

COMMISSION ON STATE MANDATES

980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov



December 4, 2015

Ms. Lisa Mierczynski
Department of Finance
915 L Street, 12th Floor
Sacramento, CA 95814

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

Re: **First Hearing Decision, Second Hearing Draft Proposed Decision, Draft Expedited Amendment to Parameters and Guidelines, and Notice of Hearing**
Mandate Redetermination Request, 14-MR-05
First Hearing: Adequate Showing
Behavioral Intervention Plans (CSM-4464)
California Code of Regulations, Title 5, Sections 3001 and 3052, as added or amended by Register 93, No. 17; Register 96, No. 8; Register 96, No. 32
As Alleged to be Modified by Statutes 2013, Chapter 48 (AB 86)
Department of Finance, Requester

Dear Ms. Mierczynski:

On December 3, 2015 the Commission on State Mandates (Commission) adopted the decision on the adequate showing issue for the above-named matter and directed staff to notice a second hearing to determine whether to adopt a new test claim decision to supersede the previously adopted test claim decision. The adopted decision is enclosed. The draft proposed decision for the second hearing and the draft expedited amendment to parameters and guidelines are enclosed for your review and comment.

Written Comments on Second Hearing Draft Proposed Decision

Written comments may be filed on the draft proposed decision by **December 28, 2015**. The draft proposed decision is set for hearing on **January 22, 2016**.

Written Comments on Draft Expedited Amendment to Parameters and Guidelines

Staff has prepared a draft expedited amendment to parameters and guidelines for adoption at the January Commission hearing. The draft expedited amendment to parameters and guidelines is set for hearing on **January 22, 2016** and will only be taken up if the Commission first approves the request for redetermination.

Review of Draft Expedited Amendment to Parameters and Guidelines. Proposed comments may be filed on staff's draft proposal by **December 24, 2015**. (Cal. Code Regs., tit. 2, § 1183.9(b).)

Rebuttals. Written rebuttals may be submitted within 15 days of service of the comments. (Cal. Code Regs., tit. 2, § 1183.9(c).)

You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your

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documents. Please see <http://www.csm.ca.gov/dropbox.shtml> on the Commission's website for instructions on electronic filing. (Cal. Code Regs., tit. 2, § 1181.3.)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

Hearing

The second hearing on the request for a mandate redetermination is set for **Friday, January 22, 2016**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. Additionally, the expedited amendment to the parameters and guidelines is also set for hearing on **Friday, January 22, 2016**, but will only be taken up if the Commission first approves the request for redetermination.

The proposed decision for the second hearing and amendment to the parameters and guidelines will be issued on or about January 8, 2016. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Sincerely,

 for

Heather Halsey
Executive Director

ITEM __
MANDATE REDETERMINATION
SECOND HEARING: NEW TEST CLAIM DECISION
DRAFT PROPOSED DECISION

California Code of Regulations, Title 5, Sections 3001 and 3052, as added or amended by Register 93, No. 17; Register 96, No. 8; Register 96, No. 32

As Alleged to be Modified by:

Statutes 2013, Chapter 48 (SB 86)

Behavioral Intervention Plans (CSM-4464)

14-MR-05

Department of Finance, Requester

EXECUTIVE SUMMARY

Overview

On September 28, 2000, the Commission on State Mandates (Commission) adopted a statement of decision finding that regulations in title 5, California Code of Regulations, sections 3001 and 3052, which implement Education Code section 56523, impose a reimbursable state-mandated new program, related to Behavioral Intervention Plans (BIPs), on school districts and special education local plan areas (SELPA) within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission approved the test claim for the following categories of reimbursable activities:

- SELPA plan requirements. (Cal. Code Regs., tit. 5, §§ 3001 and 3052(j).)
- Development and implementation of behavioral intervention plans (BIPs). (Cal. Code Regs., tit. 5, §§ 3001 and 3052(a), (c), (d), (e), and (f).)
- Functional analysis assessments. (Cal. Code Regs., tit. 5, §§ 3001 and 3052(b), (c), and (f).)
- Modifications and contingent BIPs. (Cal. Code Regs., tit. 5, § 3052(g) and (h).)
- Development and implementation of emergency interventions. (Cal. Code Regs., tit. 5, §§ 3001 and 3052(i).)
- Prohibited behavioral interventions. (Cal. Code Regs., tit. 5, §§ 3001 and 3052(l).)
- Due process hearings. (Cal. Code Regs., tit. 5, § 3052(m).)

