

COMMISSION ON STATE MANDATES

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November 18, 2015

Chris Ferguson
Department of Finance
915 L Street, 7th Floor
Sacramento, CA 95814

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

Re: Proposed Decision

Mandate Redetermination Request, 14-MR-03

First Hearing: Adequate Showing

Community College Construction (02-TC-47)

Education Code Sections 81820, 81821(a), (b), (e), and (f)

Statutes 1980, Chapter 910; Statutes 1981, Chapter 470; Statutes 1981, Chapter 891;

Statutes 1995, Chapter 758

As Alleged to be Modified by Statutes 2014, Chapter 34 (SB 860)

Department of Finance, Requester

Dear Mr. Ferguson:

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

Hearing

This matter is set for hearing on **Thursday, December 3, 2015**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Special Accommodations

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

Sincerely,

A handwritten signature in black ink, appearing to read "Heather Halsey".

Heather Halsey
Executive Director

ITEM 4
MANDATE REDETERMINATION
FIRST HEARING: ADEQUATE SHOWING
PROPOSED DECISION

Education Code Sections 81820 and 81821(a), (b), (e), and (f);
Statutes 1980, Chapter 910; Statutes 1981, Chapter 470; Statutes 1981,
Chapter 891; Statutes 1995, Chapter 758;

As Alleged to be Modified by:
Statutes 2014, Chapter 34 (SB 860)

Community College Construction (02-TC-47)

14-MR-03

Department of Finance, Requester

EXECUTIVE SUMMARY

Overview

On October 27, 2011, the Commission on State Mandates (Commission) adopted the *Community College Construction*, 02-TC-47, test claim statement of decision, approving reimbursement for community colleges to include new information in their districts' five-year plans for capital construction that must be submitted to the Board of Governors, a state agency.

The Commission adopted parameters and guidelines on March 23, 2012, authorizing reimbursement for community colleges to include the following information in the initial five-year plan for capital construction (for community college districts established on or after July 1, 2001), and continually review and report any required modifications or changes with respect to the following information in the subsequent annual update submitted to the Board of Governors by February 1 of each succeeding year:

- The plans of the district concerning its future student services programs, and the effect on estimated construction needs that may arise because of particular student services to be emphasized. (Former Ed. Code, § 81821(a).)
- The enrollment projections for each educational center within a community college district, made cooperatively by the Department of Finance and the district. (Former Ed. Code, § 81821(b).)
- An annual inventory of all land of the district using standard definitions, forms, and instructions adopted by the Board of Governors. (Former Ed. Code, § 81821(e).)
- An estimate of district funds which shall be made available for capital outlay matching purposes pursuant to regulations adopted by the Board of Governors. (Former Ed. Code, § 81821(f).)

The Commission also approved the continuing review of the plan as required by 81820, but only as to this newly required content since the requirement to review the plan was not new.

This mandate redetermination request is based on the change in law made by Statutes 2014, chapter 34 (SB 860, eff. June 20, 2014), which amended Education Code section 81821 to provide that the new information described above “may also” rather than “shall” be included in the five-year plan and reviewed on a continuing basis, which the Department of Finance (Finance) argues are now discretionary activities.

Procedural History

On June 19, 2015, Finance filed a request for redetermination of the *Community College Construction*, 02-TC-47 decision, arguing that Senate Bill 860 (Stats. 2014, ch. 34) renders the mandate permissive and no longer reimbursable.¹ On July 31, 2015, the State Controller’s Office (Controller) concurred with Finance’s request to adopt a new test claim decision.² Commission staff issued the draft proposed decision for the first hearing on September 24, 2015.³ The Controller filed comments on the draft proposed decision for the first hearing on October 8, 2015.⁴ Neither Finance nor any of the claimants filed comments on the draft proposed decision for the first hearing.

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 redetermination process provides for a two hearing process. The Commission’s regulations state:

The first hearing shall be limited to the issue of whether the requester has made 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. The Commission shall find that the requester has made an adequate showing if it finds that the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.⁵

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

¹ Exhibit A, Request for Mandate Redetermination, page 1. Based on the June 19, 2015 filing date, the potential period of reimbursement for this redetermination would begin June 20, 2014, the effective date of SB 860, the statute that is alleged to constitute the subsequent change in law.

