Hearing Date: December 3, 2015
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ITEM 5

MANDATE REDETERMINATION
FIRST HEARING: ADEQUATE SHOWING

PROPOSED DECISION

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

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

Behavioral Intervention Plans (*CSM-4464*)

14-MR-05

Department of Finance, Requester

TABLE OF CONTENTS

Exhibit A

RECEIVED
June 30, 2015
Commission on State Mandates

DEPARTMENT OF FINANCE
EDMUND G. BROWN JR. • GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

June 30, 2015

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Halsey:

Pursuant to Government Code section 17570, the Department of Finance requests the Commission on State Mandates (Commission) adopt a new test claim decision and amend the parameters and guidelines for the Behavioral Intervention Plans (CSM 4464) state-mandated program to reflect subsequent changes in law that amended the test claim statute and eliminated all of the state-mandated activities.

Chapter 48, Statutes of 2013, (AB 86) amended Education Code section 56523, to eliminate the statutory force and effect behind the regulations governing the use of behavioral interventions, and required the California Department of Education to repeal section 3052 and portions of section 3001 of Title 5 of the California Code of Regulations, which are no longer supported by statute. Section 3052 of the California Code of Regulations was repealed on October 16, 2013 and section 3001 subdivisions (d), (e), (f), (g), and (ab) on July 1, 2014.

The CSM form "Request to Adopt New Test Claim Decision" is attached with a detailed analysis, declarations and documentation.

Pursuant to section 1181.2 of the California Code of Regulations, "documents that are e-filed with the Commission need not be otherwise served on persons that have provided an e-mail address for the mailing list."

If you have any questions regarding this letter, please contact Lisa Mierczynski, Principal Program Budget Analyst at (916) 445-0328.

Sincerely,

THOMAS TODD
Assistant Program Budget Manager

Enclosure

1. TITLE OF REQUEST TO ADOPT A NEW TEST CLAIM DECISION

Behavioral Intervention Plans (CSM 4464)

For CSM Use Only
Filing Date: RECEIVED June 30, 2015 Commission on State Mandates
REQUEST# 14-MR-05

2. REQUESTER INFORMATION

Name of Local Agency, School District, Statewide Assocation of Local Agencies or School Districts, or State Agency

California Department of Finance

Requester Contact

Lisa Mierczynski

Title

Principal Program Budget Analyst

Organization

915 L Street

Street Address

Sacramento, CA 95814

City, State, Zip Code

(916) 445-0328

Telephone Number

(916) 323-9530

Fax Number

lisa.mierczynski@dof.ca.gov

E-Mail Address

3. REPRESENTATIVE INFORMATION

If requester designates another person to act as its sole representative for this request, all correspondence and communications regarding this request shall be forwarded to this representative. Any change in representation must be authorized by the requester in writing, and sent to the Commission on State Mandates. Please complete information below if desginating a representative.

Representative Name

Title

Organization

Street Address

City, State, Zip Code

Telephone Number

Fax Number

E-Mail Address

4. IDENTIFYING INFORMATION

Please identify the name(s) of the programs, test claim number(s), and the date of adoption of the Statement of Decision, for which you are requesting a new test claim decision, and the subsequent change in law that allegedly changes the state's liability. Regarding the subsequent change in law, please identify all relevant code sections (include statutes, chapters, and bill numbers), regulations (include register number and effective date), executive orders (include effective date), cases, or ballot measures.

On September 28, 2000, the Commission on State Mandates (Commission) adopted the Statement of Decision for Behavioral Interventions Plans(BIPs) (CSM-4464) and approved reimbursement for specified activities mandated in regulations which implement Education Code section 56523.
Pursuant to Government Code section 17570, the Department of Finance requests the Commission to adopt a new test claim decision and amend the parameters and guidelines for the BIPs mandated program to reflect the removal of the authority for the regulations imposing the mandate. Chapter 48, Statutes of 2013 (AB 86) eliminated the authority for section 3052 and portions of section 3001 of Title V of the California Code of Regulations effective July 1, 2013.

Sections 5, 6 and 7 are attached as follows:

5. Detailed Analysis: Pages 1 to 4.
6. Declarations: Pages 5 to 6.
7. Documentation: Pages 7 to 28

Sections 5, 6, and 7 should be answered on separate sheets of plain 8-1/2 x 11 paper. Each sheet should include the name of the request, requestor, section number (i.e., 5, 6, or 7), and a heading at the top of each page.

5. DETAILED ANALYSIS

Under the heading "5. Detailed Analysis," please provide a detailed analysis of how and why the state's liability for mandate reimbursement has been modified pursuant to article XIII B, section 6(a) of the California Constitution based on a "subsequent change in law" as defined in Government Code section 17570. This analysis shall be more than a written narrative or simple statement of the facts at law. It requires the application of the law (Gov. Code, § 17570 (a) and (b)) to the facts (i.e., the alleged subsequent change in law) discussing, for each activity addressed in the prior test claim decision, how and why the state's liability for that activity has been modified. Specific references shall be made to chapters, articles, sections, or page numbers that are alleged to impose or not impose a reimbursable state-mandated program.

Also include all of the following elements:

The actual or estimated amount of the annual statewide changes in the state's liability for mandate reimbursement pursuant to Article XIII B, section 6 (subdivision (a)) on a subsequent change in the law.

A. Identification of all of the following if relevant:
   1. Dedicated state funds appropriated for the program.
   2. Dedicated federal funds appropriated for the program.
   3. Fee authority to offset the costs of the program.
   4. Federal law.
   5. Court decisions.
   6. State or local ballot measures and corresponding date of election.

6. DECLARATIONS

Under the heading "6. Declarations," support the detailed analysis with declarations that:

A. Declare actual or estimated annual statewide costs that will or will not be incurred to implement the alleged mandate.

B. Identify all local, state, or federal funds and fee authority that may or may not be used to offset the increased costs that will or will not be incurred by the claimants to implement the alleged mandate or result in a finding of no costs mandated by the state, pursuant to Government Code section 17556.

C. Describe new activities performed to implement specified provisions of the statute or executive order alleged to impose a reimbursable state-mandated program.

D. Make specific references to chapters, articles, sections, or page numbers alleged to impose or not impose a reimbursable state-mandated program.

E. Are signed under penalty of perjury, based on the declarant's personal knowledge, information, or belief, by persons who are authorized and competent to do so.

7. DOCUMENTATION

Under heading "7. Documentation," support the detailed analysis with copies of all of the following:

A. Statutes, and administrative or court decisions cited in the detailed analysis.

Statements of Decision and published court decisions from a state mandate determination by the Board of Control or the Commission are exempt from this requirement. When an omnibus bill is pled or cited, the requester shall file only the relevant pages of the statute, including the Legislative Counsel's Digest and the specific statutory changes at issue.

8. CERTIFICATION

*Read, sign, and date this section and insert at the end of the request for a new test claim decision.**

This request for a new test claim decision is true and complete to the best of my personal knowledge, information, or belief.

Lisa Mierczynski	Principal Program Budget Analyst
Print or Type Name of Authorized Official	Print or Type Title
Lisa Mierczynski	June 30, 2015
Signature of Authorized Official	Date

*If declarant for this certification is different from the contact identified in section 2 of the form, please provide the declarant's address, telephone number, fax number and e-mail address.

Request to Adopt a New Test Claim Decision
Department of Finance
Behavioral Intervention Plans
Section 5: Detailed Analysis

Summary of Mandate

Education Code section 56523 required the Superintendent of Public Instruction and the State Board of Education to adopt regulations establishing behavioral intervention plans (BIPs), which: (1) include the types of behavioral interventions that can be used; (2) require that a pupil's individualized education plan include a description of behavior interventions that meet certain guidelines; and (3) specify standards and guidelines regarding the use of behavior interventions in emergency situations. In accordance with Education Code section 56523, the State Department of Education adopted sections 3001 and 3052 of Title 5 of the California Code of Regulations (CCR), which listed the local educational agencies' obligations concerning BIPs.

The Commission on State Mandates (Commission) found, in the test claim statement of decision (CSM-4464), that Education Code section 56523 only requires the Superintendent of Public Instruction and State Board of Education to adopt regulations governing BIPs, and does not impose any requirements upon school districts. However, the Commission concluded that the implementing regulations impose a reimbursable state-mandated program upon school districts within the meaning of Article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following categories of reimbursable activities:

A. Scope of Mandate

Special Education Local Planning, County Offices of Education, and school districts shall be reimbursed for increased costs for the activities regarding BIPs in the following categories: (1) Special Education Local Plan Area (SELPA) plan requirements; (2) development and implementation of BIPs; (3) functional analysis assessments; (4) modifications and contingent BIPs; (5) development and implementation of emergency interventions; (6) prohibited behavioral interventions; and (7) due process hearings.

B. Reimbursable Activities/Costs

For each eligible claimant, the following cost items are reimbursable:

Special Education Local Plan Area Plan Requirements

1. Section 3052(j) provides for the adoption of SELPA plan requirements, which include systematic use of BIPs, training of behavioral intervention case managers and personnel involved in implementing BIPS, special training in emergency interventions, and identification of approved emergency procedures.
2. Training is required to be included in the SELPA plan pursuant to subdivision (j) of section 3052. Subdivision (j) provides that the qualification and training of personnel to be designated as behavioral intervention case managers and personnel involved in implementing behavioral intervention plans and using emergency behavioral interventions must be included in the SELPA plan.
3. Training is required to develop and implement BIPs pursuant to subdivision (a) of section 3052. Subdivision (a) provides that behavioral intervention plans shall only be implemented by, or be under the supervision of, staff with documented training in behavior analysis, including the use of positive behavioral interventions.

Developing and Evaluating Behavioral Intervention Plans

1. Participating in individualized educational program (IEP) team meetings in which behavioral intervention plans are developed, evaluated, or modified, or in which functional analysis assessment results are reviewed; preparing behavioral intervention plans; and developing contingency plans for altering the procedures or the frequency or duration of the procedures. Providing copies of SELPA procedures on behavioral interventions and behavioral emergency interventions to parents and staff.
2. IEP team meetings are provided for in subdivision (a) of section 3052, which provides that an IEP team "shall facilitate and supervise all assessment, intervention, and evaluation activities related to an individual's [BIP]."
3. Section 3052(c) provides for the development of BIPs at an IEP team meeting upon completion of a functional analysis assessment.
4. Section 3052(f) provides for evaluation of the effectiveness of BIPs, and provides that if the IEP team determines that changes are necessary to increase effectiveness, additional functional analysis assessments are conducted and changes proposed.
5. Section 3052(h) provides for contingency BIPs, in which procedures may be altered without reconvening the IEP team.
6. Section 3052(j) provides that the SELPA procedures "shall be available to all staff members and parents whenever a behavioral intervention plan is proposed."

Implementing Behavioral Intervention Plans

1. Implementing and supervising the implementation of behavioral intervention plans; measuring and documenting the frequency, duration, and intensity of targeted behavior and effectiveness of the behavioral intervention plan. Costs of employing personnel with documented training in behavioral analysis including positive behavioral interventions (whether such personnel are new staff or existing staff) to serve as behavioral intervention case managers is reimbursable under this component.
2. Section 3052(a) provides that BIPs "shall only be implementing by, or be under the supervision of, staff with documented training in behavior analysis, including the use of positive behavioral interventions." This section thereby requires BIPs to be implemented, and requires local educational agencies to maintain properly-trained staff to conduct such implementation.
3. Section 3052(f) provides for evaluating the effectiveness of BIPs, including measurement and documentation of the frequency, duration, and intensity of targeted behaviors.

Functional Analysis Assessments

1. Conducting functional analysis assessments is provided for in section 3052(b) and (c). Providing notice to and obtaining written consent from parents to conduct functional analysis assessments; conducting functional analysis assessments; preparing written reports of assessment results; providing copies of assessment reports to parents and the individualized education program (IEP) team; conducting IEP team meetings to review assessment results.

Modifications to Behavioral Intervention Plans

1. Providing notice to parents or parent representatives of the need to make minor modifications to the behavioral intervention plans, meeting with parents to review existing program evaluation data; and developing minor modifications to behavioral intervention plans with parents or parent representatives.
2. Section 3052(f) provides for changes to be made to BIPs on the basis of evaluations, which would require additional functional analysis assessments, which in turn require parental notice under subdivision (b).

3. Section 3052(g) provides for minor modifications without an IEP team meeting, which can be made by the behavioral intervention case manager and a parent or parent representative.
4. Section 3052(g) provides that parents are entitled to notice, and "shall be informed of their right to question any modification to the plan through the IEP procedures."

Development and Implementation of Emergency Interventions

1. Emergency interventions are provided for in subdivision (i) of section 3052 and include employing emergency interventions; notifying parents and residential care providers after an emergency intervention is used; preparing and maintaining a Behavioral Emergency Report following the use of an emergency intervention; administrative review of Behavioral Emergency Reports; scheduling and conducting an IEP Team meeting to review a Behavioral Emergency Report and the need for a functional analysis assessment, interim behavioral intervention plan, or modification to an existing behavioral intervention plan.
2. Section 3052 requires that Behavioral Emergency Report data "shall be collected by SELPAs which shall report annually the number of Behavioral Emergency Reports to the [CDE] and the Advisory Committee on Special Education.
3. Preparing reports on the number of Behavioral Emergency Reports to the California Department of Education and Advisory committee on Special Education.

Prohibited Behavioral Interventions

1. Prohibited interventions are addressed in section 3052(l), which provides that no public education agency, or nonpublic school or agency may authorize, order, consent to, or pay for any of the listed interventions, or any interventions similar to or like the listed interventions. The list is non-exhaustive, implying that some ongoing development of prohibited interventions is expected.
2. Training appropriate staff regarding the types of interventions that are prohibited.

Due Process Hearings

1. Due process hearings are provided for in subdivision (m) of section 3052 of the test claim regulations, which make reference to Education Code section 56501 et seq.

Pursuant to subdivision (c) of Government Code section 17570, the Department of Finance requests the Commission adopt a new test claim decision and amend the parameters and guidelines for the BIPs (CSM 4464) mandated program to reflect the subsequent changes in law enacted in Chapter 48, Statutes of 2013.

Effective July 1, 2013,Chapter 48, Statutes of 2013 (AB 86) 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. The statute specifically requires that section 3052 and subdivisions (d), (e), (f), (g), and (ab) of section 3001 of Title 5 of the California Code of Regulations be repealed. Section 3052 was repealed effective October 16, 2013 and subdivisions (d), (e), (f), (g), and (ab) of section 3001 effective July 1, 2014.

Local educational agencies are no longer required to perform the state mandated activities required in the implementing regulations, and instead must comply with federal laws and regulations regarding behavioral interventions and supports.

As a result of the change in law, the following activities are no longer reimbursable:

(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 Special Education Local Plan Area (SELPA) plan requirements. (Repealed Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subd..(j).)
(2) Development and implementation of BIPs. (Repealed Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subds., (a), (c), (d), (e), and (f).)
(3) Functional analysis assessments. (Repealed Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subds., (b), (c), and (f).)
(4) Modifications and contingent BIPs. (Repealed Cal. Code of Regs., tit. 5, §§ 3052, subds., (g) and (h).)
(5) Development and implementation of emergency interventions. (Repealed Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subd. (i).)
(6) Prohibited behavioral interventions. (Repealed Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subd. (l).)
(7) Due process hearings. (Repealed Cal. Code of Regs., tit. 5, §§ 3052, subd. (m).)

Enclosure

According to the Controller's April 30, 2015, "State Mandated Program Cost Report of Unpaid Claims and Deficiency Pursuant to Government Code Section 17562(b)(2)," school districts claimed $105,983 in 2013-14 for activities applicable to BIPs.

The forgoing analysis provides substantiation that the reimbursable activities imposed by sections 3001 and 3052 of Title 5 of the California Code of Regulations and identified in the Behavioral Intervention Plans Program Statement of Decision cease to be eligible for reimbursements effective July 1, 2013. Therefore, based on the change in law, the State's liability for mandate reimbursement pursuant to Article XIII B, Section 6 of the California Constitution should be zero.

Enclosure

DECLARATION OF LISA MIERCZYNSKI
DEPARTMENT OF FINANCE

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

June 30, 2015
at Sacramento, CA

Lisa Mierczynski

Attachments

Assembly Bill No. 86

CHAPTER 48

[Approved by Governor July 01, 2013. Filed with Secretary of State July 01, 2013.]

SEC. 44.

Section 56523 of the Education Code is amended to read:

56523.

(a) 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.

(b) This chapter is necessary to implement the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and associated federal regulations. This chapter is intended to provide the clarity, definition, and specificity necessary for local educational agencies to comply with the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and shall be implemented by local educational agencies without the development by the Superintendent and adoption by the state board of any additional regulations.