On January 25, 2013, after much delay for reasons discussed at length in the statement of decision on parameters and guidelines, the parameters and guidelines were approved as modified by the Commission for costs incurred beginning July 1, 1993, and the statement of decision was

adopted April 19, 2013, and corrected on April 29, 2013.¹ The parameters and guidelines contain three reasonable reimbursement methodologies (RRMs): one for one-time activities required in the 1993-1994 school year; one for ongoing SELPA-level activities; and one for ongoing county-level activities.²

On July 1, 2013, the Governor signed AB 86 (Stats. 2013, ch. 48) effective the same day, which amended numerous provisions of the Education Code, including section 56523; the Education Code section that the previously-approved test claim regulations were adopted to implement. As amended, section 56523 now provides that “[t]he Superintendent shall repeal those regulations governing the use of behavioral interventions...including Section 3052 and subdivisions (d), (e), (f), (g), and (ab) of Section 3001 of Title 5 of the California Code of Regulations, as those provisions existed on January 10, 2013.” The State Board of Education has, accordingly, since repealed those regulations, as specified.³

Procedural History

On June 30, 2015, the Department of Finance (Finance) filed a request for redetermination of the *Behavioral Intervention Plans (BIPs)* test claim statement of decision (CSM-4464), based on the repeal of the regulations approved in the test claim statement of decision and parameters and guidelines.⁴

On August 10, 2015, the State Controller (Controller) filed comments concurring with Finance’s request.⁵ On September 23, 2015, Commission staff issued the draft proposed decision for the first hearing on the mandate redetermination.⁶ On October 8, 2015, the Controller filed comments on the draft proposed decision for the first hearing.⁷ Neither Finance nor any of the claimants filed comments on the draft proposed decision for the first hearing.

On December 3, 2015, the Commission adopted a decision in the first hearing on redetermination, and directed staff to proceed to the second hearing.⁸ On December 4, 2015, Commission staff issued the draft proposed decision for the second hearing.⁹

Commission Responsibilities

Government Code section 17570 provides a process whereby a previously determined mandate finding can be redetermined by the Commission, based on a subsequent change in law. The

¹ Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013.

² See Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013.

³ Register 2014, No. 19, effective July 1, 2014; Register 2013, No. 42, filed October 16, 2013.

⁴ Exhibit A, Request for Mandate Redetermination, 14-MR-05.

⁵ Exhibit D, Controller’s Comments on Request for Mandate Redetermination.

⁶ Exhibit E, Draft Proposed Decision, First Hearing.

⁷ Exhibit F, Controller’s Comments on Draft Proposed Decision, First Hearing.

⁸ Exhibit G, Decision, First Hearing.

⁹ Exhibit H, Draft Proposed Decision, Second Hearing.

redetermination process provides for a two hearing process. With regard to second hearing the Commission's regulations state:

If the Commission proceeds to the second hearing, it shall consider whether the state's liability...has been modified based on the subsequent change in law alleged by the requester, thus requiring adoption of a new test claim decision to supersede the previously adopted test claim decision.¹⁰

Therefore, the issue before the Commission at this second hearing is whether the state's liability has been modified based on a subsequent change in law and, if so, whether to adopt a new test claim decision to supersede the previously adopted test claim decision, reflecting the state's modified liability.

Staff Analysis

A. Statutes 2013, Chapter 48 Constitutes a Subsequent Change in Law, as Defined.

The test claim regulations, California Code of Regulations, title 5, sections 3001 and 3052, implemented Education Code section 56523, which the Commission found did not itself impose any mandated activities. Amended section 56523, now alleged to modify the state's liability for the mandated program, provides:

The Superintendent shall repeal those regulations governing the use of behavioral interventions with individuals with exceptional needs receiving special education and related services that are no longer supported by statute, including Section 3052 and subdivisions (d), (e), (f), (g), and (ab) of Section 3001 of Title 5 of the California Code of Regulations, as those provisions existed on January 10, 2013.¹¹

Subsections (d), (e), (f), (g), and (ab) of former section 3001 define the terms "behavioral emergency," "behavioral intervention," "behavioral intervention case manager," "behavioral intervention plan," and "serious behavior problems," and have been repealed, along with a number of other definitional provisions of section 3001.¹² In addition, the entirety of section 3052, which described the substantive requirements or elements of behavioral interventions and behavioral intervention plans, has been repealed.¹³ Only these two regulatory sections were approved in the Commission's September 28, 2000 test claim decision (corrected November 23, 2010),¹⁴ and they provide the basis for the RRM in the parameters and guidelines.¹⁵ Therefore,

¹⁰ California Code of Regulations, Title 2, section 1190.5(b)(1) (Register 2014, No. 21).

¹¹ Education Code section 56523(a) (Stats. 2013, ch. 48 (SB 86)).

¹² Register 2014, No. 19, effective July 1, 2014.

¹³ Register 2013, No. 42, filed October 16, 2013.

¹⁴ Exhibit B, Test Claim Statement of Decision, *Behavioral Intervention Plans*, CSM-4464.

¹⁵ Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013, page 65.

all regulatory sections found to impose activities in the test claim have been repealed in accordance with Statutes 2013, chapter 48.

Based on the foregoing, the Commission found at the first hearing, on December 3, 2015, that Education Code section 56523, as amended by Statutes 2013, chapter 48, which expressly disclaims the statutory authorization for the regulations, and directs the Superintendent to repeal the regulations, constitutes a subsequent change in law, as defined.