² Exhibit D, Controller’s Comments on Request for Mandate Redetermination.

³ Exhibit E, First Hearing Draft Proposed Decision issued September 24, 2015.

⁴ Exhibit F, Controller’s Comments on Draft Proposed Decision for the First Hearing.

⁵ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

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 17551.⁶

An “adequate showing” is determined in the Commission’s regulations as follows:

The Commission shall find that the requester has made an adequate showing if it finds that the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.⁷

If the Commission finds, at the first hearing, that:

The requester has made an adequate showing, when considered in light of all of the written comments, rebuttals and supporting documentation in the record and testimony at the hearing, the Commission shall publish a decision finding that an adequate showing has been made and setting the second hearing on whether the Commission shall adopt a new test claim decision to supersede the previously adopted test claim decision.⁸

Thus, the first hearing in the mandate redetermination process is to determine, pursuant to the Government Code and the Commission’s regulations, only whether the requester has made an adequate showing that the state’s liability may be modified based on a subsequent change in law, as defined. Therefore, this analysis will be limited to whether “the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.”⁹ If the Commission finds that there has been an adequate showing, a thorough mandates analysis to determine whether and to what extent the state’s liability has been modified, considering the applicable law, the arguments put forth by the parties and interested parties, and the facts in the record, will be prepared for the second hearing on this matter.

Staff Analysis

A. Statutes 2014, Chapter 34 Constitutes a Subsequent Change in Law, As Defined.

Statutes 2014, chapter 34 (SB 860, eff. June 20, 2014) amended Education Code section 81821 as follows in underline and strikeout:

- (a) The five-year plan for capital construction shall set out the estimated capital construction needs of the district with reference to ~~elements including at least all~~

⁶ Government Code section 17570, as added by Statutes 2010, chapter 719.

⁷ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

⁸ California Code of Regulations, title 2, section 1190.5(a)(5)(B) (Register 2014, No. 21).

⁹ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

both of the following elements:

- (1) The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors.
 - (2) District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors.
- (b) The five-year plan for capital construction may also set out the estimated capital construction needs of the district with reference to other elements, including, but not limited to:
- ~~(a)~~ (1) The plans of the district concerning its future academic and student services programs, and the effect on estimated construction needs which may arise because of particular courses of instruction or subject matter areas or student services to be emphasized.
 - ~~(b)~~ (2) The enrollment projections for each district formulated by the Department of Finance, expressed in terms of weekly student contact hours. The enrollment projections for each individual college and educational center within a district shall be made cooperatively by the Department of Finance and the ~~community college district~~ Chancellor of the California Community Colleges.
 - ~~(c)~~ ~~The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.~~
 - ~~(d)~~ ~~District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.~~
 - ~~(e)~~ (3) An annual inventory of all facilities and land of the district using standard definitions, forms, and instructions adopted by the board of governors.
 - ~~(f)~~ (4) An estimate of district funds ~~which~~ that shall be made available for capital outlay matching purposes pursuant to regulations adopted by the board of governors.

This is a subsequent change in law that may modify the requirements that were approved for reimbursement in the prior test claim decision and may modify the state's liability.

B. The Requester Has Made an Adequate Showing That the State's Liability May Be Modified Based on a Subsequent Change in Law, Such That Finance Has a Substantial Probability of Prevailing at the Second Hearing.

Education Code section 81821(b) now states that community colleges “may” rather than “shall” include in their five-year plans for capital construction the following information that is currently reimbursable in the parameters and guidelines: plans for future student services programs, enrollment projections for each education center within the district, an annual inventory of land, and an estimate of district funds made available for capital outlay matching purposes.¹⁰ The legislative history of this amendment indicates that it: “Makes permissive a requirement that community colleges submit specified facilities information to the CCC Chancellor's office, thereby eliminating a reimbursable state mandate (this information will continue to be collected through the state's capital outlay process).”¹¹

Section 81820 was not amended by the 2014 statute, and continues to require that the five-year plan shall be subject to the continuing review by the governing board. The requirements to include the following in the plan were not approved in the test claim decision because those requirements, and the requirement to have the plan subject to continuing review, were not new:

- (1) The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors, and
- (2) District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors.

