



Fagen Friedman & Fulfroft LLP

70 Washington Street, Suite 205  
Oakland, California 94607  
Main: 510-550-8200  
Fax: 510-550-8211  
www.fagenfriedman.com

Diana McDonough  
Direct Dial: 510-550-8208  
dmcdonough@fagenfriedman.com

December 20, 2011

Ms. Nancy Patton  
Acting Executive Director  
Commission on State Mandates  
980 Ninth Street, Suite 300  
Sacramento, CA 95814

Re: **Co-Claimants' Response to the Commission on State Mandates' August 12, 2011  
Request for Comments**  
Behavioral Intervention Plans, CSM 4464  
Chapter 959, Statutes of 1990  
Education Code Section 56523  
Title 5, California Code of Regulations section 3001 and 3052

Dear Ms. Patton:

This letter is in response to the Commission on State Mandates' ("Commission") correspondence dated August 12, 2011, in which the Commission invited Behavioral Intervention Plans Claimants San Diego Unified School District, San Joaquin County Office of Education, and Butte County Office of Education (collectively, "Co-Claimants") to submit comments to three questions related to reasonable reimbursement methodologies ("RRM") under Government Code section 17518.5. Co-Claimants respectfully request that this response also be included in the record of CSM 4464. We respond to each question in turn.

***Question 1:*** *At some point is the range of figures used to develop the unit cost so wide that it violates the constitutional requirement that local agencies be reimbursed for their mandate-related costs?*

The Constitution requires that the State reimburse local agencies for their mandated costs. The Legislature has enacted a scheme to implement this constitutional provision which includes empowering the Commission to adopt an RRM when it adopts parameters and guidelines for reimbursement. If the Commission adopts an RRM, it is required to consult with the affected

Ms. Nancy Patton  
December 20, 2011  
Re: Request for Comments  
Page 2

parties to consider an RRM that balances accuracy with simplicity. The RRM must be based on representative cost information and consider variation in costs to implement the mandate in a cost efficient manner. If those requirements are met, the resulting RRM is presumed constitutional.

1. The Constitution requires reimbursement of state mandates. Under the California Constitution, local agencies *must* be reimbursed for their mandate-related costs. Article XIII B, section 6, subdivision (a) of the California Constitution provides: “Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service . . .[.]” In *California School Boards Association v. State*, the California Court of Appeal recently considered this provision, stating, “This reimbursement obligation was ‘enshrined in the Constitution . . . to provide local entities with the assurance that state mandates would not place additional burdens on their increasingly limited revenue resources.’” (*California Sch. Boards Assn. v. State* (2011) 192 Cal.App.4th 770, 785 (CSBA), citing *Lucia Mar Unified Sch. Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6, 244; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1282.)

2. The Legislature created a statutory scheme to implement the constitutional requirement of mandate reimbursement and courts presume that scheme is consistent with the Constitution. In 1984, the Legislature enacted Government Code sections 17500 and following to implement the constitutional requirement of reimbursing local agencies and school districts for state mandates.

\* \* \*

It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIII B of the California Constitution. Further, the Legislature intends that the Commission on State Mandates, as a quasi-judicial body, will act in a deliberative manner in accordance with the requirements of Section 6 of Article XIII B of the California Constitution. (Gov. Code, § 17500.)

The action of the Legislature in creating this scheme is presumed to be constitutional and to date, no court has found to the contrary:

[A] court must presume the Legislature acts consistent with the Constitution when enacting legislation, and we must adopt an interpretation that upholds the statute's constitutionality, if the interpretation is consistent with the statutory language and purpose. (*CSBA, supra*, 192 Cal.App.4th at 795.)