(c) Pursuant to Section 1401(9) of Title 20 of the United States Code, special education and related services must meet the standards of the department.

(d) As a condition of receiving funding from the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), a local educational agency shall agree to adhere to this chapter and implementing federal regulations set forth in this chapter.

(e) The Superintendent may monitor local educational agency compliance with this chapter and may take appropriate action, including fiscal repercussions, if either of the following is found:

(1) The local educational agency failed to comply with this chapter and failed to comply substantially with corrective action orders issued by the department resulting from monitoring findings or complaint investigations.

(2) The local educational agency failed to implement the decision of a due process hearing officer based on noncompliance with this part, provisions of the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), or the federal implementing regulations, wherein noncompliance resulted in the denial of, or impeded the delivery of, a free appropriate public education for an individual with exceptional needs.

(f) Commencing with the 2010–11 fiscal year, if any activities authorized pursuant to this chapter and implementing regulations are found be a state reimbursable mandate pursuant to Section 6 of Article XIII B of the California Constitution, state funding provided for purposes of special education pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act shall first be used to directly offset any mandated costs.

(g) The Legislature hereby requests the Department of Finance on or before December 31, 2013, to exercise its authority pursuant to subdivision (d) of Section 17557 of the Government Code to file a request with the Commission on State Mandates for the purpose of amending the parameters and guidelines of CSM-4464 to delete any reimbursable activities that have been repealed by statute or executive order and to update offsetting revenues that apply to the mandated program.

SEC. 45.

Section 56525 of the Education Code is amended to read:

56525.

(a) A person recognized by the national Behavior Analyst Certification Board as a Board Certified Behavior Analyst may conduct behavior assessments and provide behavioral intervention services for individuals with exceptional needs.

(b) This section does not require a district, special education local plan area, or county office to use a Board Certified Behavior Analyst to conduct behavior assessments and provide behavioral intervention services for individuals with exceptional needs.

TITLE 5. EDUCATION

DIVISION 1. CALIFORNIA DEPARTMENT OF EDUCATION

CHAPTER 3. INDIVIDUALS WITH EXCEPTIONAL NEEDS

SUBCHAPTER 1. SPECIAL EDUCATION

ARTICLE 1. GENERAL PROVISIONS

§ 3001. Definitions.

In addition to those found in Education Code sections 56020 - ~~56033~~ 56035, ~~Public Law 94-142 as amended~~ (20 U.S.C. Sections 1401(1) to (35) ~~et seq.~~), and 34 C.F.R. ~~Title 34, Code of Federal Regulations, Part~~ Sections 300.4 - 300.45 ~~and 301~~, the following definitions are provided:

(a) "Access" means that the nonpublic, nonsectarian school shall provide State Board of Education (SBE)-adopted, standards-aligned core curriculum and instructional materials for kindergarten and grades 1 to 8 (K-8), inclusive; and provide standards-aligned core curriculum and instructional materials for grades 9 to 12 (9-12), inclusive, used by a local educational agency (LEA) that contracts with the nonpublic school.

. . .

~~(d) "Behavioral emergency" is the demonstration of a serious behavior problem:~~

~~(1) which has not previously been observed and for which a behavioral intervention plan has not been developed; or~~

~~(2) for which a previously designed behavioral intervention is not effective. Approved behavioral emergency procedures must be outlined in the special education local planning area (SELPA) local plan.~~

~~(e) "Behavioral intervention" means the systematic implementation of procedures that result in lasting positive changes in the individual's behavior. "Behavioral intervention" means the design, implementation, and evaluation of individual or group instructional and environmental modifications, including programs of behavioral instruction, to produce significant improvements in human behavior through skill acquisition and the reduction of problematic behavior. "Behavioral interventions" are designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the least restrictive educational environment as outlined in the individual's~~

~~IEP. "Behavioral interventions" do not include procedures which cause pain or trauma. "Behavioral interventions" respect the individual's human dignity and personal privacy. Such interventions shall assure the individual's physical freedom, social interaction, and individual choice~~

~~(f) "Behavioral intervention case manager" means a designated certificated school/district/county/nonpublic school or agency staff member(s) or other qualified personnel pursuant to subdivision (ac) contracted by the school district or county office or nonpublic school or agency who has been trained in behavior analysis with an emphasis on positive behavioral interventions. The "behavioral intervention case manager" is not intended to be a new staffing requirement and does not create any new credentialing or degree requirements. The duties of the "behavioral intervention case manager" may be performed by any existing staff member trained in behavioral analysis with an emphasis on positive behavioral interventions, including, but not limited to, a teacher, resource specialist, school psychologist, or program specialist.~~

~~(g) "Behavioral intervention plan" is a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP. The "behavioral intervention plan" shall become part of the IEP. The plan shall describe the frequency of the consultation to be provided by the behavioral intervention case manager to the staff members and parents who are responsible for implementing the plan. A copy of the plan shall be provided to the person or agency responsible for implementation in noneducational settings. The plan shall include the following:~~

~~(1) a summary of relevant and determinative information gathered from a functional analysis assessment;~~

~~(2) an objective and measurable description of the targeted maladaptive behavior(s) and replacement positive behavior(s);~~

~~(3) the individual's goals and objectives specific to the behavioral intervention plan;~~

~~(4) a detailed description of the behavioral interventions to be used and the circumstances for their use;~~

~~(5) specific schedules for recording the frequency of the use of the interventions and the frequency of the targeted and replacement behaviors; including specific criteria for~~

10.

~~discontinuing the use of the intervention for lack of effectiveness or replacing it with an identified and specified alternative;~~

~~(6) criteria by which the procedure will be faded or phased-out, or less intense/frequent restrictive behavioral intervention schedules or techniques will be used;~~

~~(7) those behavioral interventions which will be used in the home, residential facility, work site or other noneducational settings; and~~

~~(8) specific dates for periodic review by the IEP team of the efficacy of the program.~~

~~(h) "Board" means the California State Board of Education.~~

(d)~~(i)~~ "CDE" means the California Department of Education.

(e)~~(j)~~ "Certification" means authorization by the California State Superintendent of Public Instruction (SSPI) for a nonpublic school or nonpublic agency to service individuals with exceptional needs under a contract pursuant to the provisions of Education Code section 56366(d).

(f)~~(k)~~ "Contracting education agency," means school district, a SELPA, a charter school participating as a member of a ~~special education local plan area~~ SELPA, or county office of education.

(g)~~(l)~~ "Credential" means any valid credential, life diploma, or document in special education or Ppupil Ppersonnel Sservices issued by, or under the jurisdiction of, the California SBE ~~State Board of Education~~ prior to 1970 or the California Commission on Teacher Credentialing (CTC), which entitles the holder thereof to perform services for which certification qualifications are required.

(h)~~(m)~~ "Department of Consumer Affairs" means the California Department of Consumer Affairs.

(i)~~(n)~~ "Dual enrollment" means the concurrent attendance of the individual in a public education agency and a nonpublic school and/or a nonpublic agency.

~~(o) "Feasible" as used in Education Code section 56363(a) means the IEP team:~~

~~(1) has determined the regular class teacher, special class teacher, and/or resource specialist possesses the necessary competencies and credentials/certificates to provide the designated instruction and service specified in the IEP, and~~

~~(2) has considered the time and activities required to prepare for and provide the designated instruction and services and related services by the regular class teacher,~~

~~special class teacher, and/or resource specialist.~~

~~(p) "Free appropriate public education" means special education and related services that:~~

~~(1) have been provided at public expense, under public supervision and direction and without charge;~~

~~(2) meets any of the standards established by state or federal law;~~

~~(3) include an appropriate preschool, elementary, or secondary school education in California; and~~

~~(4) are provided in conformity with the IEP required under state and federal law.~~

(j)~~(q)~~ "Individual Services Agreement" means a document, prepared by the LEA, that specifies the length of time for which special education ~~and designated instruction and services~~ and related services are to be provided, by nonpublic schools and/or nonpublic agencies, to individuals with exceptional needs.

(k)~~(r)~~ "Instructional day" shall be the same period of time as constitutes the regular school day for that chronological peer group unless otherwise specified in the IEP.

(l)~~(s)~~ "License" means a valid nonexpired document issued by a licensing agency within the California Department of Consumer Affairs or other state licensing office authorized to grant licenses and authorizing the bearer of the document to provide certain professional services or refer to themselves using a specified professional title. If a license is not available through an appropriate state licensing agency, a certificate of registration with the appropriate professional organization at the national or state level, which has standards established for the certificate that are equivalent to a license, shall be deemed to be a license.

(m)~~(t)~~ "Linguistically appropriate goals, objectives, and programs" means:

. . .

~~(u) "Local educational agency" (LEA) means a school district, a county office of education, a charter school participating as a member of a special education local plan area, or a special education local plan area.~~

(n)~~(v)~~ "Local governing board," means either district or county board of education.

(o)~~(w)~~ "Master contract" means the legal document that binds the public education agency and the nonpublic school or nonpublic agency.

(p)~~(x)~~ "Nonsectarian" means a private, nonpublic school or agency that is not owned, operated, controlled by, or formally affiliated with a religious group or sect, whatever might be the actual character of the education program or the primary purpose of the facility and whose articles of incorporation and/or by-laws stipulate that the assets of such agency or corporation will not inure to the benefit of a religious group.

(q)~~(y)~~ "Primary language" means the language other than English, or other mode of communication, the person first learned, or the language which is ~~spoken~~ used in the person's home.

(r)~~(z)~~ "Qualified" means that a person has met federal and state certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services, or, in the absence of such requirements, the state-education-agency-approved or recognized requirements, and adheres to the standards of professional practice established in federal and state law or regulation, including the standards contained in the California Business and Professions Code and the scope of practice as defined by the licensing or credentialing body. Nothing in this definition shall be construed as restricting the activities ~~in~~ or services of a graduate needing direct hours leading to licensure, or of a student teacher or intern leading to a graduate degree at an accredited or approved college or university, as authorized by state laws or regulations.

~~(aa) "Related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as required to assist an individual with exceptional needs to benefit from special education, and includes the early identification and assessment of disabling conditions in children. Related services include, but are not limited to, designated instruction and services. The list of related services is not exhaustive and may include other developmental, corrective, or supportive services if they are required to assist a child with a disability to benefit from special education. Each related service defined under this part may include appropriate administrative and supervisory activities~~

~~that are necessary for program planning, management, and evaluation.~~

~~(ab) "Serious behavior problems" means the individual's behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the student's IEP are found to be ineffective.~~

~~(ac) "Special education" means specially designed instruction, at no cost to the parents, to meet the unique needs of individuals with exceptional needs whose educational needs cannot be met with modification of the regular instruction program, and related services, at no cost to the parent, that may be needed to assist these individuals to benefit from specially designed instruction.~~

(s)~~(ad)~~ "Specialized physical health care services" means those health services, including catheterization, gastric tube feeding, suctioning or other services prescribed by the individual's licensed physician and surgeon requiring medically related training for the individual who performs the services and which are necessary during the school day to enable the individual to attend school.

(t)~~(ae)~~ "Specified education placement" means that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP, in any one or a combination of public, private, home and hospital, or residential settings. The IEP team shall document its rationale for placement in other than the pupil's school and classroom in which the pupil would otherwise attend if the pupil were not disabled. The documentation shall indicate why the pupil's disability prevents his or her needs from being met in a less restrictive environment even with the use of supplementary aids and services.

(u)~~(af)~~ "SSPI" means the California State Superintendent of Public Instruction.

(v)~~(ag)~~ "Temporary physical disability" means a disability incurred while an individual was in a regular education class and which at the termination of the temporary physical disability, the individual can, without special intervention, reasonably be expected to return to his or her regular education class.

NOTE: Authority cited: Sections 56100 ~~and 56523~~, Education Code. Reference: Sections ~~33000, 33126,~~ 33300, 49423.5~~,~~ and ~~56026, 56026.3, 56034,~~ 56320, ~~56361, 56366, 56366.10, 56520 and 56523,~~ Education Code; ~~Section 2, Article IX, Constitution~~

~~of the State of California; 20 U.S.C. Section 1401;~~ and 34 C.F.R. Sections ~~300.4~~ 300.17, 300.28, 300.34, 300.39 and 300.320.

ARTICLE 3. IDENTIFICATION, REFERRAL, AND ASSESSMENT

§ 3023. Assessment and Reassessment.

(a) In addition to provisions of Education Code sections 56320 and 56381, assessments and reassessments shall be administered by qualified personnel who are competent in both the oral or sign language skills and written skills of the individual's primary language or mode of communication and have a knowledge and understanding of the cultural and ethnic background of the pupil. If it clearly is not feasible to do so, an interpreter must be used, and the assessment report shall document this condition and note that the validity of the assessment may have been affected.

(b) The normal process of second-language acquisition, as well as manifestations of dialect and sociolinguistic variance shall not be diagnosed as a disabling condition.

NOTE: Authority cited: Section 56100, Education Code. Reference: Sections 56001, 56320, 56324, ~~and~~ 56327, and 56381, Education Code; and 34 C.F.R. Sections 300.304, 300.305 and 300.310.

§ 3025. Assessment Option: Referral to State Schools for Further Assessment.

(a) Prior to referring a pupil for further assessment to California Schools for the Deaf or Blind or the Diagnostic Centers ~~Schools~~, districts, ~~special education local plan areas~~ SELPAs, counties, or other agencies providing education services, shall first conduct assessments at the local level within the capabilities of that agency. Results of local assessments shall be provided to parent(s) and shall state the reasons for referral to the State School. Results of local assessments shall accompany the referral request.

(b) The Schools for the Deaf and Blind and the Diagnostic Centers ~~Schools~~ shall conduct assessments pursuant to the provisions of Education Code section 56320, et seq.

(c) A representative of the district, SELPAs, or county IEP team shall participate in the staffing meeting and shall receive the final report and recommendations. Conference calls are acceptable forms of participation, provided that written reports and

ATTACHMENT C

WestlawNext **California Code of Regulations**

HomeTable of Contents

§ 3001. Definitions.
5 CA ADC § 3001
BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS

Barclays Official California Code of Regulations Currentness
Title 5. Education
Division 1. California Department of Education
Chapter 3. Individuals with Exceptional Needs
Subchapter 1. Special Education
Article 1. General Provisions

5 CCR § 3001

§ 3001. Definitions.

In addition to those found in Education Code sections 56020 - 56035, 20 U.S.C. Sections 1401(1) to (35), and 34 C.F.R. Sections 300.4 - 300.45, the following definitions are provided:

(a) "Access" means that the nonpublic, nonsectarian school shall provide State Board of Education (SBE)-adopted, standards-aligned core curriculum and instructional materials for kindergarten and grades 1 to 8 (K-8), inclusive; and provide standards-aligned core curriculum and instructional materials for grades 9 to 12 (9-12), inclusive, used by a local educational agency (LEA) that contracts with the nonpublic school.

(1) The nonpublic, nonsectarian school shall provide each student with a copy of textbooks and other instructional materials used to implement the SBE-adopted core curriculum (K-8) and standards-aligned core curriculum (9-12) in each subject area. As required through the individualized education program (IEP) for each pupil with hearing impairments, vision impairments, severe orthopedic impairments, or any combination thereof, SBE-adopted core curriculum (K-8) and standards-aligned core curriculum (9-12) may be in Braille, large print, recordings, and American Sign Language VideoBooks.

(2) Photocopies of portions of textbooks or instructional materials, or photocopies of entire textbooks or instructional materials to implement SBE-adopted core curriculum (K-8) and standards-aligned core curriculum (9-12) is not sufficient access.

(b) "Applicant" means an individual, firm, partnership, association, or corporation who has made application for certification as a nonpublic, nonsectarian school, or agency.

(c) "Assessment and development of the individualized education program" (IEP) means services described in Education Code sections 56320 et seq. and 56340 et seq.

(d) "CDE" means the California Department of Education.

(e) "Certification" means authorization by the California State Superintendent of Public Instruction (SSPI) for a nonpublic school or nonpublic agency to service individuals with exceptional needs under a contract pursuant to the provisions of Education Code section 56366(d).

(f) "Contracting education agency," means school district, a SELPA, a charter school participating as a member of a SELPA, or county office of education.

(g) "Credential" means any valid credential, life diploma, or document in special education or Pupil Personnel Services issued by, or under the jurisdiction of, the California SBE prior to 1970 or the California Commission on Teacher Credentialing (CTC), which entitles the holder thereof to perform services for which certification qualifications are required.

(h) "Department of Consumer Affairs" means the California Department of Consumer Affairs.

(i) "Dual enrollment" means the concurrent attendance of the individual in a public education agency and a nonpublic school and/or a nonpublic agency.

(j) "Individual Services Agreement" means a document, prepared by the LEA, that specifies the length of time for which special education and related services are to be provided, by nonpublic schools and/or nonpublic agencies, to individuals with exceptional needs.