In addition, the requirement for continuing review under Education Code section 81820 was approved only as to the newly required content in the prior test claim decision because the requirement for continuing review was not new. Therefore, since the content information in former Education Code section 81821, which the Commission found to impose a mandated new program or higher level of service in *Community College Construction*, 02-TC-47 appears to now be permissive, so too would be the requirement to review as to that content.

Staff finds that Finance has made an adequate showing that the state’s liability may be modified pursuant to article XIII B, section 6(a) of the California Constitution for the *Community College Construction* mandate based on a subsequent change in law, such that Finance has a substantial probability of prevailing at the second hearing on the request.

Staff Recommendation

Staff recommends that the Commission adopt the proposed decision and, pursuant to Government Code section 17570(b)(d)(4), direct staff to notice the second hearing to determine whether a new test claim decision shall be adopted to supersede the previously adopted test claim decision. If the Commission adopts the attached proposed decision, the second hearing for this matter will be set for January 22, 2016.

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

¹⁰ Former Education Code section 81821(a), (b), (e), and (f).

¹¹ Exhibit G, Assembly Floor Analysis of Senate Bill No. 860 (2013-2014 Reg. Sess.) as amended June 12, 2014, page 3.

BEFORE THE
 COMMISSION ON STATE MANDATES
 STATE OF CALIFORNIA

IN RE MANDATE REDETERMINATION:
 FIRST HEARING: ADEQUATE SHOWING
 ON:

Education Code Sections 81820 and
 81821(a), (b), (e), and (f);

Statutes 1980, Chapter 910;
 Statutes 1981, Chapter 470;
 Statutes 1981, Chapter 891;
 Statutes 1995, Chapter 758;

As Alleged to be Modified by:
 Statutes 2014, Chapter 34 (SB 860)

Filed on June 19, 2015

By the Department of Finance, Requester

Case No.: 14-MR-03

*Community College Construction
 (02-TC-47)*

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

(Adopted December 3, 2015)

DECISION

The Commission on State Mandates (Commission) heard and decided this mandate redetermination during a regularly scheduled hearing on December 3, 2015. [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 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 [directed/did not direct] 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 Commission voted 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 Findings

The Commission finds that the Department of Finance (Finance) has made an adequate showing that pursuant to article XIII B, section 6(a) of the California Constitution, the state’s liability for the *Community College Construction*, 02-TC-47 mandate may be modified based on a subsequent change in law, such that Finance has a substantial probability of prevailing at the second hearing on the request. Specifically, requirements for the five-year plan for capital construction were amended by Statutes 2014, chapter 34 (SB 860, eff. June 20, 2014) to provide that the following information that was approved in the prior test claim decision, and is currently reimbursable in the parameters and guidelines, “may also” rather than “shall” be included: plans for future student services programs, enrollment projections for each education center within the district, an annual inventory of land, and an estimate of district funds made available for capital outlay matching purposes.¹²

Section 81820 was not amended by the 2014 statute, and continues to require that the five-year plan shall be subject to continuing review by the governing board. The requirements to include the following in the plan were not approved in the test claim decision because those requirements, and the general requirement to have the plan subject to continuing review, were not new:

- (1) The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors, and
- (2) District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors.

In addition, the requirement to review the five-year plan on a continuing basis under Education Code section 81820 was approved only as to the newly required content in the prior test claim decision, because the requirement for continuing review was not new. Therefore, since the information in former Education Code section 81821, which the Commission found to impose a mandated new program or higher level of service in *Community College Construction*, 02-TC-47, appears to now be permissive, the requirement for continuing review of that content would also be permissive.

Pursuant to Government Code section 17570(b)(d)(4), the Commission will hold a second hearing to determine if a new test claim decision shall be adopted to supersede the previously adopted test claim decision.

¹² Former Education Code 81821(a), (b), (e), and (f).