Ms. Nancy Patton  
December 20, 2011  
Re: Request for Comments  
Page 3

In *CSBA*, the California Court of Appeal considered section 6 of Article XIII B and one of the statutes enacted to implement it. (*CSBA, supra*, 192 Cal.App.4th 770.) There the Court of Appeal held that the State's practice of nominally funding state mandates with the intention to defer full payment with interest to a later, unspecified date, does not satisfy the applicable constitutional and statutory provisions. (*Id.* at 790.) Rather the court found that "section 17561, subdivision (a)'s statement that 'all' costs must be reimbursed by the State is a clear statutory directive requiring full payment once a mandate is determined by the Commission . . . An interpretation of section 17561 that would allow partial payments would render the word 'all' superfluous." (*Id.* at 789.) In reaching this decision, the court gave weight to the presumption discussed above – namely that the "court must presume that the Legislature acts consistent with the Constitution when enacting legislation" – "and uphold[] the statute's constitutionality, if the interpretation is consistent with the statutory language and purpose." (*Id.* at 795.)

3. The Legislature's authorization of use of an RRM with minimal requirements is presumed to be constitutional. The Legislature has chosen to permit reimbursement through use of an RRM with minimal requirements. An RRM, 1) is a formula, 2) is based on representative cost information, 3) considers variation in costs, and 4) balances accuracy with simplicity, as follows:

--1) The RRM is "a formula for reimbursing local agencies and school districts for costs mandated by the state, as defined in Section 17514." (Gov. Code, § 17518.5, subd.(a).)

--2) An RRM "shall be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs." (Gov. Code, § 17518.5, subd.(b).)

--3) An RRM "shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner." (Gov. Code, § 17518.5, subd.(c).)

--4) The Commission "shall consult with the Department of Finance, the affected state agency, the Controller, the fiscal and policy committees of the Assembly and Senate, the Legislative Analyst, and the claimants to consider a reasonable reimbursement methodology that balances accuracy with simplicity." (Gov. Code, §17557, subd.(f).)

This minimal list of requirements makes it clear that the Legislature has authorized standardized reimbursement for a broad range of costs based on the particular mandate and the particular sources of cost information available. As long as the statutory requirements listed above are met there is no range of figures so wide as to violate constitutional requirements. In fact, no doubt with an eye towards expediting the process, "[W]henever possible" an RRM "shall be based on

Ms. Nancy Patton  
December 20, 2011  
Re: Request for Comments  
Page 4

general allocation formulas, uniform cost allowances, and other approximations of local costs . . . rather than detailed documentation of actual local costs." (Gov. Code, § 17518.5, subd.(d).)

By allowing local agencies to use RRM, the Legislature contemplates that some local agencies will receive more than their actual costs, and some local agencies will receive less. As the Commission's August 12, 2011 letter notes, the Commission has already determined an RRM reasonably reimburses each local agency even if, when applied, some local agencies receive more and some local agencies receive less than the actual costs incurred. Specifically, in Municipal Stormwater and Urban Runoffs, the Commission found \$6.74 was a reasonable level of reimbursement under an RRM even though actual costs ranged from \$2.02 to \$14.46. Applying the approved RRM, some agencies were entitled to over three times their actual costs while others received less than half their actual costs.

Does a standardized reimbursement level, an RRM, contradict the statutory mandate discussed by the Court of Appeal above that "all costs" be reimbursed by the state? We believe the answer is no. Rather the RRM is to be interpreted consistent with the rules of statutory construction which require harmonization of all parts of a legislative scheme to achieve the overall purpose – here the expeditious reimbursement of local agencies and school districts for mandated costs. As the Court of Appeal quoted with approval in *CSBA*:

"The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (*CSBA, supra, 192 Cal.App.4th at 795, citing Los Angeles Unified Sch. Dist. v. County of Los Angeles (2010) 181 Cal App.4th 414, 423.*)

One good faith method of harmonization is to adopt an RRM that will reimburse the estimated total costs of all school districts and agencies statewide to implement the mandate in a cost efficient manner although it will not necessarily reimburse the actual costs of each individual entity.