B. The State’s Liability Has Been Eliminated Pursuant to the Subsequent Change in Law Alleged.

In accordance with Education Code section 56523, as amended by Statutes 2013, chapter 48, California Code of Regulations, title 5, section 3052 was repealed in its entirety, on October 16, 2013,¹⁶ and the specified provisions of section 3001 were repealed by Register 2014, No. 19, operative July 1, 2014.¹⁷ Therefore, both the mandated activities previously approved by the Commission, and the definitions which provide context for those activities, have been repealed, pursuant to the Legislature’s direction in Statutes 2013, chapter 48.

C. The State’s Liability for the Mandated Program Ended July 1, 2013.

Section 1190.1 of the Commission’s regulations states that a request for mandate redetermination shall be filed on or before June 30 following a fiscal year in order to establish eligibility for reimbursement or loss of reimbursement for that fiscal year. Here, Finance filed its redetermination request on June 30, 2015, establishing eligibility for reimbursement or loss of reimbursement as early as July 1, 2013.

In accordance with Education Code section 56523, as amended by Statutes 2013, chapter 48, California Code of Regulations, title 5, section 3052 was repealed in its entirety, on October 16, 2013,¹⁸ and the specified provisions of section 3001 were repealed by Register 2014, No. 19, operative July 1, 2014.¹⁹ However, as noted above, amended Education Code section 56523, effective July 1, 2013, not only directs the Superintendent to repeal the *BIPs* regulations, but also identifies the provisions subject to repeal, in part, as “those regulations....that are no longer supported by statute...”²⁰ Regulations must be consistent with the statute from which their authority and reference is derived.²¹ Here, because Education Code section 56523 states that the

¹⁶ Register 2013, No. 42.

¹⁷ Register 2014, No. 19. See also, Exhibit A, 14-MR-05, pages 13-31.

¹⁸ Register 2013, No. 42.

¹⁹ Register 2014, No. 19. See also, Exhibit A, 14-MR-05, pages 13-31.

²⁰ Education Code section 56523 (Stats. 2013, ch. 48).

²¹ See, e.g., Government Code sections 11342.1 [“Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.”]; 11342.2 [“Whenever by the express or implied terms of any statute a state agency has authority 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

regulations at issue are “no longer supported by statute” and orders their repeal, to continue to act under those regulations would be inconsistent with the provisions of the statute. As a matter of law, the regulations can no longer continue to be effective.

The subsequent change in law alleged, Education Code section 56523, has an effective date of July 1, 2013, and the regulations at issue were no longer effective pursuant to the amended statute. Therefore, actual dates that the regulations were repealed, in accordance with the statute, do not control; rather, the period of eligibility for loss of reimbursement for this mandate begins July 1, 2013.

Based on the foregoing, staff finds that the mandated activities as determined in the Commission’s September 28, 2000 test claim decision were no longer mandated beginning July 1, 2013, in accordance with the subsequent change in law identified by the requester, Education Code section 56523, as amended by Statutes 2013, chapter 48, and therefore the state’s liability under the mandate ended July 1, 2013.

Staff Recommendation

Staff recommends that the Commission adopt the proposed decision.

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

consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.”].

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE MANDATE REDETERMINATION:
SECOND HEARING: NEW TEST CLAIM
DECISION ON:

California Code of Regulations, Title 5,
Sections 3001 and 3052 as added or amended
by Register 93, No. 17; Register 96, No. 8;
Register 96, No. 32;

As Alleged to be Modified by:

Statutes 2013, Chapter 48 (SB 86)

Filed on June 30, 2015

By the Department of Finance, Requester

Case No.: 14-MR-05

*Behavioral Intervention Plans
(CSM-4464)*

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

(Adopted January 22, 2016)

DECISION

The Commission on State Mandates (Commission) heard and decided this mandate redetermination during a regularly scheduled hearing on January 22, 2016. [Witness list will be included in the adopted decision.]

Government Code section 17570 and section 1190 et seq. of the Commission’s regulations establish the mandate redetermination process. In addition, the law applicable to the Commission’s determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., title 2, California Code of Regulations 1181.1 et seq., and related case law.

The Commission [adopted/modified] the proposed decision at the hearing by a vote of [vote count will be included in the adopted decision], and [adopted/ did not adopt] a new test claim decision to supersede the previously adopted test claim decision as follows:

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

SUMMARY OF THE FINDINGS

The Commission finds the state's liability pursuant to article XIII B, section 6(a) of the California Constitution, for the CSM-4464 *Behavioral Intervention Plans (BIPs)* mandate has been modified based on a subsequent change in law. Specifically, Education Code section 56523 was amended by Statutes 2013, chapter 48 to undermine statutory authority for and direct the repeal of California Code of Regulations, title 5, section 3052, and portions of section 3001. The approved activities in *BIPs* were imposed entirely and only by these regulations. The repeal of those sections pursuant to Education Code section 56523 thus eliminates all approved mandated activities. Pursuant to Government Code section 17570, the Commission approves the request for redetermination and concludes that the *BIPs* program no longer constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, effective July 1, 2013.

