i.e., ensuring that the regulation is within the scope of the statutory authority conferred, employing the independent judgment/great weight test. (See *id.* at p. 931, fn. 7, 163 Cal.Rptr. 782, 609 P.2d 1.)

In sum, when reviewing a quasi-legislative regulation, courts consider whether the regulation is within the scope of the authority conferred, essentially a question of the validity of an agency's statutory interpretation, guided by the independent judgment/great weight standard. (*Rank, supra,* 51 Cal.3d at p. 11, 270 Cal.Rptr. 796, 793 P.2d 2.) This is in contrast to the second aspect of the inquiry, whether a regulation is "reasonably necessary**1042 ***12 to effectuate the statutory purpose," wherein courts "will not intervene in the absence of an arbitrary or capricious decision." (*Ibid.*, citing *Morris, supra,* 67 Cal.2d at p. 749, 63 Cal.Rptr. 689, 433 P.2d 697.) Courts may also employ the "arbitrary and capricious" standard in reviewing whether the agency's construction of a statute is correct if the court determines that the particular statutory scheme in question explicitly or implicitly delegates this interpretive or "gap-filling" authority to an administrative agency. (See *Moore v. California State Bd. of Accountancy, supra,* 2 Cal.4th at pp. 1013- 1014, 9 Cal.Rptr.2d 358, 831 P.2d 798; Asimow, *supra,* 42 UCLA L.Rev. at p. 1198.)

What standard of review should be employed for administrative rulings that were not formally adopted under the APA? Such regulations fall generally into two categories. The first is the class of regulations that *should* have been formally adopted under the APA, but were not. In such cases, the law is clear that in order to effectuate the policies behind the APA courts are to give *no* weight to these interpretive regulations. (*Tidewater Marine Western, Inc. v. Bradshaw, supra,* 14 Cal.4th at p. 576, 59 Cal.Rptr.2d 186, 927 P.2d 296; *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204-205, 149 Cal.Rptr. 1, 583 P.2d 744.) To hold otherwise would help to perpetuate the problem of avoidance by administrative agencies of " 'the mandatory requirements of the [APA] of public notice, opportunity to be heard by the public, filing with the Secretary of State, and publication in the [California Code of Regulations].' " *20 (*Armistead, supra,* 22 Cal.3d at p. 205, 149 Cal.Rptr. 1, 583 P.2d 744.) For these reasons, and quite apart from any expertise the agency may possess in interpreting and administering the statute, courts in effect ignore the agency's illegal regulation.

In the second category are those regulations that are not subject to the APA because they are expressly or implicitly exempted from or outside the scope of APA requirements. For such rulings, the standard of judicial review of agency interpretations of statutes is basically the same as for those rules adopted under the APA, i.e., the independent judgment/great weight standard. (See, e.g., *Wilkinson v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491, 501, 138 Cal.Rptr. 696, 564 P.2d 848 [applying essentially this standard to a statutory interpretation arising within the context of the Workers' Compensation Appeals Board's decisional law]; see also Asimow, *supra,* 42 UCLA L.Rev. at pp. 1200-1201; Judicial Review of Agency Action (Feb.1997) 27 Cal. Law Revision Com. Rep. (1997) pp. 81-82 (Judicial Review of Agency Action).)

The Board counsel's legal ruling at issue in this case is an example of express exemption from the APA. Section 11342, subdivision (g), specifies that the term "regulation" for purposes of the APA does not include "legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization...." It is therefore evident that our decisions pertaining to regulations that fail to be approved according to required APA procedures are inapposite. It also appears evident that these rulings, as agency interpretations of statutory law, are also to be reviewed under the independent judgment/great weight standard.

But, as the majority point out, the precise weight to be accorded an agency interpretation varies depending on a number of factors. Professor Asimow states that deference is especially appropriate not only when an administrative agency has particular expertise, but also by virtue of its specialization in administering a statute, which "gives [that agency] an intimate knowledge of the problems dealt with in the statute and the various administrative consequences arising from particular interpretations." (Asimow, *supra,* 42 UCLA L.Rev. at p. 1196.) Moreover, deference is more appropriate when, as in the present case, the agency is interpreting "the statute [it] enforces" rather than "some other statute, the common law, the

[C]onstitution, or prior judicial precedents." (*Ibid.*)

Another important factor, as the majority recognize, is whether an administrative construction is consistent and of long standing. (Maj. opn., *ante,* at p. 7 of 78 Cal.Rptr.2d, at p. 1037 of 960 P.2d) This factor is particularly important for resolution of the present case because the tax annotation with which the case is principally concerned, ***21** Business *****13** ****1043** Taxes Law Guide Annotation No. 280.0040, was first published in 1963, and *Yamaha Corp. of America* does not contest that it has represented the Board's position on the tax question at issue at least since that time. (See now 2A State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Annots. (1998) Annot. No. 280.0040, p. 3731 (hereafter Annotation No. 280.0040).)