(k) "Instructional day" shall be the same period of time as constitutes the regular school day for that chronological peer group unless otherwise specified in the IEP.

16.

(l) "License" means a valid nonexpired document issued by a licensing agency within the California Department of Consumer Affairs or other state licensing office authorized to grant licenses and authorizing the bearer of the document to provide certain professional services or refer to themselves using a specified professional title. If a license is not available through an appropriate state licensing agency, a certificate of registration with the appropriate professional organization at the national or state level which has standards established for the certificate that are equivalent to a license, shall be deemed to be a license.

(m) "Linguistically appropriate goals, objectives, and programs" means:

(1)(A) those activities which lead to the development of English language proficiency; and

(B) those instructional systems either at the elementary or secondary level which meet the language development needs of the English language learner.

(2) For individuals whose primary language is other than English, and whose potential for learning a second language, as determined by the IEP team, is severely limited, nothing in this section shall preclude the IEP team from determining that instruction may be provided through an alternative program pursuant to a waiver under Education Code section 311 provided that the IEP team periodically, but not less than annually, reconsiders the individual's ability to receive instruction in the English language.

(n) "Local governing board," means either district or county board of education.

(o) "Master contract" means the legal document that binds the public education agency and the nonpublic school or nonpublic agency.

(p) "Nonsectarian" means a private, nonpublic school or agency that is not owned, operated, controlled by, or formally affiliated with a religious group or sect, whatever might be the actual character of the education program or the primary purpose of the facility and whose articles of incorporation and/or by-laws stipulate that the assets of such agency or corporation will not inure to the benefit of a religious group.

(q) "Primary language" means the language other than English, or other mode of communication, the person first learned, or the language which is used in the person's home.

(r) "Qualified" means that a person has met federal and state certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services, or, in the absence of such requirements, the state-education-agency-approved or recognized requirements, and adheres to the standards of professional practice established in federal and state law or regulation, including the standards contained in the California Business and Professions Code and the scope of practice as defined by the licensing or credentialing body. Nothing in this definition shall be construed as restricting the activities or services of a graduate needing direct hours leading to licensure, or of a student teacher or intern leading to a graduate degree at an accredited or approved college or university, as authorized by state laws or regulations.

(s) "Specialized physical health care services" means those health services, including catheterization, gastric tube feeding, suctioning or other services prescribed by the individual's licensed physician and surgeon requiring medically related training for the individual who performs the services and which are necessary during the school day to enable the individual to attend school.

(t) "Specified education placement" means that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP, in any one or a combination of public, private, home and hospital, or residential settings. The IEP team shall document its rationale for placement in other than the pupil's school and classroom in which the pupil would otherwise attend if the pupil were not disabled. The documentation shall indicate why the pupil's disability prevents his or her needs from being met in a less restrictive environment even with the use of supplementary aids and services.

(u) "SSPI" means the California State Superintendent of Public Instruction.

(v) "Temporary physical disability" means a disability incurred while an individual was in a regular education class and which at the termination of the temporary physical disability, the individual can, without special intervention, reasonably be expected to return to his or her regular education class.

Note: Authority cited: Section 56100, Education Code. Reference: Sections 33300, 49423.5 and 56320, Education Code; and 34 C.F.R. Sections 300.17, 300.28, 300.34, 300.39 and 300.320.

HISTORY

1. Amendment filed 3-21-88; operative 4-20-88 (Register 88, No. 15).

2. New subsections (c)-(f)(8) and (y) and subsection relettering, amendment of newly designated subsections (j), (k), (p)(1)(B)-(p)(3), (r), (s), (v), (z) and (aa), and amendment of opening paragraph and Note filed 4-20-93; operative 5-20-93 (Register 93, No. 17).

3. Editorial correction of subsection (b) (Register 96, No. 8).

4. Amendment of subsections (f), (f)(7), (j) and (y) filed 2-23-96 as an emergency; operative 2-23-96 (Register 96, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-22-96 or emergency language will be repealed by operation of law on the following day.

5. Editorial correction of subsection (j) (Register 96, No. 32).

6. Certificate of Compliance as to 2-23-96 order transmitted to OAL 6-21-96 and filed 8-5-96 (Register 96, No. 32).

7. Amendment of section and Note filed 7-18-97 as an emergency; operative 7-18-97 (Register 97, No. 29). A Certificate of Compliance must be transmitted to OAL by 11-17-97 or emergency amendments will be repealed by operation of law on the following day.

8. Amendment of section and Note refiled 11-14-97 as an emergency; operative 11-14-97 (Register 97, No. 46). A Certificate of Compliance must be transmitted to OAL by 3-16-98 or emergency language will be repealed by operation of law on the following day.

9. Reinstatement of section and Note as they existed prior to 7-18-97 emergency amendment by operation of Government Code section 11346.1(f) (Register 98, No. 16).

10. Amendment of section and Note filed 4-16-98 as an emergency; operative 4-16-98 (Register 98, No. 16). A Certificate of Compliance must be transmitted to OAL by 8-14-98 or emergency language will be repealed by operation of law on the following day.

11. Reinstatement of section and Note as they existed prior to 4-16-98 emergency amendment by operation of Government Code section 11346.1(f) (Register 98, No. 34).

12. Amendment of first paragraph, new subsections (c), (d), (n), (v), (w), (z), (aa), (ae), (ag) and (a)(k), subsection relettering, amendment of newly designated subsections (f), (g), (i), (o), (q), (r), (s)(2), (x), (y), (ab), (ac) and (ad), and amendment of Note filed 8-19-98 as an emergency; operative 8-19-98 (Register 98, No. 34). A Certificate of Compliance must be transmitted to OAL by 12-17-98 or emergency language will be repealed by operation of law on the following day.

13. Reinstatement of section and Note as they existed prior to 8-19-98 emergency amendment by operation of Government Code section 11346.1(f) (Register 98, No. 52).

14. Amendment of first paragraph, new subsections (c), (d), (n), (v), (w), (z), (aa), (ae), (ag) and (ak), subsection relettering, amendment of newly designated subsections (f), (g), (i), (o), (q), (r) and (s)(1)(A)-(B), repealer of subsection (s)(2), subsection renumbering, amendment of newly designated subsections (s)(2), (x), (y), (ab), (ac), (ad) and amendment of Note filed 12-21-98 as an emergency; operative 12-21-98 (Register 98, No. 52). A Certificate of Compliance must be transmitted to OAL by 4-20-99 or emergency language will be repealed by operation of law on the following day.

15. Repealer and new section filed 3-25-99 as an emergency; operative 3-25-99 (Register 99, No. 13). A Certificate of Compliance must be transmitted to OAL by 7-23-99 or emergency language will be repealed by operation of law on the following day.

16. Certificate of Compliance as to 3-25-99 order, including amendment of section and Note , transmitted to OAL 7-23-99 and filed 9-1-99 (Register 99, No. 36).

17. Amendment of section and Note filed 3-27-2009; operative 4-26-2009 (Register 2009, No. 13).

18. Amendment of section and Note filed 5-5-2014; operative 7-1-2014 (Register 2014, No. 19).

This database is current through 6/12/15 Register 2015, No. 24

5 CCR § 3001, 5 CA ADC § 3001

END OF DOCUMENT

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5 CA ADC § 3052

5 CCR s 3052

Cal. Admin. Code tit. 5, s 3052

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 5. EDUCATION
DIVISION 1. CALIFORNIA DEPARTMENT OF EDUCATION
CHAPTER 3. HANDICAPPED CHILDREN
SUBCHAPTER 1. SPECIAL EDUCATION
ARTICLE 5. IMPLEMENTATION (PROGRAM COMPONENTS)
This database is current through 01/05/07, Register 2007, No. 1.

s 3052. Designated Positive Behavioral Interventions.

(a) General Provisions.

(1) An IEP team shall facilitate and supervise all assessment, intervention, and evaluation activities related to a individual's behavioral intervention plan. When the behavioral intervention plan is being developed, the IEP team shall be expanded to include the behavioral intervention case manager with documented training in behavior analysis including positive behavioral intervention(s), qualified personnel knowledgeable of the student's health needs, and others as described in Education Code Section 56341(c)(2). The behavioral intervention case manager is not intended to be a new staff person and may be an existing staff member trained in behavior analysis with an emphasis on positive behavioral interventions.

(2) Behavioral intervention plans shall only be implemented by, or be under the supervision of, staff with documented training in behavior analysis, including the use of positive behavioral interventions. Such interventions shall only be used to replace specified maladaptive behavior(s) with alternative acceptable behavior(s) and shall never be used solely to eliminate maladaptive behavior(s).

(3) Behavioral intervention plans shall be based upon a functional analysis assessment, shall be specified in the individualized education program, and shall be used only in a systematic manner in accordance with the provisions of this section.

(4) Behavioral emergency interventions shall not be used as a substitute for behavioral intervention plans.

(5) The elimination of any maladaptive behavior does not require the use of intrusive behavioral interventions that cause pain or trauma.

(6) To the extent possible, behavioral intervention plans shall be developed and implemented in a consistent manner appropriate to each of the individual's life settings.

(b) Functional Analysis Assessments. A functional analysis assessment must be conducted by, or be under the supervision of a person who has documented training in behavior analysis with an emphasis on positive behavioral interventions. A functional analysis assessment shall occur after the individualized education program team finds that instructional/behavioral approaches specified in the student's IEP have been ineffective. Nothing in this section shall preclude a parent or legal guardian from requesting a functional analysis assessment pursuant to the provisions of Education Code sections 56320 et seq.

Functional analysis assessment personnel shall gather information from three sources: direct observation, interviews with significant others, and review of available data such as assessment reports prepared by other professionals and other individual records. Prior to conducting the assessment, parent notice and consent shall be given and obtained pursuant to Education Code Section 56321.

(1) A functional analysis assessment procedure shall include all of the following:

(A) Systematic observation of the occurrence of the targeted behavior for an accurate definition and description of the frequency, duration, and intensity;

(B) Systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior;

(C) Systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the individual, i.e., to identify the specific environmental or physiological outcomes produced by the behavior. The communicative intent of the behavior is identified in terms of what the individual is either requesting or protesting through the display of the behavior;

(D) Ecological analysis of the settings in which the behavior occurs most frequently. Factors to consider should include the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the individual and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities;

(E) Review of records for health and medical factors which may influence behaviors (e.g. medication levels, sleep cycles, health, diet); and

(F) Review of the history of the behavior to include the effectiveness of previously used behavioral interventions.

(2) Functional Analysis Assessment Reports. Following the assessment, a written report of the assessment results shall be prepared and a copy shall be provided to the parent. The report shall include all of the following:

(A) A description of the nature and severity of the targeted behavior(s) in objective and measurable terms;

(B) A description of the targeted behavior(s) that includes baseline data and an analysis of the antecedents and consequences that maintain the targeted behavior, and a functional analysis of the behavior across all appropriate settings in which it occurs;

(C) A description of the rate of alternative behaviors, their antecedents and consequences; and

(D) Recommendations for consideration by the IEP team which may include a proposed plan as specified in Section 3001(f).

(c) IEP Team Meeting. Upon completion of the functional analysis assessment, an IEP team meeting shall be held to review results and, if necessary, to develop a behavioral intervention plan, as defined in Article 1, Section 3001(f) of these regulations. The IEP team shall include the behavioral intervention case manager. The behavioral intervention plan shall become a part of the IEP and shall be written with sufficient detail so as to direct the implementation of the plan.

(d) Intervention. Based upon the results of the functional analysis assessment, positive programming for behavioral intervention may include the following:

(1) Altering the identified antecedent event to prevent the occurrence of the behavior (e.g., providing choice, changing the setting, offering variety and a meaningful curriculum, removing environmental pollutants such as excessive noise or crowding, establishing a predictable routine for the individual);

(2) Teaching the individual alternative behaviors that produce the same consequences as the inappropriate behavior (e.g., teaching the individual to make requests or protests using socially acceptable behaviors, teaching the individual to participate with alternative communication modes as a substitute for socially unacceptable attention-getting behaviors, providing the individual with activities that are physically stimulating as alternatives for stereotypic, self-stimulatory behaviors);

(3) Teaching the individual adaptive behaviors (e.g., choice-making, self-management, relaxation techniques, and general skill development) which ameliorate negative conditions that promote the display of inappropriate behaviors; and

(4) Manipulating the consequences for the display of targeted inappropriate behaviors and alternative, acceptable behaviors so that it is the alternative behaviors that more effectively

produce desired outcomes (i.e., positively reinforcing alternative and other acceptable behaviors and ignoring or redirecting unacceptable behaviors).

(e) Acceptable Responses. When the targeted behavior(s) occurs, positive response options shall include, but are not limited to one or more of the following:

(1) the behavior is ignored, but not the individual;

(2) the individual is verbally or verbally and physically redirected to an activity;

(3) the individual is provided with feedback (e.g., "You are talking too loudly");

(4) the message of the behavior is acknowledged (e.g., "You are having a hard time with your work"); or

(5) a brief, physical prompt is provided to interrupt or prevent aggression, self-abuse, or property destruction.

(f) Evaluation of the Behavioral Intervention Plan Effectiveness. Evaluation of the effectiveness of the behavioral intervention plan shall be determined through the following procedures:

(1) Baseline measure of the frequency, duration, and intensity of the targeted behavior, taken during the functional analysis assessment. Baseline data shall be taken across activities, settings, people, and times of the day. The baseline data shall be used as a standard against which to evaluate intervention effectiveness;

(2) Measures of the frequency, duration, and intensity of the targeted behavior shall be taken after the behavioral intervention plan is implemented at scheduled intervals determined by the IEP team. These measures shall also be taken across activities, settings, people, and times of the day, and may record the data in terms of time spent acting appropriately rather than time spent engaging in the inappropriate behavior;

(3) Documentation of program implementation as specified in the behavioral intervention plan (e.g., written instructional programs and data, descriptions of environmental changes); and

(4) Measures of program effectiveness will be reviewed by the teacher, the behavioral intervention case manager, parent or care provider, and others as appropriate at scheduled intervals determined by the IEP team. This review may be conducted in meetings, by telephone conference, or by other means, as agreed upon by the IEP team.

(5) If the IEP team determines that changes are necessary to increase program

effectiveness, the teacher and behavioral intervention case manager shall conduct additional functional analysis assessments and, based on the outcomes, shall propose changes to the behavioral intervention plan.

(g) Modifications without IEP Team Meeting. Minor modifications to the behavioral intervention plan can be made by the behavioral intervention case manager and the parent or parent representative. If the case manager is unavailable, a qualified designee who meets the training requirements of subsection (a)(1) shall participate in such modifications. Each modification or change shall be addressed in the behavioral intervention plan provided that the parent, or parent representative, is notified of the need and is able to review the existing program evaluation data prior to implementing the modification or change. Parents shall be informed of their right to question any modification to the plan through the IEP procedures.

(h) Contingency Behavioral Intervention Plans. Nothing in this section is intended to preclude the IEP team from initially developing the behavioral intervention plan in sufficient detail to include schedules for altering specified procedures, or the frequency or duration of the procedures, without the necessity for reconvening the IEP team. Where the intervention is to be used in multiple settings, such as the classroom, home and job sites, those personnel responsible for implementation in the other sites must also be notified and consulted prior to the change.

(i) Emergency Interventions. Emergency interventions may only be used to control unpredictable, spontaneous behavior which poses clear and present danger of serious physical harm to the individual or others and which cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior.

(1) Emergency interventions shall not be used as a substitute for the systematic behavioral intervention plan that is designed to change, replace, modify, or eliminate a targeted behavior.

(2) Whenever a behavioral emergency occurs, only behavioral emergency interventions approved by the special education local planning area (SELPA) may be used.

(3) No emergency intervention shall be employed for longer than is necessary to contain the behavior. Any situation which requires prolonged use of an emergency intervention shall require staff to seek assistance of the school site administrator or law enforcement agency, as applicable to the situation.

(4) Emergency interventions may not include:

(A) Locked seclusion, unless it is in a facility otherwise licensed or permitted by state law to use a locked room;

(B) Employment of a device or material or objects which simultaneously immobilize all four extremities, except that techniques such as prone containment may be used as an

emergency intervention by staff trained in such procedures; and

(C) An amount of force that exceeds that which is reasonable and necessary under the circumstances.

(5) To prevent emergency interventions from being used in lieu of planned, systematic behavioral interventions, the parent and residential care provider, if appropriate, shall be notified within one school day whenever an emergency intervention is used or serious property damage occurs. A "Behavioral Emergency Report" shall immediately be completed and maintained in the individual's file. The report shall include all of the following:

(A) The name and age of the individual;

(B) The setting and location of the incident;

(C) The name of the staff or other persons involved;

(D) A description of the incident and the emergency intervention used, and whether the individual is currently engaged in any systematic behavioral intervention plan; and

(E) Details of any injuries sustained by the individual or others, including staff, as a result of the incident.