COMMISSION FINDINGS

I. Chronology

10/27/2011	The Commission adopted the Test Claim Statement of Decision. ¹³
03/23/2012	The Commission adopted the Parameters and Guidelines. ¹⁴
06/20/2014	Statutes 2014, chapter 34 (SB 860) was filed by the Secretary of State and became effective immediately. ¹⁵
06/19/2015	Finance filed the Request for Mandate Redetermination. ¹⁶
07/31/2015	The State Controller's Office (Controller) submitted comments on the request. ¹⁷
09/24/2015	Commission staff issued the First Hearing Draft Proposed Decision. ¹⁸
10/08/2015	The Controller submitted comments on the First Hearing Draft Proposed Decision. ¹⁹

II. Background

The Community College Construction Act of 1980 requires the governing boards of community college districts to prepare and submit to the Board of Governors (a state agency), "a plan for capital construction for community college purposes of the district." As amended in 1990, the plan requires:

The plan shall reflect capital construction for community college purposes of the district for the five-year period commencing with the next proposed year of funding. The five-year plan shall be subject to continuing review by the governing board and annually shall be extended one year, and there shall be submitted to the board of governors, on or before the first day of February in each succeeding year, a report outlining the required modifications or changes, if any, in the five-year plan.²⁰

Education Code section 81821, as amended in 1995, identified the information required to be included in the five-year plan for capital construction as follows:

¹³ Exhibit B, Test Claim Statement of Decision, *Community College Construction*, 02-TC-47.

¹⁴ Exhibit C, Parameters and Guidelines, *Community College Construction*, 02-TC-47.

¹⁵ Exhibit G, Statutes 2014, chapter 34 (selected pages). Urgency statutes become effective immediately upon enactment (Cal. Const., art. IV, section 8(c)(3)).

¹⁶ Exhibit A, Request for Mandate Redetermination.

¹⁷ Exhibit D, Controller's Comments on Request for Mandate Redetermination.

¹⁸ Exhibit E, First Hearing Draft Proposed Decision.

¹⁹ Exhibit F, Controller's Comments on Draft Proposed Decision for the First Hearing.

²⁰ Education Code section 81820 (Stats. 1990, ch. 1372).

The five-year plan for capital construction shall set out the estimated capital construction needs of the district with reference to elements including at least all of the following:

- (a) The plans of the district concerning its future academic and student services programs, and the effect on estimated construction needs which may arise because of particular courses of instruction or subject matter areas or student services to be emphasized.
- (b) The enrollment projections for each district formulated by the Department of Finance, expressed in terms of weekly student contact hours. The enrollment projections for each individual college and educational center within a district shall be made cooperatively by the Department of Finance and the community college district.
- (c) The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.
- (d) District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.
- (e) An annual inventory of all facilities and land of the district using standard definitions, forms, and instructions adopted by the board of governors.
- (f) An estimate of district funds which shall be made available for capital outlay matching purposes pursuant to regulations adopted by the board of governors.

On October 27, 2011, the Commission adopted the *Community College Construction*, 02-TC-47 test claim decision based on Education Code section 81800 et seq., as added and amended by statutes enacted from 1980 through 1995. The Commission found that Education Code section 81820 did not impose a new program or higher level of service for requiring community college districts to prepare, submit, and review on a continuing basis a five-year capital construction plan because these were required under prior law enacted in 1967, by former Education Code section 20065.²¹ However, some of the information included in the plan, identified in Education Code section 81821(a), (b), (e), and (f), was newly required by the test claim statutes. The Commission approved the test claim, finding that reimbursement was required for including the new information in a community college district's five-year plan for capital construction that is submitted to the Board of Governors. The Commission also approved the continuing review of this newly-required information only pursuant to Education Code section 81820, since the requirement for continuing review of the five-year plan was not new except as to the newly required content in section 81821.

²¹ Exhibit B, Test Claim Statement of Decision, *Community College Construction*, 02-TC-47, page 18.