COMMISSION FINDINGS

I. Chronology

- | | |
|------------|--|
| 09/28/2000 | The Commission adopted a test claim statement of decision on <i>Behavioral Intervention Plans</i> , CSM-4464. ²² |
| 04/19/2013 | The Commission adopted parameters and guidelines for <i>Behavioral Intervention Plans</i> , CSM-4464. ²³ |
| 06/30/2015 | The Department of Finance (Finance) filed a request for redetermination on the <i>Behavioral Intervention Plans</i> mandate, CSM-4464. ²⁴ |
| 08/10/2015 | The State Controller (Controller) filed comments on the request for redetermination. ²⁵ |
| 09/23/2015 | Commission staff issued the draft proposed decision for the first hearing. ²⁶ |
| 10/08/2015 | The Controller filed comments on the draft proposed decision. ²⁷ |
| 12/03/2015 | The Commission adopted the decision on the first hearing and directed Commission staff to notice the second hearing. ²⁸ |
| 12/04/2015 | Commission staff issued the draft proposed decision for the second hearing and draft expedited amendment to parameters and guidelines. ²⁹ |

²² Exhibit B, Test Claim Statement of Decision, *Behavioral Intervention Plans*, CSM-4464.

²³ Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013.

²⁴ Exhibit A, Request for Mandate Redetermination, 14-MR-05.

²⁵ Exhibit D, Controller's Comments on Request for Mandate Redetermination.

²⁶ Exhibit E, Draft Proposed Decision, First Hearing.

²⁷ Exhibit F, Controller's Comments on Draft Proposed Decision, First Hearing.

²⁸ Exhibit G, Decision, First Hearing.

²⁹ Exhibit H, Draft Proposed Decision, Second Hearing.

II. Background

On September 28, 2000, the Commission adopted a statement of decision finding that, California Code of Regulations, title 5, sections 3001 and 3052, which implement Education Code section 56523, impose a reimbursable state-mandated new program on school districts and special education local plan areas (SELPA) within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission approved the test claim for the following categories of reimbursable activities:

- SELPA plan requirements. (Cal. Code Regs., tit. 5, §§ 3001 and 3052(j).)
- Development and implementation of behavioral intervention plans (BIPs). (Cal. Code Regs., tit. 5, §§ 3001 and 3052(a), (c), (d), (e), and (f).)
- Functional analysis assessments. (Cal. Code Regs., tit. 5, §§ 3001 and 3052(b), (c), and (f).)
- Modifications and contingent BIPs. (Cal. Code Regs., tit. 5, § 3052(g) and (h).)
- Development and implementation of emergency interventions. (Cal. Code Regs., tit. 5, §§ 3001 and 3052(i).)
- Prohibited behavioral interventions. (Cal. Code Regs., tit. 5, §§ 3001 and 3052(l).)
- Due process hearings. (Cal. Code Regs., tit. 5, § 3052(m).)

On January 25, 2013, after much delay for reasons discussed at length in the statement of decision on parameters and guidelines,³⁰ the parameters and guidelines were approved as modified by the Commission for costs incurred beginning July 1, 1993, and the statement of decision was adopted April 19, 2013, and corrected April 29, 2013. The parameters and guidelines contain three reasonable reimbursement methodologies (RRMs): one for one-time activities required in the 1993-1994 school year; one for ongoing SELPA-level activities; and one for ongoing county-level activities.³¹

On July 1, 2013, the Governor signed AB 86 (Stats. 2013, ch. 48), effective the same day, which amended numerous provisions of the Education Code, including section 56523; the Education Code section that the approved regulations were adopted to implement. As amended, section 56523 now provides that “[t]he Superintendent shall repeal those regulations governing the use of behavioral interventions...including Section 3052 and subdivisions (d), (e), (f), (g), and (ab) of Section 3001 of Title 5 of the California Code of Regulations, as those provisions existed on January 10, 2013.” The State Board has since repealed those regulations, as directed.³²

On June 30, 2015, Finance filed a request for redetermination of the *BIPs* mandated program.³³ On December 3, 2015, the Commission heard and adopted the first hearing decision on this mandate redetermination, finding that the requester had identified a subsequent change in law, as

³⁰ Exhibit C, Statement of Decision and Parameters and Guidelines, corrected April 29, 2013.

³¹ Exhibit C, Statement of Decision and Parameters and Guidelines, corrected April 29, 2013.

³² Register 2014, No. 19; Register 2013, No. 42.