As the Court of Appeal has stated: "Long-standing, consistent administrative construction of a statute by those charged with its administration, particularly where interested parties have acquiesced in the interpretation, is entitled to great weight and should not be disturbed unless clearly erroneous." (*Rizzo v. Board of Trustees* (1994) 27 Cal.App.4th 853, 861, 32 Cal.Rptr.2d 892). This principle has been affirmed on numerous occasions by this court and the Courts of Appeal. (See, e.g., *DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18, 194 Cal.Rptr. 722; *Nelson v. Dean* (1946) 27 Cal.2d 873, 880-881, 168 P.2d 16; *Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757, 151 P.2d 233; *Thornton v. Carlson* (1992) 4 Cal.App.4th 1249, 1256-1257, 6 Cal.Rptr.2d 375; *Lute v. Governing Board* (1988) 202 Cal.App.3d 1177, 1183, 249 Cal.Rptr. 161; *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243, 252, 239 Cal.Rptr. 395; *Horn v. Swoap* (1974) 41 Cal.App.3d 375, 382, 116 Cal.Rptr. 113.) Moreover, this principle applies to administrative practices embodied in staff attorney opinions and other expressions short of formal, quasi-legislative regulations. (See, e.g., *DeYoung, supra,* 147 Cal.App.3d 11, 19-21, 194 Cal.Rptr. 722 [long-standing interpretation of city charter provision embodied in city attorney's opinions]; *Napa Valley Educators' Assn., supra,* 194 Cal.App.3d at pp. 251-252, 239 Cal.Rptr. 395 [evidence in the record of the case, including a declaration by official with the State Department of Education, shows long-standing practice of following a certain interpretation of an Education Code provision].)

Two reasons have been advanced for this principle. First, "When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation." (*Whitcomb Hotel, Inc. v. Cal. Emp. Com., supra,* 24 Cal.2d at p. 757, 151 P.2d 233; see also *Nelson v. Dean, supra,* 27 Cal.2d at p. 881, 168 P.2d 16; *Rizzo v. Board of Trustees, supra,* 27 Cal.App.4th at p. 862, 32 Cal.Rptr.2d 892.)

Second, as we stated in *Moore, supra,* 2 Cal.4th at pages 1017-1018, 9 Cal.Rptr.2d 358, 831 P.2d 798, "a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be ***22** presumed to know of it." As the Court of Appeal has further articulated: " '[L]awmakers are presumed to be aware of long-standing administrative practice and, thus, the reenactment of a provision, or the failure to substantially modify a provision, is a strong indication the administrative practice was consistent with underlying legislative intent.' " (*Rizzo v. Board of Trustees, supra,* 27 Cal.App.4th at p. 862, 32 Cal.Rptr.2d 892; see also *Thornton v. Carlson, supra,* 4 Cal.App.4th at p. 1257, 6 Cal.Rptr.2d 375; *Lute v. Governing Board, supra,* 202 Cal.App.3d at p. 1183, 249 Cal.Rptr. 161; *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist., supra,* 194 Cal.App.3d at p. 252, 239 Cal.Rptr. 395; *Horn v. Swoap, supra,* 41 Cal.App.3d at p. 382, 116 Cal.Rptr. 113.) I note that in the present case, the statute under consideration, Revenue and Taxation Code section 6009.1, has been amended twice since the issuance of Annotation No. 280.0040. (Stats.1965, ch. 1188, § 1, p. 3004; Stats.1980, ch. 546, § 1, p. 1503.)

To state the matter in other terms, courts often recognize the propriety of assigning great weight to administrative interpretations of law either by reference to an explicit or implicit delegation of power by the Legislature to an administrative agency (see *Moore, supra,* 2 Cal.4th at pp. 1013-1014, 9 Cal.Rptr.2d 358, 831 P.2d 798;

Asimow, *supra,* 42 UCLA L.Rev. at pp. 1198-1199), or by noting the agency's specialization and expertise in interpreting the statutes it is ***14 **1044** charged with administering (see *Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 982, 8 Cal.Rptr.2d 565; Asimow, *supra,* 42 UCLA L.Rev. at pp. 1195-1196). But there is a third reason for paying special heed to an administrative interpretation: the reality that the administrative agency -- by virtue of the necessity of performing its administrative functions -- creates a body of de facto law in the interstices of statutory law, which is relied on by the business community and the general public to order their affairs and, after a sufficient passage of time, is presumptively accepted by the Legislature. In the present case, this third rationale for according great weight to an administrative interpretation is particularly applicable. Thus, judicial deference in this case is owed not so much to the tax annotation per se but to a long-standing practice of enforcement and interpretation by Board staff of which the annotation is evidence.