4. The initial enactment of the RRM language and its subsequent amendment evidence the Legislature's conclusion that levels of mandate reimbursement may range widely and still be constitutional. Prior to 2004, RRM did not exist. In 2004, the Legislature amended Section 17557 subdivision (b) to substitute "reasonable reimbursement methodology" for "allocation

Ms. Nancy Patton  
December 20, 2011  
Re: Request for Comments  
Page 5

formula” or “uniform allowance.”<sup>1</sup> Amended Section 17557, subdivision (b) reads: "In adopting parameters and guidelines, the commission may adopt a reasonable reimbursement methodology." At the same time, Section 17518.5 was added to the Government Code, which required RRM's to meet certain conditions, including the following: “The total amount to be reimbursed statewide is *equivalent* to total estimated local agency and school district costs to implement the mandate in a cost-efficient manner;” and “For *50 percent or more* of eligible local agency and school district claimants, the amount reimbursed is estimated to *fully offset their projected costs* to implement the mandate in a cost-efficient manner.” (Gov. Code, § 17518.5, subd.(a)(1)&(2) (2004), *emphasis added*.)

The 50% requirement makes it clear that in 2004 the Legislature had authorized reimbursement that would be quite different from actual costs for claimants – allowing for the possibility that 50% of claimants would be over-reimbursed and 50% would be under-reimbursed. However, in 2007 both of these requirements were eliminated and replaced by subdivisions (b) and (c).

Since 2007, the current requirements for RRM's are considerably less specific and more flexible than the former requirements. Now, there is *no* requirement that a minimum percentage of claimants’ projected costs be fully offset or that the total amount to be reimbursed statewide covers the total of local estimated costs. Since 2007, Section 17518.5 requires only that RRM's “be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs,” and that the RRM “consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner.” (Gov. Code, § 17518.5, subds.(b)&(c) (2007).) In other words, the statute expressly contemplates variation and leaves open the possibility for a potentially large degree of variation in the costs offset.

Not only does Section 17518.5 subdivision (c) intentionally leave open the possibility for cost variation underlying the RRM, it also only requires that the RRM *consider* the variation in costs. The Legislature’s amendment of Section 17518.5 to impose less stringent requirements coupled with the fact that variation of costs is assumed in the section's language, demonstrates legislative intent to allow RRM's even when the underlying costs reflect significant variation. Cost variation

---

<sup>1</sup> We believe the term “reasonable reimbursement methodology” should be given special attention. “Reasonable reimbursement methodology” is frequently interchanged with “unit cost” which we believe is inconsistent with current law. An RRM is a “formula” and while it may include a unit cost, it suggests a system that is much more general and flexible than one based on “unit cost.” (Gov. Code, § 17518.5, subd.(a).)

Ms. Nancy Patton  
December 20, 2011  
Re: Request for Comments  
Page 6

is not a bar to the use of RRM's nor is there any provision requiring that cost variation be within certain limits. As set out in Co-Claimants' Rebuttal to Finance's Comments, variation is only relevant to determine what a reasonable *level* of reimbursement is for an RRM – presumably one at or near the average, as Co-Claimants propose in the BIP context – not *whether* the use of an RRM is appropriate in the first place.<sup>2</sup>

5. The Legislature's timing in enacting the statute which authorizes RRM's shows its intent to apply RRM's to claims that require extensive retroactive reimbursement. As noted above, in 2004, the Legislature amended Section 17557 subdivision (b) to substitute "reasonable reimbursement methodology" for "allocation formula" or "uniform allowance." This amendment closely followed, and was likely spurred by, the 2003 change in law which limited test claims to mandates going back only three years and prompted a large number of filings in 2002 and 2003. (See Commission on State Mandates Backlog Reduction Plan, p.2, May 25, 2011, excerpts attached hereto as Exhibit A.) As a result local agencies and school districts filed 51 test claims in 2002 and 23 test claims in 2003 to preserve claims for mandates going as far back as 1975. (*Id.*) These larger and more complicated test claims contributed to the Commission's backlog, the effects of which are still felt today. Out of the Commission's backlog of 51 test claims (as of May 2011), 12 are from 2002 and 12 are from 2003. (*Id.*) The introduction of RRM's into the mandate process simplified the onerous task of reimbursement for large claims involving many years of retroactivity. The fact that the Legislature enacted the process just when such claims were filed suggests that it saw the RRM as a tool in those cases.