The parameters and guidelines, adopted March 23, 2012, require reimbursement for the following activities beginning July 1, 2001:

Include the following information in the initial five-year plan for capital construction (for community college districts established on or after July 1, 2001), and continually review and report any required modifications or changes with respect to the following information in the subsequent annual update submitted to the Board of Governors by February 1 of each succeeding year:

- The plans of the district concerning its future student services programs, and the effect on estimated construction needs that may arise because of particular student services to be emphasized. (§ 81821(a).)
- The enrollment projections for each educational center within a community college district, made cooperatively by the Department of Finance and the district. (§ 81821(b).)
- An annual inventory of all land of the district using standard definitions, forms, and instructions adopted by the Board of Governors. (§ 81821(e).)
- An estimate of district funds which shall be made available for capital outlay matching purposes pursuant to regulations adopted by the Board of Governors. (§ 81821(f).)²²

The Alleged Subsequent Change in Law

Finance alleges that Statutes 2014, chapter 34, constitutes a subsequent change in law that modifies the state's liability for this program. The 2014 statute amended Education Code section 81821 by providing that enrollment and facility capacity information, formerly required under subdivisions (c) and (d), "shall" be included in the content of the five-year plan in subdivision (a). As determined by the Commission in the *Community College Construction*, 02-TC-47 test claim decision, the enrollment and facility capacity information was required under prior law and did not constitute a new program or higher level of service. Thus, reimbursement was denied for preparing and submitting that information.²³

The 2014 statute then adds subdivision (b) to provide that the new information previously approved by the Commission for reimbursement in the *Community College Construction* test claim decision (in former Ed. Code, § 81821(a), (b), (e), and (f)) now "may also" (rather than "shall") be included in the plan as estimated capital construction needs of the district. Statutes 2014, chapter 34, section 15 amends section 81821 as follows (with amendments noted in ~~strikeout~~ and underline):

(a) The five-year plan for capital construction shall set out the estimated capital construction needs of the district with reference to ~~elements including~~ at least ~~all~~ both of the following elements:

(1) The current enrollment capacity of the district expressed in terms of weekly

²² Exhibit C, Parameters and Guidelines, *Community College Construction*, 02-TC-47, page 3.

²³ Exhibit B, Test Claim Statement of Decision, *Community College Construction*, 02-TC-47, pages 18-21.

student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors.

(2) District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors.

(b) The five-year plan for capital construction may also set out the estimated capital construction needs of the district with reference to other elements, including, but not limited to:

~~(a) (1) The plans of the district concerning its future academic and student services programs, and the effect on estimated construction needs which may arise because of particular courses of instruction or subject matter areas or student services to be emphasized.~~

~~(b) (2) The enrollment projections for each district formulated by the Department of Finance, expressed in terms of weekly student contact hours. The enrollment projections for each individual college and educational center within a district shall be made cooperatively by the Department of Finance and the community college district Chancellor of the California Community Colleges.~~

~~(c) The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.~~

~~(d) District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.~~

~~(e) (3) An annual inventory of all facilities and land of the district using standard definitions, forms, and instructions adopted by the board of governors.~~

~~(f) (4) An estimate of district funds which that shall be made available for capital outlay matching purposes pursuant to regulations adopted by the board of governors.~~

The legislative history of this 2014 amendment states that it: “Makes permissive a requirement that community colleges submit specified facilities information to the CCC Chancellor's office, thereby eliminating a reimbursable state mandate (this information will continue to be collected through the state's capital outlay process).”²⁴

²⁴ Exhibit G, Assembly Floor Analysis of Senate Bill No. 860 (2013-2014 Reg. Sess.) as amended June 12, 2014, page 3.

Mandate Redetermination Process under Section 17570

Government Code section 17570 provides a process for a test claim decision to be redetermined and superseded by a new test claim decision if a subsequent change in law, as defined, has modified the state's liability for reimbursement. 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."²⁵ 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 17551.²⁶

The Commission shall find that the requester has made an adequate showing if it "finds that the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing."²⁷ If the Commission finds at the first hearing, that the requester has made an adequate showing, it "shall publish a decision finding that an adequate showing has been made and setting the second hearing on whether the Commission shall adopt a new test claim decision to supersede the previously adopted test claim decision."²⁸

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

A. Department of Finance, Requester

In its request for redetermination, Finance states:

Chapter 34, Statutes of 2014 (SB 860) made components of Education Code section 81821, that were determined to be reimbursable activities, permissive by moving those components into a subdivision that allows rather than requires specified estimates to be included in the district's five-year capital construction plan.²⁹

²⁵ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

²⁶ Government Code section 17570, as added by Statutes 2010, chapter 719 (SB 856).