(6) All "Behavioral Emergency Reports" shall immediately be forwarded to, and reviewed by, a designated responsible administrator.

(7) Anytime a "Behavioral Emergency Report" is written regarding an individual who does not have a behavioral intervention plan, the designated responsible administrator shall, within two days, schedule an IEP team meeting to review the emergency report, to determine the necessity for a functional analysis assessment, and to determine the necessity for an interim behavioral intervention plan. The IEP team shall document the reasons for not conducting an assessment and/or not developing an interim plan.

(8) Anytime a "Behavioral Emergency Report" is written regarding an individual who has a behavioral intervention plan, any incident involving a previously unseen serious behavior problem or where a previously designed intervention is not effective should be referred to the IEP team to review and determine if the incident constitutes a need to modify the plan.

(9) "Behavioral Emergency Report" data shall be collected by SELPAs which shall report annually the number of Behavioral Emergency Reports to the California Department of Education and the Advisory Committee on Special Education.

(j) SELPA Plan. The local plan of each SELPA shall include procedures governing the systematic use of behavioral interventions and emergency interventions. These procedures shall be part of the SELPA local plan.

(1) Upon adoption, these procedures shall be available to all staff members and parents whenever a behavioral intervention plan is proposed.

(2) At a minimum, the plan shall include:

(A) The qualifications and training of personnel to be designated as behavioral intervention case managers, which shall include training in behavior analysis with an emphasis on positive behavioral interventions, who will coordinate and assist in conducting the functional analysis assessments and the development of the behavioral intervention plans;

(B) The qualifications and training required of personnel who will participate in the implementation of the behavioral intervention plans; which shall include training in positive behavioral interventions;

(C) Special training that will be required for the use of emergency behavioral interventions and the types of interventions requiring such training; and

(D) Approved behavioral emergency procedures.

(k) Nonpublic School Policy. Nonpublic schools and agencies, serving individuals pursuant to Education Code Section 56365 et seq., shall develop policies consistent with those specified in subsection (i) of this section.

(l) Prohibitions. No public education agency, or nonpublic school or agency serving individuals pursuant to Education Code Section 56365 et seq., may authorize, order, consent to, or pay for any of the following interventions, or any other interventions similar to or like the following:

(1) Any intervention that is designed to, or likely to, cause physical pain;

(2) Releasing noxious, toxic or otherwise unpleasant sprays, mists, or substances in proximity to the individual's face;

(3) Any intervention which denies adequate sleep, food, water, shelter, bedding, physical comfort, or access to bathroom facilities;

(4) Any intervention which is designed to subject, used to subject, or likely to subject the individual to verbal abuse, ridicule or humiliation, or which can be expected to cause excessive emotional trauma;

(5) Restrictive interventions which employ a device or material or objects that simultaneously immobilize all four extremeties, including the procedure known as prone containment, except that prone containment or similar techniques may be used by trained personnel as a limited emergency intervention pursuant to subsection (i);

(6) Locked seclusion, except pursuant to subsection (i)(4)(A);

(7) Any intervention that precludes adequate supervision of the individual; and

(8) Any intervention which deprives the individual of one or more of his or her senses.

(m) Due Process Hearings. The provisions of this chapter related to functional analysis assessments and the development and implementation of behavioral intervention plans are subject to the due process hearing procedures specified in Education Code Section 56501 et seq. No hearing officer may order the implementation of a behavioral intervention that is otherwise prohibited by this section, by SELPA policy, or by any other applicable statute or regulation.

Note: Authority cited: Section 56523(a), Education Code. Reference: Sections 56520 and 56523, Education Code.

HISTORY

1. New section filed 4-20-93; operative 5-20-93 (Register 93, No. 17).

2. Amendment of subsections (b), (b)(2)(D), (c), (i), (i)(5) and (i)(7) filed 2-23-96 as an emergency; operative 2-23-96 (Register 96, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-22-96 or emergency language will be repealed by operation of law on the following day.

3. Certificate of Compliance as to 2-23-96 order including further amendment of subsection (b) transmitted to OAL 6-21-96 and filed 8-5-96 (Register 96, No. 32).

5 CCR s 3052, 5 CA ADC s 3052
1CAC

5 CA ADC s 3052

END OF DOCUMENT

ATTACHMENT E

WestlawNext **California Code of Regulations**

HomeTable of Contents

§ 3052. Designated Positive Behavioral Interventions. [Repealed]
5 CA ADC § 3052
BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS

Barclays Official California Code of Regulations Currentness
Title 5. Education
Division 1. California Department of Education
Chapter 3. Individuals with Exceptional Needs
Subchapter 1. Special Education
Article 5. Implementation (Program Components)

5 CCR § 3052

§ 3052. Designated Positive Behavioral Interventions. [Repealed]

Note: Authority cited: Section 56100, Education Code. Reference: Sections 56520, 56521 and 56523, Education Code.

HISTORY

1. New section filed 4-20-93; operative 5-20-93 (Register 93, No. 17).

2. Amendment of subsections (b), (b)(2)(D), (c), (i), (i)(5) and (i)(7) filed 2-23-96 as an emergency; operative 2-23-96 (Register 96, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-22-96 or emergency language will be repealed by operation of law on the following day.

3. Certificate of Compliance as to 2-23-96 order including further amendment of subsection (b) transmitted to OAL 6-21-96 and filed 8-5-96 (Register 96, No. 32).

4. Change without regulatory effect amending subsections (a)(1), (a)(3), (b), (b)(2)(D), (c), (g), (i)(2), (i)(9), (k)-(*l*), (*l*)(5)-(6) and (m) and amending Note filed 9-27-2012 pursuant to section 100, title 1, California Code of Regulations (Register 2012, No. 39).

5. Change without regulatory effect repealing section filed 10-16-2013 pursuant to section 100, title 1, California Code of Regulations (Register 2013, No. 42).

This database is current through 6/12/15 Register 2015, No. 24

5 CCR § 3052, 5 CA ADC § 3052

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State Controller's Office
Division of Accounting and Reporting
Schedule B, Section 2. Net Deficiencies and Surpluses for the Unfunded Mandates by Program
As of April 1, 2015

Fiscal Year	Program Name	Legal Reference	Program Number	Program Costs	Program Payments	Established Receivables	Payable Balance	Receivable Balance	Net Balance
Behavioral Intervention Plans (07/01/1993 to 06/30/2012) Total				**$ 732,601,704**	$ -	$ -	**$ 732,601,704**	$ -	**$ 732,601,704**
2013-14	Behavioral Intervention Plans (On or after 07/01/2012)	Title 5	349	$ 105,983	$ -	$ -	$ 105,983	$ -	$ 105,983
2012-13	Behavioral Intervention Plans (On or after 07/01/2012)	Title 5	349	$ 5,551,492	$ -	$ -	$ 5,551,492	$ -	$ 5,551,492
Behavioral Intervention Plans (On or after 07/01/2012) Total				**$ 5,657,475**	$ -	$ -	**$ 5,657,475**	$ -	**$ 5,657,475**
2013-14	California Public Records Act	Ch. 463/92	354	$ 114,536	$ -	$ -	$ 114,536	$ -	$ 114,536
2012-13	California Public Records Act	Ch. 463/92	354	$ 138,826	$ -	$ -	$ 138,826	$ -	$ 138,826
2011-12	California Public Records Act	Ch. 463/92	354	$ 119,930	$ -	$ -	$ 119,930	$ -	$ 119,930
2010-11	California Public Records Act	Ch. 463/92	354	$ 86,685	$ -	$ -	$ 86,685	$ -	$ 86,685
2009-10	California Public Records Act	Ch. 463/92	354	$ 49,027	$ -	$ -	$ 49,027	$ -	$ 49,027
2008-09	California Public Records Act	Ch. 463/92	354	$ 34,650	$ -	$ -	$ 34,650	$ -	$ 34,650
2007-08	California Public Records Act	Ch. 463/92	354	$ 9,928	$ -	$ -	$ 9,928	$ -	$ 9,928
2006-07	California Public Records Act	Ch. 463/92	354	$ 45,752	$ -	$ -	$ 45,752	$ -	$ 45,752
2005-06	California Public Records Act	Ch. 463/92	354	$ 19,255	$ -	$ -	$ 19,255	$ -	$ 19,255
2004-05	California Public Records Act	Ch. 463/92	354	$ 3,432	$ -	$ -	$ 3,432	$ -	$ 3,432
2003-04	California Public Records Act	Ch. 463/92	354	$ 3,454	$ -	$ -	$ 3,454	$ -	$ 3,454
2002-03	California Public Records Act	Ch. 463/92	354	$ 3,363	$ -	$ -	$ 3,363	$ -	$ 3,363
2001-02	California Public Records Act	Ch. 463/92	354	$ 1,464	$ -	$ -	$ 1,464	$ -	$ 1,464
California Public Records Act Total				**$ 630,302**	$ -	$ -	**$ 630,302**	$ -	**$ 630,302**
2006-07	Charter Schools III	Ch. 34/98	277	$ 84,983	$ -	$ -	$ 84,983	$ -	$ 84,983
2005-06	Charter Schools III	Ch. 34/98	277	$ 9,521	$ -	$ -	$ 9,521	$ -	$ 9,521
2004-05	Charter Schools III	Ch. 34/98	277	$ 1,932	$ -	$ -	$ 1,932	$ -	$ 1,932
2003-04	Charter Schools III	Ch. 34/98	277	$ 1,295	$ -	$ -	$ 1,295	$ -	$ 1,295
2002-03	Charter Schools III	Ch. 34/98	277	$ 1,180	$ -	$ -	$ 1,180	$ -	$ 1,180
2001-02	Charter Schools III	Ch. 34/98	277	$ 1,100	$ -	$ -	$ 1,100	$ -	$ 1,100
2000-01	Charter Schools III	Ch. 34/98	277	$ 1,225	$ -	$ -	$ 1,225	$ -	$ 1,225
1999-00	Charter Schools III	Ch. 34/98	277	$ 1,005	$ -	$ -	$ 1,005	$ -	$ 1,005
Charter Schools III Total				**$ 102,241**	$ -	$ -	**$ 102,241**	$ -	**$ 102,241**
2008-09	Comprehensive School Safety Plans II: Discrimination and Harassment Policy, and Hate Crime Reporting Procedures	Ch. 890/01	311	$ 3,616	$ -	$ -	$ 3,616	$ -	$ 3,616
2007-08	Comprehensive School Safety Plans II: Discrimination and Harassment Policy, and Hate Crime Reporting Procedures	Ch. 890/01	311	$ 3,730	$ -	$ -	$ 3,730	$ -	$ 3,730
2004-05	Comprehensive School Safety Plans II: Discrimination and Harassment Policy, and Hate Crime Reporting Procedures	Ch. 890/01	311	$ 1,029	$ -	$ -	$ 1,029	$ -	$ 1,029

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 July 10, 2015, I served the:

New Filing; and Notice of Complete Filing and Schedule for Comments
Mandate Redetermination Request, 14-MR-05
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)
California 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 July 10, 2015 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 7/8/15

Claim Number: 14-MR-05

Matter: Behavioral Intervention Plans (CSM-4464)

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.)

Amber Alexander, *Department of Finance*
915 L Street, Sacramento, Ca
Phone: (916) 445-0328
Amber.Alexander@dof.ca.gov

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Harmeet Barkschat, *Mandate Resource Services,LLC*
5325 Elkhorn Blvd. #307, Sacramento, CA 95842
Phone: (916) 727-1350
harmeet@calsdrc.com

Lacey Baysinger, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
lbaysinger@sco.ca.gov

Mike Brown, *School Innovations & Advocacy*
5200 Golden Foothill Parkway, El Dorado Hills, CA 95762
Phone: (916) 669-5116
mikeb@sia-us.com

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916)595-2646

Bburgess@mgtamer.com

Gwendolyn Carlos, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-0706
gcarlos@sco.ca.gov

David Cichella, *California School Management Group*
3130-C Inland Empire Blvd., Ontario, CA 91764
Phone: (209) 834-0556
dcichella@csmcentral.com

Joshua Daniels, Attorney, *California School Boards Association*
3251 Beacon Blvd, West Sacramento, CA 95691
Phone: (916) 669-3266
jdaniels@csba.org

Marieta Delfin, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-4320
mdelfin@sco.ca.gov

Andra Donovan, *San Diego Unified School District*
Legal Services Office, 4100 Normal Street, Room 2148, , San Diego, CA 92103
Phone: (619) 725-5630
adonovan@sandi.net

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Chris Ferguson, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Ferguson@dof.ca.gov

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Paul Golaszewski, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8341
Paul.Golaszewski@lao.ca.gov

Ed Hanson, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
ed.hanson@dof.ca.gov

Mark Ibele, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814

Phone: (916) 651-4103
Mark.Ibele@sen.ca.gov

Cheryl Ide, Associate Finance Budget Analyst, *Department of Finance*
Education Systems Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-0328
Cheryl.ide@dof.ca.gov

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

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

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

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

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

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

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

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

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

Jameel Naqvi, Analyst, *Legislative Analyst's Office*
Education Section, 925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8331
Jameel.naqvi@lao.ca.gov

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

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

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

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

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

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

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

David Scribner, *Max8550*
2200 Sunrise Boulevard, Suite 240, Gold River, CA 95670
Phone: (916) 852-8970
dscribner@max8550.com

Steve Shields, *Shields Consulting Group,Inc.*
1536 36th Street, Sacramento, CA 95816
Phone: (916) 454-7310
steve@shieldscg.com

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-5849
jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
DSpeciale@sco.ca.gov

Meg Svoboda, *Senate Office of Research*
1020 N Street, Suite 200, Sacramento, CA
Phone: (916) 651-1500
meg.svoboda@sen.ca.gov

Amy Tang-Paterno, Educational Fiscal Services Consultant, *California Department of Education*
Government Affairs, 1430 N Street, Suite 5602, Sacramento, CA 95814
Phone: (916) 322-6630
ATangPaterno@cde.ca.gov

Thomas Todd, Assistant Program Budget Manager, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
Thomas.Todd@dof.ca.gov

Jolene Tollenaar, *MGT of America*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 443-411
jolene_tollenaar@mgtamer.com

Brian Uhler, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8328
brian.uhler@lao.ca.gov

Marichi Valle, *San Jose Unified School District*
855 Lenzen Avenue, San Jose, CA 95126
Phone: (408) 535-6141
mvalle@sjusd.org

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Section 56523 as added by Statutes of 1990, Chapter 959; and Title 5, California Code of Regulations, Sections 3001 and 3052 Filed on September 28, 1994 By the Butte County Office of Education, San Joaquin County Office of Education, and the San Diego Unified School District, Co-Claimants.	No. CSM-4464 *Behavioral Intervention Plans* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on September 28, 2000)* *(Corrected on November 23, 2010)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter. This Decision shall become effective on September 29, 2000.

On November 23, 2010, this Statement of Decision was corrected to add the Butte County Office of Education and the San Joaquin County Office of Education to the caption as Co-Claimants.

_____

Paula Higashi, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Section 56523 as added by Statutes of 1990, Chapter 959; and Title 5, California Code of Regulations, Sections 3001 and 3052 Filed on September 28, 1994 By the Butte County Office of Education, the San Joaquin County Office of Education, and the San Diego Unified School District, Co-Claimants.	No. CSM-4464 *Behavioral Intervention Plans* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on September 28, 2000)* *(Corrected on November 23, 2010)*

STATEMENT OF DECISION

On September 30, 1999, the Commission first heard this test claim and took no action due to a 3-3 tie vote. On November 30, 1999, the Commission directed staff to hold this test claim until the appointment of the seventh Commission member. The seventh Commission member was appointed in April 2000. On August 24, 2000, the Commission heard this test claim during a regularly scheduled hearing. Therefore, the sole issue before the Commission is whether the Proposed Statement of Decision accurately reflects the vote of the Commission.[1] James Cunningham and Frank Terstegge appeared on behalf of the San Diego Unified School District, Gail Cafferata appeared on behalf of the Butte County Office of Education, and Nona Martinez and Dan Stone appeared on behalf of the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state mandated program is Government Code section 17500 et seq., article XIII B, section 6 of the California Constitution and related case law.

The Commission, by a vote of 5-2, approved this test claim.