Why does an RRM make particular sense in cases where the claim goes back a number of years? In such a case, local agencies and districts do not have records to show actual costs. However, an RRM, based on costs incurred in a recent year, can be developed with accuracy. Without an RRM, local agencies and school districts would be forced to forgo reimbursement, to base claims on pure speculation or undertake a burdensome, likely fruitless, effort to substantiate claims. In such a case, an RRM, which may be based on a wide range of costs but meets the statutory requirements, furthers the constitutional intent of reimbursing school districts and local agencies for state-imposed mandates in a rational way.

---

<sup>2</sup> Co-Claimants incorporate by reference their October 14, 2011 Rebuttal to Finance's Comments (hereafter "Rebuttal").

Ms. Nancy Patton  
December 20, 2011  
Re: Request for Comments  
Page 7

**Question 2:** *How should "cost-efficient" be defined?*

“A reasonable reimbursement methodology shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost efficient manner.” (Gov. Code, § 17518.5(c).) The Legislature did not define “cost-efficient.” The Commission has the power to determine what "cost-efficient" means. As the agency charged with interpreting and implementing the statutes and regulations governing state mandates and RRM, the Commission’s interpretation of “cost-efficient” “is entitled to consideration and respect by the courts.” (*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 6, 7.)

Since the Legislature stated that an RRM shall consider the “variation in costs” “to implement the mandate in a cost efficient manner,” we can conclude that it believed variation in costs provides information regarding what is cost efficient. Considering variation, we believe, means that the Legislature concluded that a mandate implemented at a middle cost, not at a high cost and not at a low cost, was a mandate implemented with cost efficiency. This approach allows for mandate implementation in an adequate, but not extravagant, manner. If the state reimbursed at the average cost level it would be meeting its constitutional obligation.

**Question 3:** *What does this section require be cost-efficient? Stated another way, what does a requestor need to show to demonstrate that its proposed RRM unit cost meets the requirement of section 17518.5(c)?*

Government Code section 17518.5, subdivision (c) states: “A reasonable reimbursement methodology shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner.” The express language of the statute assumes that “cost-efficient” implementation for one local agency will vary from “cost-efficient” implementation for another. As we do not believe there can be one definition for “cost-efficient” with respect to mandate implementation, it follows that there is no single way for a requestor to show that its proposed RRM meets the requirement of Section 17518.5(c).

However, we believe one straightforward manner to use variation to ensure cost-efficiency is to base an RRM on an average weighted by ADA. With this approach, 1) the average cost per item in a given district or agency is multiplied by the number of students, or other relevant multiplier, 2) the products of these calculations are totaled, and 3) the sum is divided by the total number of students (or other relevant multiplier) to reach the RRM. In this manner the RRM is neither set at the top, nor the bottom. Thus the highest cost districts are reimbursed below their costs requiring them to be more efficient if possible and the lowest cost districts are reimbursed above their costs encouraging their fuller implementation of the mandate.

Ms. Nancy Patton  
December 20, 2011  
Re: Request for Comments  
Page 8

We hope that this response is helpful to the Commission. If we can provide any further briefing or information please do not hesitate to contact us.

Sincerely,

FAGEN FRIEDMAN & FULFROST, LLP



Diana McDonough



Melanie Seymour

Attachment



**EXHIBIT A**

# Commission on State Mandates

## Backlog Reduction Plan

A Comprehensive Plan Prepared by Staff  
to Complete All Pending Claims

May 25, 2011

### I. Executive Summary

As of May 25, 2011, the Commission on State Mandates (Commission) has a backlog of 51 test claims and 163 incorrect reduction claims. The Commission has pledged to develop a strategy to reduce the backlog of incorrect reduction claims. This document sets forth staff's plan to reduce the backlog of both test claims and incorrect reduction claims. The plan describes several tools Commission staff plan to employ to reduce the backlog as expeditiously as possible. The plan contemplates presenting all of the most complicated test claims (the 2002 and 2003 claims) to the Commission for decision by the end of fiscal year 2011-2012, and all backlogged test claims by 2014. Of the 163 pending incorrect reduction claims, 102 involve just two programs. Commission staff believe by working closely with the State Controller's Office and the claimant community, the backlog of IRCs could also be eliminated by 2014.

