

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 (AB 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)*

*(Served January 26, 2016)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this mandate redetermination during a regularly scheduled hearing on January 22, 2016. Mollie Quasebarth appeared on behalf of the Department of Finance (Finance).

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 the proposed decision as its new test claim decision to supersede the previous test claim decision by a vote of 6-0 as follows:

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

## 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

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|------------|---|
| 09/28/2000 | The Commission adopted the test claim statement of decision on <i>Behavioral Intervention Plans</i> , CSM-4464. <sup>1</sup>      |
| 04/19/2013 | The Commission adopted parameters and guidelines for <i>Behavioral Intervention Plans</i> , CSM-4464. <sup>2</sup>                |
| 06/30/2015 | Finance filed a request for redetermination on the <i>Behavioral Intervention Plans</i> mandate, CSM-4464. <sup>3</sup>           |
| 08/10/2015 | The State Controller (Controller) filed comments on the request for redetermination. <sup>4</sup>                                 |
| 09/23/2015 | Commission staff issued the draft proposed decision for the first hearing. <sup>5</sup>   |
| 10/08/2015 | The Controller filed comments on the draft proposed decision. <sup>6</sup>  |
| 12/03/2015 | The Commission adopted the decision on the first hearing and directed Commission staff to notice the second hearing. <sup>7</sup> |

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<sup>1</sup> Exhibit B, Test Claim Statement of Decision, *Behavioral Intervention Plans*, CSM-4464.

<sup>2</sup> Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013.

<sup>3</sup> Exhibit A, Request for Mandate Redetermination, 14-MR-05.

<sup>4</sup> Exhibit D, Controller's Comments on Request for Mandate Redetermination.

<sup>5</sup> Exhibit E, Draft Proposed Decision, First Hearing.

<sup>6</sup> Exhibit F, Controller's Comments on Draft Proposed Decision, First Hearing.

<sup>7</sup> Exhibit G, Decision, First Hearing.

- 12/04/2015 Commission staff issued the draft proposed decision for the second hearing and draft expedited amendment to parameters and guidelines.<sup>8</sup>
- 12/23/2015 Controller filed comments on the draft proposed decision for the second hearing and draft expedited amendment to parameters and guidelines.<sup>9</sup>

## 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 (SELPAs) 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,<sup>10</sup> 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.<sup>11</sup>

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

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<sup>8</sup> Exhibit H, Draft Proposed Decision, Second Hearing; Exhibit I, Draft Expedited Amendment to Parameters and Guidelines.

<sup>9</sup> Exhibit J, Controller's Comments on Draft Proposed Decision, Second Hearing, and Draft Expedited Parameters and Guidelines.

<sup>10</sup> Exhibit C, Statement of Decision and Parameters and Guidelines, corrected April 29, 2013.

<sup>11</sup> Exhibit C, Statement of Decision and Parameters and Guidelines, corrected April 29, 2013.

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.<sup>12</sup>

On June 30, 2015, Finance filed a request for redetermination of the *BIPs* mandated program.<sup>13</sup> 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 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.<sup>14</sup> On December 4, 2015, Commission Staff issued the draft proposed decision for the second hearing and a draft expedited amendment to the parameters and guidelines. On December 23, 2015, the Controller filed comments on the draft proposed decision for the second hearing and the draft expedited amendment to parameters and guidelines, recommending no changes. No comments have been filed by claimants on the draft proposed decision.

### **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.<sup>15</sup>

#### **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.<sup>16</sup> The Controller further concurs with the draft proposed decision for the second hearing and recommends no changes to the draft expedited amendment to parameters and guidelines.<sup>17</sup>

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<sup>12</sup> Register 2014, No. 19; Register 2013, No. 42.

<sup>13</sup> Exhibit A, Request for Mandate Redetermination, 14-MR-05.

<sup>14</sup> Exhibit G, Decision, First Hearing.

<sup>15</sup> Exhibit A, Request for Mandate Redetermination, 14-MR-05, page 8.

<sup>16</sup> Exhibit D, Controller’s Comments on Request for Mandate Redetermination.

<sup>17</sup> Exhibit I, Controller’s Comments on Draft Proposed Decision, Second Hearing, and Draft Expedited Parameters and Guidelines, page 1.

#### 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."<sup>18</sup>

California Code of Regulations, title 2, section 1190.5(b) 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."<sup>19</sup>

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.

##### **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.<sup>20</sup>

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

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<sup>18</sup> California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

<sup>19</sup> Register 2014, No. 21.

<sup>20</sup> Government Code section 17570 (Stats. 2010, ch. 719 (SB 856)).

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.<sup>21</sup>

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.<sup>22</sup> In addition, the entirety of section 3052, which described the substantive requirements or elements of behavioral interventions and behavioral intervention plans, has been repealed.<sup>23</sup> 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),<sup>24</sup> and the only regulations on which the RRM in the parameters and guidelines was based.<sup>25</sup> 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:

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<sup>21</sup> Education Code section 56523(a) (Stats. 2013, ch. 48 (AB 86)).

<sup>22</sup> Register 2014, No. 19.

<sup>23</sup> Register 2013, No. 42.

<sup>24</sup> Exhibit B, Test Claim Statement of Decision, *Behavioral Intervention Plans*, CSM-4464.

<sup>25</sup> Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013, page 65.

- 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, subds. (a), (c), (d), (e), and (f).)
- Functional analysis assessments. (Cal. Code Regs., tit. 5, §§ 3001 and 3052, subds. (b), (c), and (f).)
- Modifications and contingent BIPs. (Cal. Code Regs., tit. 5, § 3052, subds. (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).)<sup>26</sup>

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

- (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,<sup>27</sup> and the specified provisions of section 3001 were repealed by Register 2014, No. 19, operative July 1, 2014.<sup>28</sup> 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

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<sup>26</sup> Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013, page 65.

<sup>27</sup> Register 2013, No. 42.

<sup>28</sup> Register 2014, No. 19. See also, Exhibit A, 14-MR-05, pages 13-31.

repeal, in part, as “those regulations...that are no longer supported by statute...”<sup>29</sup> 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.”<sup>30</sup> The Commission agrees.

Regulations must be consistent with the statute from which their authority and reference is derived.<sup>31</sup> 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 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.<sup>32</sup>

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

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<sup>29</sup> Education Code section 56523 (Stats. 2013, ch. 48).

<sup>30</sup> Exhibit A, Request for Mandate Redetermination, 14-MR-05, page 9.

<sup>31</sup> 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.”].

<sup>32</sup> See Exhibit A, 14-MR-05, page 22.

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 approves the request for a new test claim decision and concludes that the *BIPs*, CSM-4464 mandate has ended based on a subsequent change in law and does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution beginning July 1, 2013.

**COMMISSION ON STATE MANDATES**

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RE: **Decision**

Mandate Redetermination Request, 14-MR-05

Second Hearing: New Test Claim Decision

*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

On January 22, 2016, the foregoing decision of the Commission on State Mandates was adopted on the above-entitled matter.

A handwritten signature in black ink, appearing to read "Heather Halsey", written over a horizontal line.

Heather Halsey, Executive Director

Dated: January 26, 2016