³³ Exhibit A, Request for Mandate Redetermination, 14-MR-05.

defined, and had made an adequate showing that the request, considered in light of all evidence in the record, had a substantial possibility of prevailing at this second hearing.³⁴

III. Positions of the Parties, Interested Parties, and Interested Persons

A. Department of Finance, Requester

Finance asserts that Statutes 2013, chapter 48, effective July 1, 2013, “amended Education Code section 56523 to eliminate the statutory force and effect of the regulations that imposed the reimbursable state-mandated activities and to require the Superintendent of Public Instruction to repeal the regulations that govern behavioral intervention for individuals with exceptional needs that are no longer supported by statute.” Accordingly, Finance states that California Code of Regulations, title 5, section 3052 was repealed effective October 16, 2013; and the operative provisions of section 3001, which were identified in the test claim decision as providing context for the mandate, or imposing the mandate, were repealed effective July 1, 2014.³⁵

B. State Controller

The Controller concurs with Finance’s request to adopt a new test claim decision and amend the parameters and guidelines for the *Behavioral Intervention Plans* mandated program, pursuant to the enactment of Statutes 2013, chapter 48.³⁶

IV. Discussion

Under Government Code section 17570, upon request, the Commission may consider the adoption of a new test claim decision to supersede a prior test claim decision based on a subsequent change in law which modifies the state’s liability. The redetermination process calls for a two hearing process. At the first hearing, the requester must make “an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior test claim decision, that may modify the state’s liability pursuant to Article XIII B, section 6(a) of the California Constitution.”³⁷

California Code of Regulations, title 2, section 1190.5 provides that “[i]f the Commission proceeds to the second hearing, it shall consider whether the state’s liability pursuant to article XIII B, section 6(a) of the California Constitution has been modified based on the subsequent change in law alleged by the requester, thus requiring adoption of a new test claim decision to supersede the previously adopted test claim decision.”³⁸

Therefore, the issue before the Commission at this second hearing is whether the state’s liability has been modified based on a subsequent change in law and, if so, whether to adopt a new test claim decision to supersede the previously adopted test claim decision, reflecting the state’s modified liability.

³⁴ Exhibit G, Decision, First Hearing.

³⁵ Exhibit A, Request for Mandate Redetermination, 14-MR-05, page 8.

³⁶ Exhibit D, Controller’s Comments on Request for Mandate Redetermination.

³⁷ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

³⁸ Register 2014, No. 21.

A. Statutes 2013, Chapter 48 Constitutes a Subsequent Change in Law, Within the Meaning of Government Code Section 17570.

Government Code section 17570 provides a process whereby a test claim decision may be redetermined and superseded by a new test claim decision, if a subsequent change in law, as defined, has altered the state's liability for reimbursement. A subsequent change in law is defined in section 17570 as follows:

[A] change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law, except that a "subsequent change in law" does not include the amendments to Section 6 of Article XIII B of the California Constitution that were approved by the voters on November 2, 2004. A "subsequent change in law" also does not include a change in the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of Section 17551.³⁹

Under this definition, then, a subsequent change in law is one that (1) requires a finding of a new cost mandated by the state under section 17514; (2) requires a new finding that a cost is not a cost mandated by the state pursuant to section 17556; or (3) another change in mandates law.

Finance, in its request for redetermination, alleges that a subsequent change in law requires a finding that there are no costs mandated by the state pursuant to section 17514, in that Statutes 2013, chapter 48 requires the repeal of the regulatory provisions that make up the mandate, and also purports to remove all force and effect of those regulatory provisions. The original test claim regulations, California Code of Regulations, title 5, sections 3001 and 3052, implemented Education Code section 56523, which the Commission found did not itself impose any mandated activities. Amended section 56523 now alleged to modify the state's liability for the mandated program, provides:

The Superintendent shall repeal those regulations governing the use of behavioral interventions with individuals with exceptional needs receiving special education and related services that are no longer supported by statute, including Section 3052 and subdivisions (d), (e), (f), (g), and (ab) of Section 3001 of Title 5 of the California Code of Regulations, as those provisions existed on January 10, 2013.⁴⁰

The test claim statement of decision and parameters and guidelines for CSM-4464 found reimbursable activities imposed by California Code of Regulations, title 5, sections 3001 and 3052. Subsections (d), (e), (f), (g), and (ab) of former section 3001 define the terms "behavioral emergency," "behavioral intervention," "behavioral intervention case manager," "behavioral intervention plan," and "serious behavior problems," and have been repealed, along with a number of other definitional provisions of section 3001.⁴¹ In addition, the entirety of section 3052, which described the substantive requirements or elements of behavioral interventions and

³⁹ Government Code section 17570 (Stats. 2010, ch. 719 (SB 856)).

⁴⁰ Education Code section 56523(a) (Stats. 2013, ch. 48 (SB 86)).

⁴¹ Register 2014, No. 19.

behavioral intervention plans, has been repealed.⁴² These two regulatory sections were the only test claim regulations approved in the Commission’s September 28, 2000 test claim decision (corrected November 23, 2010),⁴³ and the only regulations on which the RRM in the parameters and guidelines was based.⁴⁴ Therefore, all regulatory sections found to impose activities in the test claim have been repealed pursuant to Statutes 2013, chapter 48.