BACKGROUND AND FINDINGS

The Legislature found that the state has continually sought to provide an appropriate and meaningful educational program in a safe and healthy environment for all children regardless of

[1] Title 2, California Code of Regulations, section 1188.1, subdivision (g).

possible physical, mental, or emotional disabling conditions.[2] In addition, the Legislature declares that teachers of children with special needs require training and guidance that provides positive ways for working successfully with children who have difficulties conforming to acceptable behavior patterns in order to provide an environment in which learning can occur.[3]

The test claim legislation and the implementing regulations involve special education services for children with disabilities. It requires an IEP team[4] to develop a behavioral intervention plan whenever an individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP.[5] The IEP is a written statement developed in a meeting between the school, the teacher, and the parents. The IEP includes the child's current performance, the annual goals and short-term instructional objectives, specific educational services, and the objective criteria and evaluation procedures to determine whether the objectives are being achieved.[6] Special education services include both *special education*, defined as specially designed instruction to meet the unique needs of a child with disabilities, and *related services*, defined as such developmental, corrective, and other supportive services as may be required to assist a child with disabilities to benefit from special education.[7] There is no prior state law that addresses behavioral intervention plans.

The Test Claim Legislation

Education Code section 56523 requires the Superintendent of Public Instruction and the State Board of Education to adopt regulations establishing behavioral intervention plans, which: (1) include the types of behavioral interventions that can be used; (2) require that a pupil's IEP include a description of behavior interventions that meet certain guidelines; and (3) specify standards and guidelines regarding the use of behavior interventions in emergency situations. In response to Education Code section 56523, the California Department of Education adopted sections 3001 and 3052, which detail school districts' obligations concerning the development and implementation of behavioral intervention plans.

The Commission found that Education Code section 56523 only requires the *State* Superintendent of Public Instruction and the *State* Board of Education to adopt regulations.

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[2] Education Code section 56520.

[3] *Ibid*.

[4] Chapter 5.5, Education Code, sections 56520 et seq. Federal law requires that the IEP team's membership include the individual's parents, at least one regular education teacher of the individual, at least one special education teacher, a local agency representative who is qualified to provide or supervise the provision of special instruction to meet the individual's needs, an individual who can interpret the instructional implications of evaluation results (may be a member listed above), at the parent's or agency's discretion, other individuals who have knowledge or special expertise regarding the child, and whenever appropriate, the disabled individual. (*See* Title 20, United States Code, section 1414, subdivision (d)(1)(B); Title 34, Code of Federal Regulations, section 300.344.)

[5] Title 5, California Code of Regulations, section 3001, subdivision (h).

[6] Title 20, United States Code, section 1401, subdivision (a)(19).

[7] Title 20, United States Code, section 1401(a)(17). The IDEA includes specific services in the related services section, but the text does not limit the provision to those services. These services include transportation, early identification and assessment of disabling conditions in children, speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except those medical services that are for diagnostic and evaluation purposes only.

Section 56523, on its face, does not impose any requirements upon school districts and therefore, does not impose any reimbursable state mandated activities upon school districts. However, the Commission noted that this conclusion does not resolve the inquiry as to whether the regulations promulgated pursuant to section 56523 constitute reimbursable state mandated activities upon school districts.

The Commission found that in order for a statute, or executive order, which is the subject of a test claim, to impose a reimbursable state mandated program, the statutory and regulatory language: (1) must direct or obligate an activity or task upon local governmental entities; and (2) the required activity or task must be new, thus constituting a "new program," or it must create an increased or "higher level of service" over the former required level of service. The court has defined a "new program" or "higher level of service" as a program that carries out the governmental function of providing services to the public, or a law, which to implement a state policy, imposes unique requirements on local agencies or school districts that do not apply generally to all residents and entities in the state. To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated.[8]

The test claim legislation involves the provision of special education to disabled students enrolled in public education. Public education in California is a peculiarly governmental function administered by local agencies as a service to the public. Moreover, the test claim legislation imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state. Therefore, the Commission found that public education constitutes a "program" within the meaning of section 6, article XIII B of the California Constitution.[9]

However, the Commission continued the inquiry to determine if the activities are new or impose a higher level of service and if the activities are mandated by the state. The claimants contended that the test claim legislation and regulations impose a higher level of service by requiring school districts to perform *additional* activities not required under state or federal law.

The Test Claim Regulations

Behavioral Intervention Plans Defined

The test claim legislation and regulations define *behavioral intervention* as the systematic implementation of procedures that result in lasting positive changes in an individual's behavior.[10] Specifically, *behavioral interventions* are the design, implementation, and evaluation of instructional and environmental modifications to produce significant improvements in behavior through skill acquisition and the reduction of problematic behavior.[11] Generally, behavioral intervention plans are implemented for pupils with an IEP.

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[8] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835.

[9] *Long Beach Unified School Dist.* v. *State of California* (1990) 225 Cal.App.3d 155, 172.

[10] Title 5, California Code of Regulations, section 3001, subdivision (f).

[11] *Ibid*.

The Commission noted that the *behavioral intervention plan* is the written document developed by an IEP team and is integrated into an individual's current IEP when an individual exhibits a serious behavior problem that interferes with the implementation of the individual's IEP.[12] *Serious behavior problems* are behaviors that are self-injurious, assaultive, cause serious property damage, or other severe behavior problems that are pervasive and maladaptive for which the instructional or behavioral approaches in the individual's IEP are ineffective.[13]

SELPA Plan Requirements[14]

Under the test claim legislation's implementing regulations, each SELPA must include procedures in its local plan regarding the systematic use of behavioral interventions.[15] These procedures include training of behavioral intervention case managers, training of personnel involved with implementing behavioral intervention plans, special training for emergency interventions, and identification of approved behavioral emergency procedures.[16] SELPAs must inform all staff members and parents of these procedures whenever a behavioral intervention plan is proposed.[17]

The Commission found that these activities represent a new program or higher level of service because SELPAs were under no obligation to include such information in their local plans before the adoption of the test claim legislation's implementing regulations.[18]

Development of Behavioral Intervention Plans

An IEP team must supervise all assessment, intervention, and evaluation activities related to an individual's behavioral intervention plan.[19] When a behavioral intervention plan is being developed, the IEP team is expanded to include a behavioral intervention case manager who is trained in behavior analysis including positive behavioral interventions.[20] A *behavioral intervention case manager* is a designated certificated school/district/county staff member or other qualified personnel who has been trained in behavior analysis with an emphasis on positive

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[12] *Id*. at subdivision (h).

[13] *Id*. at subdivision (ah).

[14] SELPA is an acronym for "Special Education Local Plan Area." Title 2, California Code of Regulations, section 60010 defines SELPA as "the service area covered by a special education local plan, and its governance structure created under any of the planning options" set forth in the Education Code.

[15] Title 5, California Code of Regulations, section 3052, subdivision (j).

[16] *Id*. at subdivision (j)(2)(A)-(D).

[17] *Id*. at subdivision (j)(1).

[18] The test claim legislation requires nonpublic schools to develop policies consistent with those specified in the emergency intervention section of the regulations. The Commission found that this requirement does not impose any activities upon public school districts. (*See* Title 5, California Code of Regulations, section 3052, subdivision (k).)

[19] *Id.* at section 3052, subdivision (a)(1).

[20] *Ibid*. Federal law does not require the inclusion of a behavioral intervention case manager in the IEP team. (*See* Title 20, United States Code, section 1414, subdivision (d)(1)(B).)

behavioral interventions.[21] The case manager is not intended to be a new staff person, but rather may be an existing staff member with the appropriate training.[22]

The Commission found that the activities of including in the IEP team and training a staff member to become a behavioral intervention case manager represents a new program or higher level of service because school districts were under no obligation to perform behavioral interventions before the adoption of the test claim legislation's implementing regulations.

Functional Analysis Assessments

A behavioral intervention plan is based on a *functional analysis assessment* of the individual.[23] A *functional analysis assessment* includes a description of the maladaptive behavior and replacement positive behavior, goals and objectives, detailed descriptions of the interventions to be used, schedules for recording the frequency of use of the interventions, how the intervention will be phased out, those interventions to be used at home or other non-educational settings, and dates for plan review.[24] A functional analysis assessment occurs when the IEP team finds that the instructional/behavioral approaches specified in an individual's IEP have been ineffective.[25] The assessment must include: (1) systematic observation of the behavior; (2) the immediate antecedent events associated with that behavior; (3) the consequences to determine the function the behavior serves for the individual;
(4) ecological analysis of the settings in which the behavior occurs most frequently; (5) review of records of health and medical factors that may influence behavior; and (6) review history of behavior including effectiveness of past interventions.[26]

The Commission found that following an assessment, a written report of the results is prepared and provided to the parent.[27] The report includes: (1) a description of the nature and severity of the targeted behavior; (2) a description of the antecedents and consequences that maintain the targeted behavior across all settings in which it occurs; (3) a description of the rate of alternative behaviors, their antecedents and consequences; and (4) recommendations for consideration by the IEP team.[28]

The Commission found that all of the activities associated with functional analysis assessments represent a new program or higher level of service because school districts were under no obligation to perform functional analysis assessments before the adoption of the test claim legislation's implementing regulations.

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[21] Title 5, California Code of Regulations, section 3001, subdivision (g).

[22] *Ibid.*; *Id.* at section 3052, subdivision (a).

[23] *Id*. at section 3052, subdivision (a)(3).

[24] *Ibid*.

[25] *Id*. at section 3052, subdivision (b); *See also* section 3001, subdivision (ah), which provides: "serious behavior problems are behaviors that are self-injurious, assaultive, cause serious property damage, or other severe behavior problems that are pervasive and maladaptive for which the instructional or behavioral approaches in the individual's IEP are ineffective."

[26] *Id*. at subdivision (b)(1)(A)-(F).

[27] *Id*. at subdivision (b)(2).

[28] *Id*. at subdivision (b)(2)(A)-(D).

Upon completion of the functional analysis assessment, the IEP team meets to review the results and, if necessary, develop a behavioral intervention plan.[29] The Commission found that this activity represents a new program or higher level of service because school districts were under no obligation to convene an IEP team meeting specifically for review of functional analysis assessments before the adoption of the test claim legislation's implementing regulations.

Implementation of Behavioral Intervention Plans

In developing a behavioral intervention plan, the IEP team may develop positive programming strategies that address the individual's behavior. Positive programming for behavioral intervention may include: (1) altering the identified antecedent event to prevent the occurrence of the behavior (e.g., change the setting); (2) teaching the individual alternative behaviors or adaptive behaviors that produce the same consequences as the inappropriate behavior; and (3) positively reinforcing alternative and other acceptable behaviors and ignoring or redirecting unacceptable behavior.[30]

The Commission found that, to the extent these activities are required to implement an individual's behavioral intervention plan, the activities represent a new program or higher level of service because school districts were under no obligation to develop and implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.

Once an IEP team has developed and/or modified an individual's IEP to include a behavioral intervention plan, responses to the targeted behavior shall include, but are not limited to: (1) ignoring the behavior, but not the individual; (2) verbal, or verbal and physical redirection; (3) the provision of feedback (e.g., "you are talking too loudly");
(4) the message of the behavior is acknowledged (e.g., "you are having a hard time with your work"); or (5) a brief, physical prompt to interrupt or prevent aggression, self-abuse, or property destruction.[31]

The Commission found that, to the extent these activities are required to implement an individual's behavioral intervention plan, the activities represent a new program or higher level of service because school districts were under no obligation to develop and implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.

Once a behavioral intervention plan is implemented, it is evaluated to measure the frequency, duration, and intensity of the targeted behavior identified in the functional analysis assessment.[32] The teacher, the behavioral intervention case manager, parent or care provider, and others, as

[29] *Id*. at subdivision (c); although subdivision (c) provides that IEP teams shall develop a behavioral intervention plan *if necessary*, section 3001, subdivision (h), defines a behavioral intervention plan as a written document that *is developed* when an individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP. Accordingly, the Commission found that school districts *must* develop a behavioral intervention plan once an individual exhibits a serious behavior problem.

[30] *Id*. at subdivision (d).

[31] *Id*. at subdivision (e).

[32] *Id*. at subdivision (f)(1)-(3).

appropriate, review the evaluation at scheduled intervals determined by the IEP team.[33] If the IEP team determines changes are necessary, the teacher and behavioral intervention case manager conduct additional functional analysis assessments, and based on the outcomes, propose changes to the plan.[34]

The Commission found that these activities represent a new program or higher level of service because school districts were under no obligation to evaluate the effectiveness of behavioral intervention plans or to modify them based on an additional functional analysis assessment before the adoption of the test claim legislation's implementing regulations.

Modifications and Contingent Behavioral Intervention Plans

Minor modifications to the behavioral intervention plan can be made by the behavioral intervention case manager and the parent or parent representative.[35] In addition, the IEP team may develop the behavioral intervention plan in such a way as to allow for alterations or changes to the plan without reconvening the IEP team.[36]

The Commission found that the activities of the behavioral intervention case manager and the IEP team regarding development and modification of behavioral intervention plans represent a new program or higher level of service because school districts were under no obligation to implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.

Development and Implementation of Emergency Interventions

In instances where the individual's behavior is unpredictable or spontaneous and poses a clear and present danger of serious bodily harm, an emergency intervention approved by the SELPA may be used.[37] School districts must notify the individual's parent and residential care provider within one school day whenever an emergency intervention is used or serious property damage occurs.[38]

Anytime an emergency intervention is used, schools must complete a "Behavioral Emergency Report," place the Report in the individual's file, and immediately forward it to a responsible administrator who must review the Report.[39] The Report includes: (1) the name and age of the individual; (2) the setting/location of the incident; (3) name of staff or others involved; (4) a description of the emergency intervention used and whether the individual currently has a behavioral intervention plan; and (5) injuries sustained by the individual or others.[40]

Anytime a "Behavioral Emergency Report" is written regarding an individual who does not have a behavioral intervention plan, the designated and responsible administrator must, within two

[33] *Id*. at subdivision (f)(4).

[34] *Id*. at subdivision (f)(5).

[35] *Id*. at subdivision (g).

[36] *Id*. at subdivision (h).

[37] *Id*. at subdivision (i) and (i)(2).

[38] *Id*. at subdivision (i)(5).

[39] *Ibid*.; *Id.* at subdivision (i)(6).

[40] *Id*. at subdivision (i)(5)(A)-(E).

days, convene an IEP team meeting to review the Report, determine the necessity of a functional analysis assessment, and the necessity for an interim behavioral intervention plan.[41]

Anytime a "Behavioral Emergency Report" is written regarding an incident involving previously unseen serious behavior problems or where a previously designed intervention is ineffective for an individual who has a behavioral intervention plan, the IEP team should meet to review the Report and determine if the incident requires the need to modify the plan.[42]

SELPAs are required to collect data on "Behavioral Emergency Reports" and annually report the number of Reports to the California Department of Education and the Advisory Committee on Special Education.[43]

The Commission found that all activities associated with emergency interventions represent a new program or higher level of service because school districts were under no obligation to develop and implement emergency behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.

Prohibited Behavioral Intervention Plans

Interventions that may cause physical harm, deprivation of sleep or food, humiliation or ridicule, or deprivation of one or more senses are prohibited.[44] The use of restrictive devices that limit mobility, locked seclusion, or inadequate supervision is also prohibited.[45]

The Commission found that the activity of informing school district personnel of the restrictions represents a new program or higher level of service because school districts were under no obligation to develop and implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.

Due Process Hearings

The provisions of the test claim legislation that relate to functional analysis assessments and the development and implementation of behavioral intervention plans are subject to the due process hearing procedures specified in the Education Code.[46] Before the enactment of the test claim legislation's implementing regulations school districts were under no obligation to develop and implement behavioral intervention plans.

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[41] *Id*. at subdivision (i)(7).

[42] *Id*. at subdivision (i)(8). Although the subdivision provides that the IEP team *should*, not *shall* or *must*, review the incident and current IEP, the Commission found that, to the extent these activities are required to implement an individual's behavioral intervention plan, the activities represent a new program or higher level of service because school districts were under no obligation to develop or implement behavioral intervention plans before the enactment of the test claim legislation and implementing regulations.

[43] *Id*. at subdivision (i)(9).

[44] *Id*. at subdivision (l).

[45] *Ibid*.

[46] *Id*. at subdivision (m). Education Code section 56501 et seq. details the state's due process procedures, due process hearings, mediation conferences, parent's access to school records, rights of parties, and the use of attorneys at due process hearings.

Therefore, the Commission found that any due process procedures associated with the development and implementation of behavioral intervention plans represents a new program or higher level of service.[47]

The Commission found that the test claim legislation's implementing regulations impose a new program upon school districts. However, the Commission noted that the inquiry must continue to determine whether behavioral intervention plans required by the regulations impose costs mandated by the state.

The Commission noted that in order for the test claim legislation to impose a reimbursable program under section 6, article XIII B of the California Constitution, the newly required activities must be state mandated.[48] Government Code section 17556, subdivision (c), provides that the Commission shall not find costs mandated by the state if the Commission finds that the test claim legislation implements a federal law or regulation and resulted in costs mandated by the federal government.[49] Therefore, if the Commission finds that federal law requires the development and implementation of behavioral intervention plans, then the Commission should deny this test claim.