²⁷ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

²⁸ California Code of Regulations, title 2, section 1190.5(a)(5)(B) (Register 2014, No. 21).

²⁹ Exhibit A, Request for Mandate Redetermination, page 1.

Finance maintains that because the activities determined to be reimbursable are now permissive, the state's liability should be zero as of June 20, 2014, the effective date of Statutes 2014, chapter 34.

B. State Controller

The Controller states that it "concur[s] with the Department of Finance's request to adopt a new test claim decision and to amend the parameters and guidelines for the Community College Construction Program."³⁰ Commenting on the draft proposed decision for the first hearing, the Controller "recommends no changes."³¹

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 that modifies the state's liability.

The first hearing in the mandate redetermination process is to determine, pursuant to the Government Code and the Commission's regulations, only whether the requester has made an adequate showing that the state's liability has been modified based on a subsequent change in law, as defined. Therefore, the analysis will be limited to whether the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing."³² If the Commission determines that an adequate showing has been made, a thorough mandates analysis to determine whether and to what extent the state's liability has been modified, considering the applicable law, the arguments put forth by the parties and interested parties, and the facts in the record, will be prepared for the second hearing on this matter.

A. Statutes 2014, Chapter 34 Constitutes a Subsequent Change in Law Within the Meaning of Government Code Section 17570.

Government Code section 17570(b) states that the Commission may adopt a new test claim decision to supersede a previously adopted test claim decision only upon a showing that, pursuant to article XIII B section 6, the state's liability has been modified based on a subsequent

³⁰ Exhibit D, Controller's Comments on Request for Mandate Redetermination.

³¹ Exhibit F, Controller's Comments on Draft Proposed Decision for the First Hearing.

³² California Code of Regulations, title 2, section 1190.5 (Register 2014, No. 21). This regulation describes the standard for the first hearing as follows:

The first hearing shall be limited to the issue of whether the requester has made 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. The Commission shall find that the requester has made an adequate showing if it finds that the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.

change in law. A subsequent change in law is defined in Government Code section 17570(a)(2) as:

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 17551.³³

Effective June 20, 2014,³⁴ Statutes 2014, chapter 34, amended Education Code section 81821 by providing, in subdivision (b), that the new information previously approved by the Commission for reimbursement in the *Community College Construction* test claim decision (formerly required by Ed. Code, § 81821(a), (b), (e), and (f)) is no longer required to be included in the five-year plan for capital construction, but “may also” be included in the plan as estimated capital construction needs of the district as follows (with amendments noted in strikeout and underline):

(b) The five-year plan for capital construction may also set out the estimated capital construction needs of the district with reference to other elements, including, but not limited to:

- ~~(a)~~ (1) The plans of the district concerning its future academic and student services programs, and the effect on estimated construction needs which may arise because of particular courses of instruction or subject matter areas or student services to be emphasized.
- ~~(b)~~ (2) The enrollment projections for each district formulated by the Department of Finance, expressed in terms of weekly student contact hours. The enrollment projections for each individual college and educational center within a district shall be made cooperatively by the Department of Finance and the ~~community college district~~ Chancellor of the California Community Colleges.
- ~~(c)~~ The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.
- ~~(d)~~ District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.

³³ Government Code section 17570(a)(2).

³⁴ Urgency statutes become effective immediately upon enactment (Cal. Const., art. IV, section 8(c)(3)).

- (e) (3) An annual inventory of all facilities and land of the district using standard definitions, forms, and instructions adopted by the board of governors.
- (f) (4) An estimate of district funds ~~which~~ that shall be made available for capital outlay matching purposes pursuant to regulations adopted by the board of governors.

Finance asserts that the plain language of the section 81821(b), as amended, makes the requirements in the parameters and guidelines permissive by substituting the word “may” in place of the word “shall,” resulting in no costs mandated by the state for this program.³⁵

The Commission finds that Finance has made an adequate showing that Statutes 2014, chapter 34, as it amends Education Code section 81821, may require a finding that the state’s liability for the *Community College Construction*, 02-TC-47 program has been modified. Courts generally interpret the word “may” as permissive and “shall” as mandatory.³⁶ Thus, as amended, Education Code section 81821 no longer contains the mandatory language requiring community college districts to include in their five-year plans for capital construction, the following information found by the Commission to impose a reimbursable state-mandated program: plans for future student services programs, enrollment projections for each education center within the district, an annual inventory of land, and an estimate of district funds made available for capital outlay matching purposes.