Based on the foregoing, the Commission found at the first hearing, on December 3, 2015, that Statutes 2013, chapter 48, constitutes a subsequent change in law, as defined.

B. The State’s Liability Has Been Eliminated Pursuant to the Subsequent Change in Law Alleged.

In accordance with the Commission’s regulations, at this second hearing on mandate redetermination, the Commission shall consider whether the state’s liability for mandate reimbursement has been modified by the subsequent change in law alleged, thus requiring adoption of a new test claim decision to supersede the previously adopted test claim decision.

As noted above, the test claim decision and parameters and guidelines for the *BIPs* mandate outline the reimbursable activities as follows:

- SELPA plan requirements. (Cal. Code Regs., tit. 5, §§ 3001 and 3052, subd. (j).)
- Development and implementation of behavioral intervention plans (BIPs). (Cal. Code Regs., tit. 5, §§ 3001 and 3052, subs. (a), (c), (d), (e), and (f).)
- Functional analysis assessments. (Cal. Code Regs., tit. 5, §§ 3001 and 3052, subs. (b), (c), and (f).)
- Modifications and contingent BIPs. (Cal. Code Regs., tit. 5, § 3052, subs. (g) and (h).)
- Development and implementation of emergency interventions. (Cal. Code Regs., tit. 5, §§ 3001 and 3052, subd. (i).)
- Prohibited behavioral interventions. (Cal. Code Regs., tit. 5, §§ 3001 and 3052, subd. (l).)
- Due process hearings. (Cal. Code Regs., tit. 5, § 3052, subd. (m).)⁴⁵

Finance, in its request for mandate redetermination, describes “SELPA plan requirements” with somewhat greater specificity:

⁴² Register 2013, No. 42.

⁴³ Exhibit B, Test Claim Statement of Decision, *Behavioral Intervention Plans*, CSM-4464.

⁴⁴ Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013, page 65.

⁴⁵ Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013, page 65.

- (1) Preparing for, attending, and documenting and informing appropriate staff concerning the results of any mediation or due process hearing related to functional analysis assessments or the development or implementation of BIPs...(Repealed Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subd. (j).)

Although the Commission’s test claim statement of decision and parameters and guidelines cite provisions of California Code of Regulations, title 5, section 3001, section 3001 consists entirely of regulatory definitions, and does not contain any mandatory or directory language. All of the mandated activities approved by the Commission are actually contained within California Code of Regulations, title 5, former section 3052, though section 3001 does help to define the scope of those mandated activities.

In accordance with Education Code section 56523, as amended by Statutes 2013, chapter 48, California Code of Regulations, title 5, section 3052 was repealed in its entirety, effective October 16, 2013,⁴⁶ and the specified provisions of section 3001 were repealed by Register 2014, No. 19, operative July 1, 2014.⁴⁷ Therefore, both the mandated activities previously approved by the Commission, and the definitions which provide context for those activities, have been repealed, pursuant to the Legislature’s direction in Statutes 2013, chapter 48.

C. The State’s Liability for the Mandated Program Ended July 1, 2013.

As noted above, amended Education Code section 56523, effective July 1, 2013, not only directs the Superintendent to repeal the *BIPs* regulations, but also identifies the provisions subject to repeal, in part, as “those regulations...that are no longer supported by statute...”⁴⁸ In this manner the amended code purports to remove all force and effect of the underlying statutes on the effective date of the statute, July 1, 2013, even though the full repeal of the regulations occurred later. Finance alleges in its request for mandate redetermination that “the reimbursable activities imposed by sections 3001 and 3052...cease to be eligible for reimbursements effective July 1, 2013.”⁴⁹ The Commission agrees.

Regulations must be consistent with the statute from which their authority and reference is derived.⁵⁰ Here, because Education Code section 56523 states that the regulations at issue are “no longer supported by statute” and orders their repeal, to continue to act under those regulations would be inconsistent with the provisions of the statute. As a matter of law, the

⁴⁶ Register 2013, No. 42.

⁴⁷ Register 2014, No. 19. See also, Exhibit A, 14-MR-05, pages 13-31.

⁴⁸ Education Code section 56523 (Stats. 2013, ch. 48).

⁴⁹ Exhibit A, Request for Mandate Redetermination, 14-MR-05, page 9.