DOF argued that the test claim legislation implements federal requirements as detailed in the IDEA. Specifically, DOF contended that the test claim legislation allows for the provision of a free appropriate public education and related services as required under federal statutes and case law.

Federal Special Education Law and Behavioral Management Plans[50]

The Education for All Handicapped Children Act (Act) of 1975 is the backbone of the federal statutory provisions governing special education.[51] The 1975 Act begins with findings that the special education needs of children with disabilities are not being fully met. Thus, the purpose of the Act is to assist state and local educational efforts in order to assure equal protection of the law and to assure that children with disabilities have available special education and related services designed to meet their unique needs.[52]

The Act also lists substantive definitions, which both clarify the meaning of terms and set out some of the obligations the Act creates. For example, the Act defines *free appropriate public education* as special education and related services that: (1) are provided at public expense, under public supervision and direction, and without charge; (2) meet the standards of the state

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[47] To be discussed below in Issue 2.

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

[49] Government Code section 17513 provides: "'Costs mandated by the federal government' means any increased costs incurred by a local agency or school district . . . in order to comply with the requirements of a federal statute or regulation. . . ."; In *Hayes* v. *Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593, 1594, the appellate court stated, "the determination whether certain costs were imposed upon a local agency by a federal mandate must focus on the local agency which is ultimately forced to bear the costs and how these costs came to be imposed upon that agency."

[50] The background on federal special education law comes from, Special Education Law and Litigation Treatise, by Mark C. Weber.

[51] In 1990, Congress changed the title of the Act to the "Individuals with Disabilities Education Act."

[52] Title 20, United States Code, section 1400.

educational agency; (3) include an appropriate preschool, elementary, or secondary school education in the state involved; and (4) are provided in conformity with the individualized education program required under federal law.

The Act continues with administration and funding provisions, which include state eligibility requirements. In order to receive federal funding, the state must have a policy that assures all children with disabilities, who meet the age requirements, the right to a free appropriate public education.[53]

Moreover, the eligibility and plan requirements require a system of procedural hearing rights for parents of children with disabilities. These rights include prior written notice when the designation, evaluation, or placement of a child is initiated or changed. They also include the right of children whose parents are not known or available, or who are wards of the state, to have surrogate parents acting in their place. Furthermore, parents or guardians have the right to examine educational records and receive an independent evaluation of the child.[54]

Are Behavioral Intervention Plans Required Under the Federal Statutory Scheme?

The Commission found that the issue of whether behavioral intervention plans are a federal or state mandate relates to whether they can be defined as a *related service* under federal law. Federal law defines *related services* as supportive services required to assist a child with a disability to benefit from special education. Such supportive services include psychological services.[55] The Commission noted that the issue of whether behavioral intervention plans are a related service centers on whether they can be defined as a *psychological service*.

Before the U.S. Department of Education's March 11, 1999, amendments to the implementing regulations for the IDEA,[56] federal law defined *psychological services* as: (1) administering psychological and educational tests, and other assessment procedures; (2) interpreting assessment results; (3) obtaining, integrating, and interpreting information about child behavior and conditions relating to learning; (4) consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and (5) planning and managing a program of psychological services, including psychological counseling for children and parents.[57]

The Commission found three reasons why behavioral intervention plans, as defined by the test claim legislation and implementing regulations, were not a *psychological service* and therefore not a *related service* under the IDEA's implementing regulations as they existed before the U.S. Department of Education's March 11, 1999, amendments.

First, the U.S. Department of Education recently amended the definition of *related services* to *include* behavioral interventions in the implementing regulations for the IDEA.[58] Specifically, the *psychological services* definition, as amended, now provides that such services include

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[53] *Id*. at section 1412(1).

[54] *Id*. at section 1415(b)(1)(A).

[55] Title 20, United States Code, section 1401(a)(18); Title 34, Code of Federal Regulations, section 300.24.

[56] The Commission addresses the March 11, 1999, amendments below.

[57] Title 34, Code of Federal Regulations, section 300.24(b)(9).

[58] Title 34, Code of Federal Regulations, section 300.24.

assisting in developing positive behavioral intervention strategies.[59] The fact that the U.S. Department of Education recently *added* behavior interventions to the related service section of the IDEA's implementing regulations is evidence that behavior interventions were not previously considered a related service or psychological service.

Second, under California law, in order to perform behavioral intervention tasks a person is not required to be a licensed psychologist as defined in the Business and Professions Code.[60] Rather, the California Department of Education provides that an individual wishing to develop behavioral intervention plans need only receive training in behavior analysis with an emphasis on positive behavioral interventions.[61] Thus, California's behavioral intervention plans would not qualify under the federal definition of psychological services.

Third, California Department of Consumer Affairs' Counsel to the Board of Psychology and Board of Behavioral Science concluded behavior analysts do not engage in the practice of psychology or the practice of marriage, family, and child counseling. Thus, Consumer Affairs' Counsel concluded that behavioral analysts do not engage in diagnosing mental disorders, but focus on external environmental factors that influence behavior.

Accordingly, the Commission found that behavioral intervention plans were not a *psychological service* or a *related service* under the federal statutory scheme before the March 11, 1999, U.S. Department of Education amendments to the implementing regulations for the IDEA. Further evidence that behavioral intervention plans were not part of federal law when the test claim legislation and implementing regulations were enacted is the fact that Congress made several attempts before finally *adding* such plans to the federal statutory scheme.

In 1995, Congress was unsuccessful in its attempt to amend the IDEA to include provisions relating to behavior management plans. Both the House and Senate introduced bills that were unsuccessful in adding a new section to the IDEA with the following language:

> "In developing an IEP, the IEP team shall . . . in the case of a child whose behavior impedes his or her learning or that of others, consider strategies, including *behavior management plans*, to address that behavior." (Emphasis added.)

In 1996, Congress again was unsuccessful in its attempt to amend the IDEA to include a new section with the following language:

> "An individualized education program team shall develop the IEP. . . . In developing such IEP, the IEP Team . . . shall . . . in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate,

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[59] Title 34, Code of Federal Regulations, section 300.24(b)(9)(vi) as amended on March 11, 1999, by the U.S. Department of Education provides: "(b) *Individual terms defined.* The terms used in this definition are defined as follows: . . . (9) *Psychological services* includes—. . . (vi) Assisting in developing positive behavioral intervention strategies."

[60] Under Business and Professions Code section 2914, an individual wishing to provide psychological services must possess a doctorate in psychology, have two years of supervised professional experience, pass a specialized examination, complete training regarding the detection of alcohol or other chemical abuse, and complete coursework in spousal or partner abuse assessment.

[61] Title 5, California Code of Regulations, section 3052, subdivision (a)(1)-(2).

strategies, including *positive behavior management interventions and strategies* to help the child behave in an appropriate and responsible manner conducive to learning." (Emphasis added.)

On June 4, 1997, Congress successfully amended the IDEA, which states in pertinent part:[62]

"(d) Individualized education programs

"....

"(3) Development of IEP

"....

"(B) Consideration of special factors – the IEP Team shall—

"(i) in the case of a child whose behavior impedes his or her learning or that of others, *consider*, when appropriate, strategies, *including positive behavioral interventions*, strategies, and supports to address that behavior."[63] (Emphasis added.)

The claimants contended that the test claim legislation and implementing regulations were not enacted to implement the IDEA Amendments of 1997. The test claim legislation was enacted in 1990 and the regulations in 1993. Thus, it is not possible to conclude that the test claim legislation and implementing regulations were adopted to implement federal requirements that did not exist at the time.

DOF contended that Congress did not view the recent amendments to the IDEA as a new extension or expansion of children's rights. Rather, DOF took the position that these amendments were meant to clarify federal policies already in place.[64] Thus, DOF concluded that behavioral interventions are not new to federal law and that such interventions have always been required under the IDEA. DOF maintained that the central purpose of the IDEA is to ensure that disabled children receive a free appropriate public education and, since public education is defined to include such related services necessary to achieve this goal, interventions that are necessary to ensure the education of a disabled child are federally mandated under the IDEA.

The Commission found that, although the IDEA paints the special education landscape with broad strokes, the specificity in the test claim legislation and implementing regulations do not fit onto the canvas. The state *requires* school districts to engage in functional analysis assessments and implement behavioral intervention plans whenever a disabled child exhibits serious behavior problems. Under the IDEA, if a disabled child exhibits such behavior, school districts are not tied to one response. Before, and even after, the IDEA Amendments of 1997, school districts are free to consider interventions as a possible approach, but are not required to use them. Furthermore, the Commission found that consideration of strategies, such as behavioral intervention plans, were not an express part of federal law before the enactment of the test claim

[62] Title 20, United States Code, section 1414.

[63] *Id*. at section 1414(d)(3)(B)(i).

[64] In the Department of Finance's May 6, 1999, response, DOF quoted the following from the House of Representatives Report on the IDEA Amendments of 1997: "It is the Committee's intent that this set of practical and balanced guidelines reinforce and clarify the understanding of Federal policy on this matter, which is currently found in statute, case law, regulations, and informal policy guidance."

legislation and implementing regulations because Congress recently amended the IDEA to *include* consideration, when appropriate, of such strategies in the federal statutory scheme.

Based on the foregoing, the Commission found that behavioral intervention plans are not required under the federal statutory scheme. However, the question remains whether the recent amendments to the IDEA's implementing regulations by the U.S. Department of Education may create a federal mandate to develop and implement behavioral intervention plans.

Are Behavioral Intervention Plans Required Under the U.S. Department of Education's Current Regulations?

Current language in the United States Code only requires an IEP team to *consider* strategies such as positive behavioral interventions when developing a child's IEP. However, regulations recently adopted by the U.S. Department of Education may *require* the inclusion of behavioral intervention strategies in a child's IEP.

The recently amended version of Title 34, Code of Federal Regulations, section 300.346, provides that IEP teams are required to *consider* behavioral interventions in instances where the child's behavior impedes his or her learning or that of others. If, upon considering the use of an intervention, the IEP team determines that intervention is necessary to ensure that the child receives a free appropriate public education, the IEP team *must* include a statement to that effect in the child's IEP.[65] Prior federal regulations did not require the inclusion of behavioral intervention plans in a child's IEP. The U.S. Department of Education adopted the amended regulations on May 11, 1999.[66]

The claimants contended that the U.S. Department of Education's regulations do not require the use of behavioral interventions under the IDEA. The regulations provide that an IEP team shall *consider* interventions, but they are not *required* to develop or implement behavioral intervention plans. Furthermore, section 300.346, subdivision (c), only requires a statement concerning interventions to be placed in a child's IEP, *if* the IEP team deems it necessary. Federal law gives IEP teams the leeway to develop IEPs as they see fit. Federal law does not *require* the development and implementation of behavioral intervention plans.

DOF contended that the new regulations only underscore the point that the U.S. Department of Education is charged with providing explanation, elaboration, and interpretation of the IDEA and the states are responsible for filling in the details. It was DOF's contention that the foregoing amendments to the IDEA's implementing regulations are nothing more than clarifying amendments to ensure special education children are receiving a free appropriate public

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[65] Title 34, Code of Federal Regulations, section 300.346 provides in pertinent part: "(a) . . . (2) Consideration of Special Factors. The IEP team also shall—(i) In the case of a child whose behavior impeded his or her learning or that of others, *consider, if appropriate,* strategies, *including positive behavioral intervention,* strategies, and supports to address that behavior. . . . (c) Statement in IEP. *If,* in considering the special factors described in paragraphs (a)(1) and (2) of this section, *the IEP team determines* that a child needs a particular device or service (including an *intervention,* accommodation, or other program modification) in order for the child to receive [a free appropriate public education], the IEP team *must include a statement to that effect in the child's IEP. . . .*" (Emphasis added.)

[66] Compliance with the new regulations is not required until either the fiscal year 1998 funds that are unobligated by states and school districts become carryover funds (October 1, 1999) or, if earlier, the state receives fiscal year 1999 funding (expected to be available for obligation to states July 1, 1999.)

education in the least restrictive environment. Therefore, DOF concluded that the test claim legislation and implementing regulations are designed to fill in the interstices of the IDEA to achieve the purposes and policies of the Act. And, as such, the test claim legislation and implementing regulations must be considered part and parcel of the federal mandate and not reimbursable as a state mandate.

The Commission found that the U.S. Department of Education's regulations do not require the development and implementation of behavioral intervention plans. The plain language of section 300.346 provides that IEP teams shall *consider* using intervention strategies *if* appropriate. However, there is no language requiring teams to engage in such consideration. Furthermore, it cannot be said that state law is filling in the interstices of federal law. The Legislature has created a new program, one that was not described or outlined in federal law before the adoption of the test claim legislation's implementing regulations. Although behavioral intervention plans may aid the provision of a free appropriate public education to certain disabled children, so may other techniques or services, which IEP teams have at their disposal. The test claim legislation and implementing regulations take a step beyond federal law by *requiring* the use of a technique which, under federal law, IEP teams have *discretion* to use.

DOF further contended that "Assuming that there are in fact several alternative approaches to compliance with a federally mandated program, the fact that a given state, in implementing the mandate, selects only one or two such compliance options changes nothing: *in making that choice, obviously, the state is doing nothing more than adopting a reasonable and appropriate means of complying with the federal mandate*." (Emphasis in original.)

The Commission found that nothing in federal law requires school districts to develop and implement behavioral intervention plans. Under federal law the bottom line is simple; school districts must provide disabled children a free and appropriate public education in the least restrictive environment. If an individual exhibits serious behavior problems, federal law provides a wide array of strategies to address such behavioral problems. However, state law requires the use of one strategy, behavioral intervention plans.

Accordingly, the Commission found that the IDEA's implementing regulations do not require IEP teams to develop and implement behavioral intervention plans.

Cedar Rapids Community School District v. *Garret F.*

DOF cited *Cedar Rapids Community School District* v. *Garret F.* as support for its contention that behavioral intervention plans are required under federal law. Specifically, DOF contended that *Cedar Rapids* stands for the proposition that behavioral intervention plans help guarantee that students receive a free appropriate public education. Accordingly, it concluded that the test claim legislation and implementing regulations are not state mandated, but rather flow from requirements found in the IDEA, its purposes, and case law. The Commission disagreed.

On March 4, 1999, the United States Supreme Court decided *Cedar Rapids Community School District* v. *Garret F.*[67] The issue centered on whether the definition of "related services" in Title 20, United States Code, section 1401, subdivision (a)(17), requires a public school district to provide a ventilator-dependent student with certain nursing services during school hours. When Garret was four years old, his spinal column was severed in a motorcycle accident. As a

[67] *Cedar Rapids Community School Dist.* v. *Garret F.* (1999) 119 S.Ct. 992.

result of the accident, Garret was paralyzed from the neck down and is ventilator dependent, requires assistance with urinary bladder catheterization at least once a day, suctioning of his tracheotomy tube, getting into a reclining position for five minutes of every hour, and ambu-bagging when his ventilator is checked for proper operation. At the time the decision was entered, Garret was a sophomore in the Cedar Rapids Community School District.

The Supreme Court developed a two-part test for determining whether a particular activity falls under the "related service" portion of the IDEA in *Irving Independent School Dist*. v. *Tatro*.[68] Under this test, it must first be determined whether the requested services are included within the phrase "supportive services;" and second it must be determined whether the services are excluded as "medical services."

In *Cedar Rapids*, the District argued that the cost of providing a full-time nurse to attend to Garret's needs while in school was too costly. Therefore, the District's main contention focused on the second part of the test; whether the services Garret requires are excluded as medical services. Specifically, it was contended that Garret's needs fall under the "medical services" exclusion detailed in *Tatro*. In *Tatro*, the Court concluded that the term "medical services" referred only to services that *must* be performed by a physician. The *Tatro* court found that a specific form of health care (clean intermittent catherization) that is often, though not always, performed by a nurse is not an excluded medical service.[69] Therefore, the *Cedar Rapids* court found that it the phrase "medical services" under the IDEA does not embrace all forms of care that might loosely be described as "medical" in other contexts, such as allowable expenses for an income tax medical deduction.

The *Cedar Rapids* court concluded that under the statute, the Court's precedent in *Tatro*, and in accordance with the purposes of the IDEA, the District must fund such "related services" in order to help guarantee that students like Garret are integrated into the public schools.

DOF concluded that "from the *Cedar Rapids* case we learn that federal courts interpret the rights of disabled students very broadly under the IDEA, even when such an interpretation requires elaborate substantive services and imposes extremely burdensome costs on local school districts." The Commission agreed with this conclusion. However, the Commission found that acceptance of this conclusion does not support DOF's contention that *Cedar Rapids* stands for the proposition that federal case law requires school districts to develop and implement behavioral intervention plans.