Section 81820 was not amended by the 2014 statute, and continues to require that the five-year plan shall be subject to the continuing review by the governing board. However, since the content information in former Education Code section 81821(a), (b), (e), and (f), which the Commission found to impose a mandated new program or higher level of service in *Community College Construction*, 02-TC-47, is no longer required to be included in the plan, any continuing review of that information pursuant to Education Code section 81820 would be permissive.

Therefore, the Commission finds that Statutes 2014, chapter 34 establishes a subsequent change in law pursuant to Government Code section 17570(a)(2), that may require a finding that the state’s liability has been modified.

B. The Requester Has Made an Adequate Showing That the State’s Liability May Be Modified Based on a Subsequent Change in Law.

Education Code section 81821(b) now states that community colleges now “may” rather than “shall” include in their five-year plan for capital construction, the following information that is currently listed in the parameters and guidelines as eligible for reimbursement: plans for future student services programs, enrollment projections for each education center within the district, an annual inventory of land, and an estimate of district funds made available for capital outlay matching purposes.³⁷ The legislative history of this amendment indicates that it: “Makes permissive a requirement that community colleges submit specified facilities information to the

³⁵ Exhibit A, Request for Mandate Redetermination, page 1.

³⁶ Education Code section 75. *John Doe v. Albany Unified School District* (2010) 190 Cal.App.4th 668, 676 on statutory construction involving the terms “may” and “shall.”

³⁷ Former Education Code 81821(a), (b), (e), and (f).

CCC Chancellor's office, thereby eliminating a reimbursable state mandate (this information will continue to be collected through the state's capital outlay process).”³⁸

Section 81820 was not amended by the 2014 statute, and continues to require that the five-year plan shall be subject to the continuing review by the governing board. The requirements to include the following in the plan were not approved in the test claim decision because those requirements, and the general requirement to have the plan, were not new:

- (1) The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors, and
- (2) District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors.

In addition, the requirement to review under Education Code section 81820 was approved only as to the newly required content in the prior test claim decision, because the requirement for continuing review was not new. Therefore, since the content information in former Education Code section 81821, which the Commission found to impose a mandated new program or higher level of service in *Community College Construction, 02-TC-47* appears to now be permissive, so too would be the requirement to review as to that content. As a result, it appears that this subsequent change in law may modify the state’s liability for this program.

For the reasons discussed above, the Commission finds that Finance has made an adequate showing that the state’s liability may be modified pursuant to Statutes 2014, chapter 34, a subsequent change in law, such that Finance has a substantial possibility of prevailing at the second hearing.

V. Conclusion

Based on the foregoing, the Commission finds that the requester has made an adequate showing that the state’s liability for the *Community College Construction, 02-TC-47* mandate may be modified based on a subsequent change in law and that Finance has a substantial probability of prevailing at the second hearing. The Commission hereby directs Commission staff to notice the second hearing to determine whether to adopt a new test claim decision to supersede the Commission’s previously adopted test claim decision on *Community College Construction, 02-TC-47*.

³⁸ Exhibit G, Assembly Floor Analysis of Senate Bill No. 860 (2013-2014 Reg. Sess.) as amended June 12, 2014, page 3.

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 November 18, 2015, I served the:

Proposed Decision

Mandate Redetermination Request, 14-MR-03

First Hearing: Adequate Showing

Community College Construction (02-TC-47)

Education Code Sections 81820, 81821(a), (b), (e), and (f)

Statutes 1980, Chapter 910; Statutes 1981, Chapter 470; Statutes 1981, Chapter 891;

Statutes 1995, Chapter 758

As Alleged to be Modified by Statutes 2014, Chapter 34 (SB 860)

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 November 18, 2015 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 10/29/15

Claim Number: 14-MR-03

Matter: Community College Construction (02-TC-47)

Requester: Department of Finance

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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