⁵⁰ See, e.g., Government Code sections 11342.1 [“Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.”]; 11342.2 [“Whenever by the express or implied terms of any statute a state agency has authority 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 and reasonably necessary to effectuate the purpose of the statute.”].

regulations can no longer continue to be effective. Moreover, the Regulatory Notice Register states that repeal of section 3052 was a change “without regulatory effect to comply with section 56523 of the Education Code...” Therefore, although section 3052 remained in the Code until its full repeal in October of 2013, the Office of Administrative Law and the State Board of Education presumed that it was no longer in force during that period. Similarly, the relevant provisions of California Code of Regulations, title 5, section 3001 were amended out of the remaining section on May 5, 2014, including former subdivisions (d) through (g) and (ab), which formerly defined the terms “behavioral emergency,” “behavioral intervention,” “behavioral intervention case manager,” “behavioral intervention plan,” and “serious behavior problems,” respectively. The Regulatory Notice Register entry for these changes does not expressly state that they are without regulatory effect; however, definitional provisions in statutes or regulations do not generally impose a mandate in the first instance. Here, the definitions that were repealed do not contain any mandatory or directory language, but help to define the scope of the mandatory provisions of section 3052. Therefore, to the extent that the repeal of these regulatory provisions was not clearly accomplished until May 5, 2014, it has no effect on the period of eligibility for this mandate redetermination request.⁵¹

Section 1190.1 of the Commission’s regulations states that a request for mandate redetermination shall be filed on or before June 30 following a fiscal year in order to establish eligibility for reimbursement or loss of reimbursement for that fiscal year. Here, Finance filed its redetermination request on June 30, 2015, establishing eligibility for reimbursement or loss of reimbursement for fiscal year 2013-2014. The subsequent change in law alleged, Education Code section 56523, has an effective date of July 1, 2013, and the regulations at issue were no longer effective on that date pursuant to the amended statute, as analyzed above. Therefore, the period of eligibility for loss of reimbursement for this mandate begins July 1, 2013.

Based on the foregoing, the Commission finds that the mandated activities, as determined in the Commission’s September 28, 2000 test claim statement of decision, were no longer mandated beginning July 1, 2013, in accordance with the subsequent change in law identified by the requester, Education Code section 56523, as amended by Statutes 2013, chapter 48.

V. Conclusion

Based on the foregoing, the Commission finds that the state’s liability for the activities identified in the *BIPs* mandate has been ended based on a subsequent change in law, namely, Education Code section 56523, as amended by Statutes 2013, chapter 48, beginning July 1, 2013.

⁵¹ See Exhibit A, 14-MR-05, page 22.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

On December 4, 2015, I served the:

First Hearing Decision, Second Hearing Draft Proposed Decision, Draft Expedited Amendment to Parameters and Guidelines, and Notice of Hearing

Mandate Redetermination Request, 14-MR-05

First Hearing: Adequate Showing

Behavioral Intervention Plans (CSM-4464)

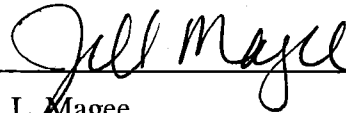
California Code of Regulations, Title 5, Sections 3001 and 3052, as added or amended by Register 93, No. 17; Register 96, No. 8; Register 96, No. 32

As Alleged to be Modified by Statutes 2013, Chapter 48 (AB 86)

Department of Finance, Requester

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 4, 2015 at Sacramento, California.



Jill L. Magee

Commission on State Mandates

980 Ninth Street, Suite 300

Sacramento, CA 95814

(916) 323-3562

COMMISSION ON STATE MANDATES

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Matter: Behavioral Intervention Plans (CSM-4464)

Requester: Department of Finance

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Amber Alexander, *Department of Finance*

915 L Street, Sacramento, Ca

Phone: (916) 445-0328

Amber.Alexander@dof.ca.gov

Socorro Aquino, *State Controller's Office*

Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 322-7522

SAquino@sco.ca.gov

Harmeet Barkschat, *Mandate Resource Services, LLC*

5325 Elkhorn Blvd. #307, Sacramento, CA 95842

Phone: (916) 727-1350

harmeet@calsdrc.com

Lacey Baysinger, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 324-0254

lbaysinger@sco.ca.gov

Mike Brown, *School Innovations & Advocacy*

5200 Golden Foothill Parkway, El Dorado Hills, CA 95762

Phone: (916) 669-5116

mikeb@sia-us.com

J. Bradley Burgess, *MGT of America*

895 La Sierra Drive, Sacramento, CA 95864

Phone: (916) 595-2646

Bburgess@mgtamer.com

Gwendolyn Carlos, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 323-0706

gcarlos@sco.ca.gov

David Cichella, *California School Management Group*

3130-C Inland Empire Blvd., Ontario, CA 91764

Phone: (209) 834-0556

dcichella@csmcentral.com

Joshua Daniels, *Attorney, California School Boards Association*

3251 Beacon Blvd, West Sacramento, CA 95691

Phone: (916) 669-3266

jdaniels@csba.org

Marieta Delfin, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 322-4320

mdelfin@sco.ca.gov

Andra Donovan, *San Diego Unified School District*

Legal Services Office, 4100 Normal Street, Room 2148, , San Diego, CA 92103

Phone: (619) 725-5630

adonovan@sandi.net

Donna Ferebee, *Department of Finance*

915 L Street, Suite 1280, Sacramento, CA 95814

Phone: (916) 445-3274

donna.ferebee@dof.ca.gov

Chris Ferguson, *Department of Finance*

Education Systems Unit, 915 L Street, 7th Floor, 915 L Street, 7th Floor, Sacramento, CA 95814