### II. Overview

Local agencies and school districts are authorized by law to file test claims with the Commission alleging that a statute or executive order imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. If the Commission finds that there is a reimbursable state-mandated program, the Commission is required to determine the amount to be subvended by adopting parameters and guidelines for the program. The State Controller's Office (Controller) then prepares and issues claiming instructions to local agencies and school districts to notify them of the right to file reimbursement claims for the fiscal years eligible for reimbursement.

Local agencies and school districts may then file reimbursement claims with the Controller for the reimbursement of state-mandated costs. The Controller is authorized to reduce reimbursement claims it deems excessive or unreasonable. If the Controller reduces a reimbursement claim, a local agency or school district may file an incorrect reduction claim (IRC) with the Commission alleging that the Controller incorrectly reduced the claim. The Commission is required to hear these claims and determine if they were incorrectly reduced.

Despite having a small staff of only about 11 employees, the Commission over the last decade has completed a substantial amount of work. Between fiscal years 2003-2003 and 2009-2010, the Commission decided a total of 146 test claims, reconsidered another 17 test claims, adopted or set aside 184 parameters and guidelines (and parameters and guidelines amendments), adopted 55 statewide cost estimates, and decided 86 incorrect reduction claims. In addition, Commission staff during this time worked on numerous litigation matters and on a host of special projects such as the mandate reform process and the audits performed by the Bureau of State Audits.

Nevertheless, over time, a backlog of claims has accumulated. Preparing staff analyses for test claims and IRCs is the most time-consuming activity for Commission staff and is the primary area the Commission needs to focus on in order to reduce the backlog. The oldest test claims were filed in 2002 and 2003. Collectively, those claims are much larger and more complicated than claims from any subsequent year because in 2003 the law was amended to only allow claimants to allege mandates going back three years. Prior to this amendment, claimants could allege mandates going all the way back to 1975. This amendment caused local agencies and school districts to file 51 test claims for 2002 and 23 for 2003. These test claims allege that nearly 500 statutes and 400 regulatory sections and executive orders are mandated programs. As of May 25, 2011, 12 test claims from 2002 and 12 from 2003 are still pending with the Commission.

The Commission also has 163 pending IRCs. In October 2009, the Bureau of State Audits published a report (BSA 2009 Report<sup>1</sup>) regarding the Commission on State Mandates. The BSA paid particular attention to IRCs and recommended that the Commission accelerate its efforts to complete IRCs. The report stated:

Until the incorrect reduction claims are resolved, the Controller may continue to make similar field-audit reductions that are reversed later by the Commission. Conversely, if the Commission ultimately finds the Controller's reductions to be correct, local entities will have continued to submit inappropriate claims until the time the Commission makes its decision. Either way, speedier resolution of outstanding incorrect reduction claims would allow the Controller to conduct audits with an awareness of the Commission's decisions and to incorporate those results into its audit findings and outreach efforts. (BSA 2009 Report, p. 40.)

In its September 15, 2010 Report<sup>2</sup> to the Director of the Department of Finance, the Commission stated that it would prepare a plan to reduce and ultimately eliminate the backlog of IRCs. Because the Commission has limited staff resources, if staff shifts its efforts from test claims to IRCs, the time it will take to reduce the test claim backlog will increase, and vice versa. Accordingly, Commission staff decided to assemble a plan to comprehensively address the problem by focusing both on IRCs and test claims. This document represents that plan, and is divided into three sections. The first section describes the nature of the backlog, with tables that illustrate the types of claims before the Commission. The second section describes the challenges Commission staff faces in trying to reduce this backlog. The third section articulates Commission staff's plan to reduce and ultimately eliminate the backlog.

### **III. Backlog of Claims**

The Commission's pending caseload consists of matters filed by claimants and state agencies, including test claims, incorrect reduction claims, parameters and guidelines and proposed

---

<sup>1</sup> The full title of the report is *State Mandates: Operational and Structural Changes Have Yielded Limited Improvements in Expediting Processes and in Controlling Costs and Liabilities, October 2009, Report 2009-501*. It can be found at <http://www.bsa.ca.gov/pdfs/reports/2009-501.pdf>

<sup>2</sup> This document can be found at <http://www.csm.ca.gov/docs/091510b.pdf>