There are also particularly sound reasons why the principle of giving especially greater weight to long-standing administrative practice should apply when, as in this case, that practice is embodied in a published ruling of the Board's legal counsel. These rulings have a special legal status. As noted, they have been specifically exempted from the APA by section 11342, subdivision (g). The purpose of this exemption was stated by the Franchise Tax Board staff in its enrolled bill report to the Governor immediately prior the enactment of the 1983 amendment containing the exemption, and its statement could be equally well applied to the Board of *23 Equalization. "Department counsel issues a large number of legal rulings in several forms which address specific problems of taxpayers. While these opinions address specific problems, *they are intended to have general application to all taxpayers similarly situated.* This bill provides that such rulings are not regulations, and accordingly, not subject to the [Office of Administrative Law (OAL)] review process. This statutory determination will permit the department to continue to provide a valuable service to taxpayers. If rulings were deemed to be regulations, the service would have to be discontinued because of the administrative burdens created by the OAL review process." (Franchise Tax Bd. staff, Enrolled Bill Rep., Assem. Bill No. 227 (1983-1984 Reg. Sess.) Sept. 16, 1983, p. 3, italics added.)

Thus, the passage of the 1983 amendment to section 11342 was evidently designed for the benefit of taxpayers, so that they would continue to have information about the effective legal positions of the two tax boards. The complexity of tax law and its application to the manifold factual situations of individual taxpayers appears to far outpace an agency's capacity to promulgate and amend formal regulations. Given the importance of certainty in tax law, the Board has long engaged in the practice of issuing legal opinions to individual taxpayers. (See 1 Cal. Taxes (Cont., Ed., Bar Supp.1996) § 2.152, p. 347.) The Legislature recognized such practice, and recognized the propriety of taxpayer reliance on such rulings, in Revenue and Tax Code section 6596. That section provides that if a person's failure to make a timely payment or return "is due to the person's reasonable reliance on written advice from the [B]oard," that person would be relieved of certain payment obligations. The authorization in section 11342 to publish such individual rulings without following APA requirements is a further legislative means of facilitating business planning and increasing taxpayer certainty about tax law. Publication of this information allows taxpayers subject to the sales and use tax to structure their affairs accordingly, and, if they perceive the need, lobby the Board or the Legislature to overturn these legal rulings. As the Attorney General states in his brief, such rulings, while not binding on the agency, "have substantial precedential effect within the agency." There is accordingly no reason to decline to extend to such legal rulings, insofar as they embody the Board's long-standing interpretations of the sales and use tax statutes, the especially great weight accorded to other representations of long-standing administrative practice. [FN4]

FN4. Yamaha and amicus curiae claim that tax annotations are frequently inconsistent, and that the Board legal staff has been lax in purging the Business Taxes Law Guide of outdated annotations. Obviously, to extent that an old annotation does *not* represent the Board's long- standing,

consistent, interpretation, it does not merit the same consideration. (See *Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1125, 41 Cal.Rptr.2d 46.) In the present case, Yamaha does not contend that Annotation No. 280.0040 is inconsistent with other annotations, or with the Board's actual practice, since it was issued.

***15 **1045** Tax annotations representing the Board's long-standing position may usefully be contrasted to positions the Board might adopt in the context of *24 litigation. In *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 130 Cal.Rptr. 321, 550 P.2d 593, we found that such litigating positions were not entitled to as great a level of deference as administrative rulings that were "embodied in formal regulation[s] or even interpretive ruling[s] covering the ... industry as a whole...." (*Id.* at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593). [FN5] The tax annotation at issue in this case, although originally addressing an individual taxpayer's query, was published and has represented the Board's categorical position regarding taxation of gifts originating from a California source. The annotation, therefore, being both an interpretive ruling of a general nature, and one of long standing, is deserving of significantly greater weight than if the Board had adopted its position only as part of the present litigation. [FN6]

FN5. I note that some of the *Culligan* court's language may be open to misinterpretation. The Board in that case contended that the proper standard of review was whether its position was "arbitrary, capricious or without rational basis." (17 Cal.3d at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593.) The court disagreed, holding that " '[t]he interpretation of a regulation, like the interpretation of the statute, is, of course, a question of law [citations], and while an administrative agency's interpretation of its own regulation obviously deserves great weight [citations], the ultimate resolution of such legal questions rests with courts.' " (*Id.* at p. 93, 130 Cal.Rptr. 321, 550 P.2d 593.) In expressing its disagreement with the proposition that the Board's litigating position deserves the highest level of deference, the *Culligan* court differentiated such positions from "formal regulation" of a general nature, which, the court agreed, would be overturned only if arbitrary and capricious. (*Id.* at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593.) Perhaps because the *Culligan* court was focused on making a distinction between regulations of a general nature and litigating positions, it did not articulate the two-pronged judicial inquiry into the validity of quasi-legislative regulations as discussed above, nor did it specify that the arbitrary and capricious standard applied only to the *second* prong.