Phone: (916) 445-3274

Chris.Ferguson@dof.ca.gov

Susan Geanacou, *Department of Finance*

915 L Street, Suite 1280, Sacramento, CA 95814

Phone: (916) 445-3274

susan.geanacou@dof.ca.gov

Paul Golaszewski, *Legislative Analyst's Office*

925 L Street, Suite 1000, Sacramento, CA 95814

Phone: (916) 319-8341

Paul.Golaszewski@lao.ca.gov

Rebecca Hamilton, *Department of Finance*

Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814

Phone: (916) 445-0328

Rebecca.Hamilton@dof.ca.gov

Ed Hanson, *Department of Finance*

Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814

Phone: (916) 445-0328
ed.hanson@dof.ca.gov

Mark Ibele, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
Mark.Ibele@sen.ca.gov

Matt Jones, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
matt.jones@csm.ca.gov

Jill Kanemasu, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-9891
jkanemasu@sco.ca.gov

Dan Kaplan, *Fiscal & Policy Analyst, Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8353
Dan.Kaplan@lao.ca.gov

Jennifer Kuhn, *Deputy, Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8332
Jennifer.kuhn@lao.ca.gov

Jay Lal, *State Controller's Office (B-08)*
Division of Accounting & Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0256
JLal@sco.ca.gov

George Landon, *Deputy Superintendent, Admin. Fiscal Support, Lake Elsinore Unified School District*
545 Chaney Street, Lake Elsinore, CA 92530
Phone: (951) 253-7095
George.Landon@leusd.k12.ca.us

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Yazmin Meza, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-0328
Yazmin.meza@dof.ca.gov

Lisa Mierczynski, *Department of Finance (A-15)*
Requester Representative
915 L Street, 12th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
lisa.mierczynski@dof.ca.gov

Meredith Miller, Director of SB90 Services, *MAXIMUS*
3130 Kilgore Road, Suite 400, Rancho Cordova, CA 95670
Phone: (972) 490-9990
meredithcmiller@maximus.com

Robert Miyashiro, *Education Mandated Cost Network*
1121 L Street, Suite 1060, Sacramento, CA 95814
Phone: (916) 446-7517
robertm@sscal.com

Keith Nezaam, *Department of Finance*
915 L Street, 8th Floor, Sacramento, CA 95814
Phone: (916) 445-8913
Keith.Nezaam@dof.ca.gov

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Christian Osmena, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-0328
christian.osmena@dof.ca.gov

Arthur Palkowitz, *Stutz Artiano Shinoff & Holtz*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@sashlaw.com

Keith Petersen, *SixTen & Associates*
P.O. Box 340430, Sacramento, CA 95834-0430
Phone: (916) 419-7093
kbsixten@aol.com

Mollie Quasebarth, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
mollie.quasebarth@dof.ca.gov

Mark Rewolinski, *MAXIMUS*
625 Coolidge Drive, Suite 100, Folsom, CA 95630
Phone: (949) 440-0845
markrewolinski@maximus.com

Sandra Reynolds, *Reynolds Consulting Group, Inc.*
P.O. Box 894059, Temecula, CA 92589
Phone: (951) 303-3034
sandrareynolds_30@msn.com

David Scribner, *The Law Office of David E. Scribner, Esq*
11347 Folsom Blvd, Suite D, Rancho Cordova, CA 95742
Phone: (916) 207-2848
david@deslawoffice.com

Steve Shields, *Shields Consulting Group, Inc.*

1536 36th Street, Sacramento, CA 95816

Phone: (916) 454-7310

steve@shieldscg.com

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*

Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 323-5849

jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 324-0254

DSpeciale@sco.ca.gov

Meg Svoboda, *Senate Office of Research*

1020 N Street, Suite 200, Sacramento, CA

Phone: (916) 651-1500

meg.svoboda@sen.ca.gov

Amy Tang-Paterno, Educational Fiscal Services Consultant, *California Department of Education*

Government Affairs, 1430 N Street, Suite 5602, Sacramento, CA 95814

Phone: (916) 322-6630

ATangPaterno@cde.ca.gov

Thomas Todd, Assistant Program Budget Manager, *Department of Finance*

Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814

Phone: (916) 445-0328

Thomas.Todd@dof.ca.gov

Jolene Tollenaar, *MGT of America*

2251 Harvard Street, Suite 134, Sacramento, CA 95815

Phone: (916) 443-411

jolene_tollenaar@mgtamer.com

Brian Uhler, *Legislative Analyst's Office*

925 L Street, Suite 1000, Sacramento, CA 95814

Phone: (916) 319-8328

brian.uhler@lao.ca.gov

Marichi Valle, *San Jose Unified School District*

855 Lenzen Avenue, San Jose, CA 95126

Phone: (408) 535-6141

mvalle@sjusd.org