Case Law in Other Jurisdictions

DOF contended that "it is clear that [the following] cases, though not entirely on point, shed important light on the questions here presented and support the Department's argument that the challenged state laws here are reasonably designed to ensure compliance with the federal mandate."[70] The Commission agreed. However, as discussed below, the Commission found that the following cases cited by DOF do not answer the question of whether federal case law mandates that the state require the development and implementation of behavioral intervention plans under certain circumstances.

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[68] *Irving Independent School Dist*. v. *Tatro* (1984) 468 U.S. 883.

[69] *Cedar Rapids Community School Dist.* v. *Garret F.* (1999) 119 S.Ct. 992.

[70] *Ibid*.

In *Chris D.* v. *Montgomery County Board of Education,*[71] the court addressed Chris' need for a free appropriate public education and the school board's inability to provide such an education. For Chris to receive an appropriate education it was determined that he needed training in behavior management and anger control. The court found that Chris' behavior deteriorated to a point where intensive behavior management techniques were required due to the school board's poor response to Chris' special educational needs.

In *Oberti* v. *Board of Education,*[72] the court focused on the IDEA requirements regarding the education of disabled children in regular classroom settings. The court held that the IDEA requires disabled children to receive a free appropriate public education in the least restrictive environment. Regarding the pupil's behavior problems, the court found that the informal behavior plan developed by the school district was inadequate because it did not include the appropriate supplementary aids and services required under the IDEA. The court found that the school district failed to provide the pupil a free appropriate public education in the least restrictive environment because the district failed to provide the necessary supplementary aids and services that would allow the pupil to be educated in a regular classroom setting.

In *Cremeans* v. *Fairland Local School District*[73], the district determined that a pupil, a severely disabled autistic child, could not benefit from education in a regular classroom setting. The IEP drafted for this child stated he needed 24 hours-a-day, 7 days-a-week in-home education and behavior management training. The court held that the school district failed to provide a free appropriate public education for the child because it failed to implement the IEP.

The Commission found the foregoing cases illustrate the point that federal case law recognizes there are a variety of strategies to ensure that disabled children receive a free appropriate public education in the least restrictive environment. These strategies range from behavior management as in *Chris D.*, to 24 hours-a-day, 7 days-a-week in-home education as in *Cremeans*. Accordingly, the Commission found that federal case law does not mandate that the state require school districts to develop and implement behavioral intervention plans whenever an individual exhibits serious behavior problems.

Is the Due Process Hearing Requirement Detailed in the Test Claim Legislation's Implementing Regulations Required Under Federal Law?

The Commission found that the test claim legislation's implementing regulations provide that functional analysis assessments and the development and implementation of behavioral intervention plans are subject to the procedural protections and due process hearing procedures specified in the Education Code for special education.[74]

The 14th Amendment to the Federal Constitution provides that no state may deprive any person of life, liberty, or property without due process of law. The due process provisions of

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[71] *Chris D.* v. *Montgomery County Board of Education* (M.D. Ala. 1990) 743 F.Supp. 1524.

[72] *Oberti* v. *Board of Education* (D.N.J. 1992) 801 F.Supp. 1392.

[73] *Cremeans* v. *Fairland Local School District* (Ohio App. 4th Dist.) 91 Ohio App.3d 668.

[74] Title 5, California Code of Regulations, section 3052, subdivision (m). Education Code section 56501 et seq. details the state's due process procedures, due process hearings, mediation conferences, parent's access to school records, rights of parties, and the use of attorneys at due process hearings.

California's Constitution[75] are identical in purpose and in scope with the due process clause of the 14th Amendment. The IDEA also establishes procedures for according due process to parents and guardians of a disabled child.[76]

However, as the Commission previously noted, the IDEA does not require the development and implementation of behavioral intervention plans – the state does. Therefore, although due process hearings are required under federal law and the IDEA, the provision for due process hearings relating to behavioral intervention plans remains a state mandate. In other words, the Commission found that these hearings would not be required but-for the test claim legislation's implementing regulations.

Therefore, the Commission found that providing due process hearings regarding a child subject to a functional analysis assessment or developing and implementing a behavioral intervention plan represent reimbursable state mandated activities.

Does Government Code Section 17556, Subdivision (e), Preclude the Commission from Finding that the Test Claim Legislation and Implementing Regulations Impose Costs upon School Districts?

DOF contended that:

> "The State of California has already allocated billions of dollars to fund its Special Education program, the vast majority of which is dictated by the IDEA and other federal mandates. Most of this state funding, . . . $1.4 billion, . . . was available to locals to spend on any costs they may have incurred as a result of the state behavioral intervention requirements challenged here. Accordingly, this state revenue, which was manifestly intended to fund the Special Education program, more than offsets any such costs, and leaves the claimants with an untenable, and entirely, moot, test claim."

The Commission recognized that the claimants did not have the opportunity to address DOF's section 17556, subdivision (e) argument.

Section 17556, subdivision (e), sets forth two tests for determining whether the Commission shall find that there are no costs mandated by the state. Under the first test, the Commission shall find that there are no costs mandated by the state if the statute or executive order provides for offsetting savings that result in *no net costs*. The second test of subdivision (e), provides that the Commission shall find there are no costs mandated by the state if the statute or executive order includes additional revenue *specifically intended* to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

The Commission found that DOF oversimplifies the application of section 17556, subdivision (e), by concluding that if any funding has been provided for special education that school districts are not entitled to reimbursement for the behavioral intervention plans test claim, even if the Commission finds that the test claim imposes a reimbursable state mandate. The fact that an agency or school district has received funding is only the beginning of the analysis. The

[75] California Constitution, Article I, sections 7, 15.

[76] *See* Title 20, United States Code, section 1415; Title 34, Code of Federal Regulations, sections 300.482-300.487, 300.500-300.515.

Commission must then determine if either of the two tests of section 17556, subdivision (e), apply.

(1) Does the Statute or Executive Order Provide for Offsetting Savings that Result in No Net Costs?

As stated above, under the first test of Government Code section 17556, subdivision (e), the Commission shall not find costs mandated by the state if the statute or executive order provides for *offsetting savings which result in no net costs* to local agencies or school districts.

DOF did not contend that the test claim legislation provides for offsetting savings that result in no net costs to the claimants. Nor did the Commission found any language in either the test claim legislation or implementing regulations that specifically provides for *offsetting savings which result in no net costs* to the claimants. Accordingly, the Commission found that there is no evidence that the test claim legislation provides for *offsetting savings, which result in no net costs* to the claimants. However, the analysis must continue to determine whether the second test of section 17556, subdivision (e), applies.

(2) Does the Statute or Executive Order Include Additional Revenue Specifically Intended to Fund the Costs of the State Mandate in an Amount Sufficient to Fund the Cost of the State Mandate?

As stated above, the second test of Government Code section 17556, subdivision (e), provides that the Commission shall not find costs mandated by the state if the statute or executive order includes additional revenue *specifically intended* to fund the cost of the state mandate in an amount sufficient to fund the cost of the state mandate.

From the plain language of subdivision (e), the Commission looked at the test claim legislation and implementing regulations to determine if there are funds specifically intended to fund the mandate. Based on the documentation provided by the parties and the Commission's review of the test claim legislation, the Commission found that although the state has provided substantial funding for special education, school districts have not received funds *specifically intended* to fund the costs of the state mandate.

CONCLUSION

The Commission concluded that the test claim legislation and implementing regulations impose a reimbursable state mandated program upon school districts within the meaning of section 6, article XIII B of the California Constitution and Government Code section 17514 for the following activities:

- SELPA plan requirements. (Cal. Code of Regs., tit. 2, §§ 3001 and 3052, subd. (j).)
- Development and implementation of behavioral intervention plans. (Cal. Code of Regs., tit. 2, §§ 3001 and 3052, subds. (a), (c), (d), (e), and (f).)
- Functional analysis assessments. (Cal. Code of Regs., tit. 2, §§ 3001 and 3052, subds. (b), (c), and (f).)

- Modifications and contingent behavioral intervention plans. (Cal. Code of Regs., tit. 2, § 3052, subds. (g) and (h).)
- Development and implementation of emergency interventions. (Cal. Code of Regs., tit. 2, §§ 3001 and 3052, subd. (i).)
- Prohibited behavioral intervention plans. (Cal. Code of Regs., tit. 2, §§ 3001 and 3052, subd. (l).)
- Due process hearings. (Cal. Code of Regs., tit. 2, § 3052, subd. (m).)

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE PARAMETERS AND GUIDELINES FOR: 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 Period of reimbursement begins July 1, 1993	Case No.: CSM 4464 *Behavioral Intervention Plans* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted April 19, 2013*) (*Served April 25, 2013)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard the above-captioned matter on January 25, 2013. Ms. Diana McDonough, Dr. Sandee Kludt, Mr. Michael Lenahan, and Ms. Mary Bevernick appeared on behalf of the claimants. Ms. Susan Geanacou and Ms. Jillian Kissee appeared on behalf of the Department of Finance (DOF). The Commission approved the final staff analysis, as modified by the Commission, by a vote of 7 to 0, and continued the matter for the adoption of the statement of decision and parameters and guidelines that accurately reflect the decision of the Commission.

On April 19, 2013, the Commission adopted this statement of decision and parameters and guidelines during a regularly scheduled hearing. Ms. Diana McDonough appeared on behalf of the claimants. Mr. Jim Spano and Ms. Jill Kanemasu appeared on behalf of the State Controller's Office (SCO). Mr. Christian Osmena appeared on behalf of DOF.

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., and related case law.

The Commission adopted the parameters and guidelines and statement of decision by a vote of 6 to 0.

I. SUMMARY OF THE MANDATE

These parameters and guidelines, including a reasonable reimbursement methodology (RRM), pertain to the *Behavioral Intervention Plans* test claim statement of decision (CSM-4464) adopted September 28, 2000. Based on the filing date of the test claim, the period of reimbursement begins on July 1, 1993. The test claim addresses a 1990 statute and 1993 implementing regulations adopted by the Department of Education (CDE) regarding special

education services for children with disabilities. Education Code section 56523 requires the Superintendent of Public Instruction and the State Board of Education to adopt regulations establishing behavioral intervention plans (BIPs), which:

> (1) include the types of behavioral interventions that can be used; (2) require that a pupil's [individualized education plan] include a description of behavior interventions that meet certain guidelines; and (3) specify standards and guidelines regarding the use of behavior interventions in emergency situations.[1]

In accordance with Education Code section 56523, CDE adopted sections 3001 and 3052 of Title 5 of the California Code of Regulations, which detail school districts' obligations concerning BIPs.

The Commission found, in the test claim statement of decision, that Education Code section 56523 only requires the Superintendent of Public Instruction and the State Board of Education to adopt regulations establishing BIPs, and does not impose any requirements upon school districts. However, the Commission concluded that the implementing regulations impose a reimbursable state-mandated program upon school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following categories of activities:

- Special Education Local Plan Area (SELPA) plan requirements. (Cal. Code of Regs., tit.5, §§ 3001 and 3052(j).)
- Development and implementation of BIPs. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(a), (c), (d), (e), and (f).)
- Functional analysis assessments. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(b), (c), and (f).)
- Modifications and contingent BIPs. (Cal. Code of Regs., tit. 5, § 3052(g) and (h).)
- Development and implementation of emergency interventions. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(i).)
- Prohibited behavioral interventions. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(l).)
- Due process hearings. (Cal. Code of Regs., tit. 5, § 3052(m).)[2]

II. PROCEDURAL HISTORY

The underlying test claim was filed in September of 1994 by San Diego Unified School District, Butte County Office of Education, and San Joaquin County Office of Education. A number of requests for extension were granted, both to claimants and to interested state agencies, before the test claim was brought before the Commission. The matter was heard in September 1999, but

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[1] Exhibit A, Corrected Statement of Decision, *Behavioral Intervention Plans* CSM-4464, p. 2

[2] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464 pp. 17-18 [the test claim statement of decision incorrectly cites Code of Regulations, Title 2; the regulations at issue are found at Title 5, sections 3001 and 3052].

not decided, due to a tie vote, until a seventh member was appointed the next year. The test claim statement of decision was adopted September 28, 2000, by a 5-2 vote.[3]

Claimants filed proposed parameters and guidelines for the approved activities on October 26, 2000, within the 30 days provided for in statute.[4] The Department of Finance (DOF) opposed the parameters and guidelines, in comments submitted November 20, 2000, and recommended actual cost claiming instead of the proposed uniform time allowances or uniform costs. San Diego City Schools requested four 60-day extensions of time to file comments, stating that the employee responsible for responding in this matter had left the employ of the district. These extensions were granted for good cause. On September 9, 2001, a new representative requested time to review the record and develop rebuttal comments, which was granted for good cause. On October 9, 2001, claimants requested an extension of time, stating that the parties were discussing settlement of the matter. Similar extension requests and approvals followed on November 16, 2001, January 15, 2002, February 19, 2002, and March 15, 2002. On May 22, 2002, claimants filed rebuttal comments. Claimants filed further rebuttal comments on May 31, 2002 and August 26, 2002. On October 11, 2002, claimants requested a continuance pending a statewide study of costs, which was granted for good cause. Sixteen subsequent requests for continuance followed between January 2003 and March 2005, at which time Commission staff informed the claimants that no further extensions would be granted without substantive information from the parties about the status of the matter.

Meanwhile, before the expiration of the three year statute of limitations to seek judicial review of the Commission's decision, on September 26, 2003, DOF filed a petition for a writ of administrative mandamus to set aside the decision, placing this matter on inactive status until the mandamus petition was dismissed in 2010. On October 7, 2007, the Deputy Attorney General representing DOF opened settlement negotiations with the claimants. Over the next few months, claimants surveyed eligible local educational agencies regarding costs incurred to implement the mandate for the previous school year. The surveys asked for cost data regarding specific activities approved in the test claim decision, and were developed in cooperation with representatives of DOF. The surveys were returned in May 2008 by 21 SELPAs of the 30 that had originally agreed to participate. While the survey data were being considered the court granted an extension of the five-year rule for the court to hear and determine the matter, which would have required the court to resolve the case before September 26, 2008.[5]

Between July and November 2008, the claimants and DOF worked closely with the survey results. Both agreed that the survey sample was adequate, and the results were compiled and reviewed until both agreed that they were accurate.[6] On October 15, 2008, the court issued a Second Stipulation and Order to Extend Time to Hear Petition for Administrative Mandamus. On November 20, 2008, the court issued a Third Stipulation and Order to Extend Time.

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[3] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464 p. 1.

[4] Exhibit K, Proposed Parameters and Guidelines, *Behavioral Intervention Plans*, CSM-4464.

[5] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[6] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

Upon review of the survey results the parties continued cooperative efforts, reaching a settlement in November 2008. The settlement agreement called for all retroactive and current reimbursement claims to be extinguished by an allocation of $510 million to school districts for the cost of the BIPs activities, $10 million to SELPAs and county offices of education, and $65 million annually to school districts for ongoing costs of the program.[7] As of the 2008-2009 fiscal year, the total estimated costs, "including the total statewide extrapolated annual costs and the total statewide extrapolated one-time costs, were $1,014,605,046.17.[8] Despite the fact that the settlement would have reimbursed only slightly more than half of the eligible claimants' estimated costs to that point in time, 95% of all LEAs, representing 99% of statewide ADA, agreed to the settlement.[9]

On February 25, 2009, AB 661 was introduced to implement the settlement agreement to appropriate funds for the mandate on an ongoing basis and to appropriate the $520 million in satisfaction of the accumulated costs. AB 661 was introduced by State Assemblyman Torlakson, but died in the Assembly Committee on Appropriations.[10] As a result, the settlement was not funded as described, and the *BIPs* program has not been reimbursed to date. After the settlement agreement was not funded by the Legislature for two consecutive budget years, DOF dismissed its mandamus action with prejudice on October 26, 2010.

On October 19, 2010, one week before the mandamus petition was dismissed, AB 1610 was enacted as a budget trailer bill to amend Education Code section 56523, among others, to address funding shortfalls in a number of state-mandated programs. AB 1610 sought to "deem" the activities approved under the test claim regulations as necessary to implement a federal mandate, and thus negate the Commission's decision on reimbursement.[11] AB 1610 also sought to declare that local educational agencies must agree to implement the BIPs program as a condition of receiving ongoing special education funds. AB 1610, in addition, sought to compel local educational agencies receiving special education funds from the state to use those funds for state-mandated programs first, beginning in the 2010-2011 fiscal year.[12]

On December 17, 2010, after the settlement was not funded by the Legislature and attorneys representing DOF had abandoned the effort to compromise, claimants proposed revised parameters and guidelines that include an RRM relying on the same survey data collected during settlement negotiations with DOF.[13] The proposed parameters and guidelines offer three distinct

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[7] Exhibit O, Settlement and Release Agreement, dated January 26, 2009

[8] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[9] Exhibit O, Joint Stipulation for Entry of Judgment and Proposed Judgment, 05/19/09, Superior Court, County of Sacramento, No 03CS01432, p. 4.