Nonetheless, the *Culligan* court was correct in holding that statutory interpretations contained in formal regulations merit more deference, all other things being equal, than an agency's litigating positions.

FN6. Moreover, although the *Culligan* court referred to "litigating positions of the Board (announced either in tax bulletins or merely as the result of an individual audit)" (*Culligan Water Conditioning v. State Bd. of Equalization, supra,* 17 Cal.3d at p. 93, fn. 4, 130 Cal.Rptr. 321, 550 P.2d 593), it was not implying that all material contained in tax bulletins were "litigating positions." Indeed the *Culligan* court cited *Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization* (1973) 30 Cal.App.3d 1009, 106 Cal.Rptr. 867, as an example of a case typifying the limited judicial review appropriate for regulations of a general nature. (*Culligan, supra,* at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593.) The court in *Henry's Restaurants* considered the Board's interpretation of a sales tax question issued in the form of a General Sales Tax Bulletin. (30 Cal.App.3d at p. 1014, 106 Cal.Rptr. 867.) The citation to *Henry's Restaurants* shows that the *Culligan* court's reference to "litigating positions of the Board ... announced ... in tax bulletins" was not to legal rulings of a general nature that might be contained in tax bulletins.

It may be argued that regulations formally adopted in compliance with the APA should intrinsically be assigned greater weight than tax annotations, because the former are promulgated only after a notice and comment period, whereas the latter are devised by the Board's legal staff without public input. ***25** In the abstract, that argument is not without merit. But even if the statutory interpretations contained in tax annotations are not, *ab initio,* as reliable or worthy of deference as formally adopted regulations, the well-established California case law quoted above demonstrates that such reliability may be earned subsequently. Tax annotations that represent the Board's administrative practices may, if they withstand the test of time, merit a weight that initially may not have been intrinsically warranted. Or in other words, while formal APA adoption is one factor in favor of giving greater weight to an agency construction of a statute, the fact that a rule is of long- standing and the statute it interprets has been reenacted are other such factors.

In sum, as the Attorney General correctly sets forth in his brief, the appropriate standard ****1046** of review for Annotation No. 280. 0040 *****16** can be stated as follows: (1) the court should exercise its independent judgment to determine whether the Board's legal counsel correctly construed the statute; (2) the Board's construction of the statute is nonetheless entitled to "great weight"; (3) when, as here, the Board is construing a statute it is charged with administering and that statutory interpretation is long-standing and has been acquiesced in by persons interested in the matter, and by the Legislature, it is particularly appropriate to give these interpretations great weight. (*Rizzo v. Board of Trustees, supra,* 27 Cal.App.4th at p. 861, 32 Cal.Rptr.2d 892.) [FN7]

> FN7. The majority quote at length from (*Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 65 S.Ct. 161) to describe the proper standard of judicial review of administrative rulings. I note that the United States Supreme Court has at least partly abandoned *Skidmore* 's open-ended formulation in favor of a more bright line one. (See *Chevron v. Natural Resources Defense Council* (1984) 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694.) In any case, I agree with the majority that many of the factors discussed in Justice Jackson's opinion in *Skidmore* are appropriate considerations under the governing California decisions, and that the discussion in *Skidmore* may be a useful guide to the extent it is consistent with the independent judgment/great weight test subsequently developed under California law.

The Court of Appeal in this case, although it stated the standard of review nearly correctly, reflected some of the confusion found in our case law when it suggested that it would defer to the Board's annotation unless it was "arbitrary, capricious or without rational basis." It is therefore appropriate to remand to the Court of Appeal for reconsideration in light of the proper standard of review.

GEORGE, C.J., and WERDEGAR, J., concur.

78 Cal.Rptr.2d 1, 19 Cal.4th 1, 960 P.2d 1031, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211

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Commission on State Mandates

Mailing Information: Draft Staff Analysis

Mailing List

Original List Date: 8/7/2000
Last Updated: 7/25/2002
List Print Date: 01/08/2003
Claim Number: 99-TC-13
Issue: Enrollment Fee Collection

Related Matter(s)

00-TC-15 Enrollment Fee Waivers

TO ALL PARTIES AND INTERESTED PARTIES:

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Commission on State Mandates

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Mailing Information: Draft Staff Analysis

Mailing List

Related Matter(s)

99-TC-13 Enrollment Fee Collection

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