[10] Exhibit O, AB 661 (text of proposed bill).

[11] Exhibit O, Statutes 2010, chapter 724 § 27 (AB 1610).

[12] Exhibit O, Education Code section 56523(b-f) (Stats. 2010, ch. 724 § 27 (AB1610)).

[13] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

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.[14]

On January 27, 2011, the State Controller's Office (SCO) submitted written comments on the revised proposed parameters and guidelines.[15] On February 23, 2011, the claimants submitted a rebuttal to the SCO comments.[16] On August 9, 2011, DOF submitted written comments on the revised proposed parameters and guidelines.[17] On August 12, 2011, the Commission requested comments from parties and interested parties on three pending proposed RRMs.[18] On October 14, 2011, claimants submitted a rebuttal to DOF's comments.[19] On December 20, 2011, claimants submitted a response to the Commission's request for comments on the pending RRMs.[20] On August 15, 2012, claimants submitted Amended Exhibit 2 to the revised proposed parameters and guidelines.[21]

On December 4, 2012, the Commission issued the draft staff analysis. On December 21, 2012, SCO responded with comments on the draft proposed parameters and guidelines, primarily consisting of technical changes, most of which are reflected in the parameters and guidelines attached to this statement of decision. On December 24, 2012, the claimants submitted comments on the draft staff analysis, generally supporting the adoption of option A, with the exception of the language regarding offsetting revenues. Claimants' comments are discussed, where relevant, below. On December 28, 2012, Commission staff received comments also from DOF on the draft staff analysis, generally opposing the adoption of either an RRM or parameters and guidelines at this time. Those comments as well are addressed below.

III. POSITION OF THE PARTIES

A. Claimants' Position

The claimants' proposed parameters and guidelines offer three distinct RRMs, specific to the eligible claimants who implement the reimbursable activities, and to the time and manner in which the activities are implemented.

1. RRM for One-Time SELPA-Level Activities

The first RRM is for one-time SELPA-level activities, which include preparing and adopting procedures and policies, to update the SELPA plan in conformity with the regulations. The SELPA plans, which govern the provision of special education services locally, must be updated

[14] Exhibit B, Revised Proposed Parameters and Guidelines, December 17, 2010.

[15] Exhibit C, SCO Comments, Revised Proposed Parameters and Guidelines, January 27, 2011.

[16] Exhibit D, Claimants' Rebuttal to SCO Comments, February 23, 2011.

[17] Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[18] Exhibit G, Commission Request for Comments on Proposed Pending RRMs, August 12, 2011.

[19] Exhibit F, Claimants' Rebuttal to DOF Comments, October 14, 2011.

[20] Exhibit H, Claimants' Response to Request for Comments, December 20, 2011.

[21] Exhibit J, Claimants' Comments and Amended Exhibit 2.

to reflect the changes imposed by the test claim regulations, including: training requirements for certain staff involved in developing BIPs; training requirements for staff involved in implementing BIPs; special training for the use of emergency behavioral interventions; and identification of approved emergency behavioral interventions.[22]

The surveys produced by claimants sought information from SELPAs regarding how much time, for each position involved, was spent updating the SELPA plan in conformity with Code of Regulations section 3052(j) and adopting the changes.[23] The claimants and DOF engaged in some manipulating and negotiating regarding those figures, and resolved a number of discrepancies.[24] An hourly rate was then applied to the time spent, by position, to determine the cost of each activity.[25] Those costs were then totaled for all SELPAs surveyed, and divided by P2 ADA of all 21 SELPAs[26] for 2006-2007, to arrive at a unit cost per average daily attendance (ADA) for the one-time SELPA activities.[27] "P2 ADA" refers to "the total number of units of average daily attendance reported for the second principal apportionment" pursuant to Education Code section 41601 for all pupils enrolled in the district or districts that are a part of the SELPA. The resulting cost per ADA (unit rate) is then to be adjusted by the Implicit Price Deflator for the appropriate fiscal year in which the one-time activities were conducted by an eligible claimant SELPA, and then applied to the P2 ADA figures for that same year.

2. RRM for On-Going SELPA Activities

The second RRM proposed is for on-going activities at the SELPA level. These activities include providing and obtaining training in behavior analysis, positive behavioral interventions, and behavioral emergency interventions; reporting to the CDE and Advisory Committee on Special Education on the number of emergency behavior intervention reports; and satisfying due

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[22] Code of Regulations section 3052(j) (Register 93, No. 17).

[23] See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, at p. 0017.

[24] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer; Claimants' Exhibits 5-7.

[25] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer, ["We often needed to call school personnel while compiling the data as we became aware of missing information. We always checked to obtain the actual information, and if we were unsuccessful, we ultimately did not use any of that SELPA's information. We did not estimate."]. See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, August 15, 2012, at p. 0052; 0058-0059.

[26] See Exhibit O, AB 602 This includes also schools operated by county offices of education. (Ed. Code § 56836.06 (Stats. 1997, ch. 854 § 65 (AB 602)))]. Section 41601, in turn provides that school districts and COEs "shall report to the Superintendent of Public Instruction during each fiscal year the average daily attendance…during [(1) the period between July 1 and December 31 (period one)] and (2) the period between July 1 and April 15, inclusive, to be known as the "second period" report." (Ed. Code § 41601).

[27] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

process requirements related to functional analysis assessments or the development or implementation of BIPs.[28]

The methodology employed to calculate the unit rate was substantially the same as above: the surveys sought information from SELPAs regarding time spent, by position, on the ongoing activities of training, collecting data and reporting on emergency behavior intervention reports; and satisfying due process requirements in the 2006-2007 school year.[29] The time data were then manipulated until agreeable to both claimants and DOF,[30] and multiplied by the reported average hourly rates of the personnel assigned to those tasks.[31] The costs of the ongoing activities at the SELPA level were then totaled for all SELPAs surveyed and divided by the P2 ADA for the 21 SELPAs surveyed in 2006-2007 school year.[32] That figure is then applied retroactively and prospectively, adjusting by the Implicit Price Deflator for each applicable year, to the P2 ADA figures for each year since implementation began (presumably 1993-1994 in most cases).

3. RRM for On-Going School District and County Office of Education Activities

The third RRM proposed is for on-going activities at the school district and county office of education (COE) level. The ongoing activities include: conducting functional analysis assessments; developing, implementing, evaluating, and modifying BIPs; employing emergency interventions, including appropriate recordkeeping; training staff on prohibited behavioral interventions; and satisfying due process requirements related to functional analysis assessments or the development or implementation of BIPs.

The same methodology used for the other proposed RRMs is employed here. The surveys sought information from school districts and COEs operating schools in the place of school districts regarding time spent, by position, on the reimbursable activities. The surveys also sought to determine whether any outside contractors or specialists were employed to conduct the required activities.[33] Then, the hours reported were multiplied by the average hourly rates reported for the staff involved in those activities, and added to the fees imposed by outside contractors to determine the total district-level costs for 2006-2007.[34] Those costs were totaled from all districts surveyed, then divided by P2 ADA for 2006-2007 for all districts surveyed, to

[28] Exhibit B, Revised Proposed Parameters and Guidelines, December 17, 2010.

[29] See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, at pp. 0017-0022.

[30] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer; Claimants' Exhibits 5-7.

[31] See, e.g., Exhibit B, Revised Proposed Parameters and Guidelines, Claimants' Exhibit 2, Survey Results from Butte SELPA, December 17, 2010.

[32] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

[33] See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, at pp. 0054-0056.

[34] See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, at pp. 0058-0059;

arrive at a unit cost per ADA, which could be applied both retroactively and prospectively, as adjusted by the Implicit Price Deflator.[35]

The claimants urge the Commission to adopt the proposed parameters and guidelines, including the proposed RRMs, believing the proposal to be "reasonable, representative, and cost-effective." The claimants also note that "given the number of years that have passed since the mandate took effect, it will always be difficult, and often impossible, for school agencies to provide documentation of activities and actual costs to perform the mandate," and that the time and effort involved in obtaining such documentation would be "extensive and burdensome."[36] The claimants explain that "because substantial staff time was involved to complete the survey[s] and no funding for the effort was available, [claimants] were not in a position to require participation." Claimants received data from 21 SELPAs, which both claimants and DOF agreed "was an adequate sampling."[37] Claimants stress that they retained "experienced school business officials" as consultants to compile the results, and that the results "were reviewed and modified" by DOF until DOF and claimants agreed that they were accurate. Claimants also state that a settlement agreement was reached with DOF, and the underlying litigation was set to be dismissed, until the Legislature declined to fund the settlement for two consecutive budget cycles, and the settlement fell apart.[38]

The claimants responded to the comments of DOF and SCO by challenging the statutory requirements implied by their comments.[39]

The claimants submitted comments in response to the draft staff analysis on December 24, 2012, agreeing with staff's recommendation to adopt Option A, but disputing staff's conclusions regarding offsetting revenues. The claimants' concerns are addressed in the analysis below.

B. DOF Position

DOF opposes the adoption of the RRMs. DOF argues that section 17518.5(b) and (c), "require that an RRM be based on cost information from a representative sample of eligible claimants, and that it consider the variation of costs among local school districts to implement the mandate in a cost efficient manner."

DOF argues that the proposed RRM would not provide reimbursement based on cost information from a representative sample of eligible claimants. DOF argues that "only 21 of 120 SELPAs" is not a representative sample; those 21 SELPAs represent "just 11.3 percent of total ADA." DOF argues that the largest SELPAs are not represented, and that the southern part of the state is underrepresented.

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[35] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

[36] Exhibit B, Revised Proposed Parameters and Guidelines, cover letter, December 17, 2010.

[37] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[38] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[39] Exhibit D, Claimants' Rebuttal to SCO Comments, February 23, 2011; Exhibit F, Claimants' Rebuttal to DOF Comments, October 14, 2011.

DOF also argues that the proposed RRM does not consider the variation of costs among local school districts because the survey data betrays a wide range of costs among school districts. DOF argues that the proposed RRM "does not consider the relationship of the mandated activities and the mechanism that triggers the need for those activities." DOF concludes, "we do not believe using ADA as part of the proposed RRM is appropriate."

Finally, DOF notes that "the proposed unit rate is based on survey results from SELPAs, not on actual cost claims that have been audited." DOF expresses concern "that this data along with the proposed RRM does not accurately reflect the cost of the program," and questions "whether the BIPs program is suitable for such an approach."[40]

DOF has not disputed the accuracy of the underlying cost data reported in the surveys, or the methodology by which the survey data were compiled. DOF does not dispute the proposed language describing the reimbursable activities.

DOF submitted comments on the draft staff analysis in which it is argued that "it is premature to adopt any parameters and guidelines for the BIPs program at this time." DOF also disputes staff's recommendation to adopt Option A, approving the RRMs, because DOF believes that Government Code sections 17518.5 and 17557 provide statutory requirements that are not met. The specific arguments raised by DOF are not new, and they are addressed where relevant in the analysis below.

C. SCO Position

SCO opposes the adoption of the RRM also based upon the legal sufficiency of the evidence. SCO opposes the RRM because the rates were based on "1) unaudited cost data; 2) cost data for only a single school year (2006-2007); 3) data from only 12% of SELPA and; 4) to be utilized over an 18 year period."

SCO does not elaborate on the issue of unaudited cost data; and does not further explain its concern with "data from only 12% of SELPA, except to say that "[a]ccording to the Declaration of Diana K. McDonough, both the co-test claimants and the Department of Finance agreed that this was an adequate sampling." But as to SCO's concerns of data for a single school year, and data to be utilized over 18 years of cost claims, SCO cites to section 17518.5(d), which provides:

> In cases when local agencies and school districts are projected to incur costs to implement a mandate over a period of more than one fiscal year, the determination of a reasonable reimbursement methodology may consider local costs and state reimbursements over a period of greater than one fiscal year, but not exceeding 10 years.

SCO argues that the RRM unit rates were "derived from a single fiscal year of cost data and the reimbursement period in question is over 15 years." SCO argues that adjustments based on the Implicit Price Deflator "cannot give an accurate RRM rate for such a long reimbursement period based on a single year of cost data."[41]

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[40] Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[41] Exhibit C, SCO Comments, Revised Proposed Parameters and Guidelines, January 24, 2011.

SCO has not disputed the accuracy of the underlying cost data reported in the surveys, or the methodology employed. SCO does not dispute the proposed reimbursable activities.

SCO submitted comments on the draft staff analysis, primarily suggesting technical changes, which are incorporated in the attached parameters and guidelines where appropriate, and discussed in the analysis below where necessary.

IV. COMMISSION FINDINGS

The question before the Commission is whether the evidence submitted, which includes voluminous documentation of 2006-2007 fiscal year costs to implement the program, is sufficient to support adoption of the proposed RRM to reimburse costs incurred going back to July 1, 1993, consistent with the substantial evidence standard, and the constitutional and statutory requirements for RRMs and for Commission decisions generally. In addition, issues relating to the proper scope of reimbursable activities and applicable offsetting revenues are discussed further below. However, as a threshold issue, subsequent amendments made to the test claim statute purport to end reimbursement, or to change the Commission's decision on reimbursement, as described in Part (A).

A. The Commission's Decision on Reimbursement is Final, and Legislation Enacted after the Commission's Decision (AB 1610) that Purports to Remove the Implementing Regulations from the Subvention Requirement May Only be Analyzed under a Request for Redetermination Properly Filed Pursuant to the Commission's Governing Statutes and Regulations.

The Commission has exclusive authority to decide mandates issues, and those decisions are final and conclusive, barring judicial review.[42] The Legislature enacted Assembly Bill 1610, in Statutes 2010, chapter 724, which added a number of provisions to Education Code 56523, in an apparent attempt to negate the Commission's decision finding the *BIPs* program reimbursable under article XIII B, section 6 of the California Constitution.[43]

AB 1610 adds the following new provisions to Education Code section 56523:

> (b) This section and the implementing regulations adopted by the board *are declaratory of federal law and deemed necessary to implement the federal*

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[42] *California School Boards Association v. State* (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, at pp. 1199-1200.

[43] Exhibit O, Statutes 2010, chapter 724, Legislative Counsel's Digest (AB 1610) ["This bill would specify that [Section 56523] and its implementing regulations are declaratory of federal law and are intended to provide the clarity, definition, and specificity necessary for local educational agencies to comply with the federal Individuals with Disabilities Education Act. The bill would provide that this provision and the implementing state regulations shall not exceed the requirements of federal law, create new or separate state requirements, or result in a level of state service beyond that needed to comply with federal law and regulations. The bill would require local educational agencies to agree to adhere to implementing federal and state regulations as a condition of choosing to receive funding from the federal Individuals with Disabilities Education Act…"].

Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and associated federal regulations. This section is intended to provide the clarity, definition, and specificity necessary for local educational agencies to comply with the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.). This section, including the implementing state regulations needed to implement federal law and regulations, *shall not exceed the requirements of federal law, create new or separate state requirements, or result in a level of state service beyond that needed to comply with federal law and regulations*.

(c) *As a condition of receiving funding* from the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), a local educational agency *shall agree to adhere* to implementing federal regulations and state regulations set forth in this section.

(d) The Superintendent may monitor local educational agency compliance with this section and may take appropriate action, including fiscal repercussions, if either of the following is found:

(1) The local educational agency failed to comply with this section and implementing regulations that govern the provision of special education and related services to individuals with exceptional needs and failed to comply substantially with corrective action orders issued by the department resulting from monitoring findings or complaint investigations.

(2) The local educational agency failed to implement the decision of a due process hearing officer based on noncompliance with this part, the state implementing regulations, provisions of the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), or the federal implementing regulations, wherein noncompliance resulted in the denial of, or impeded the delivery of, a free appropriate public education for an individual with exceptional needs.

(e) Commencing with the 2010-11 fiscal year, *if any activities authorized pursuant to this section and implementing regulations are found be a state reimbursable mandate* pursuant to Section 6 of Article XIII B of the California Constitution, *state funding provided for purposes of special education* pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act *shall first be used to directly offset any mandated costs*.

(f) Contingent on the adoption of a statute in the 2009-10 Regular Session that adds Section 17570.1 to the Government Code, the Legislature hereby *requests the Department of Finance on or before December 31, 2010, to exercise its authority pursuant to subdivision (c) of Section 17570 of the Government Code and file a request with the Commission on State Mandates for the purpose of seeking the adoption of a new test claim to supersede CSM-4464 based on*

> *subsequent changes in law* that may modify a requirement that the state reimburse a local government for a state mandate [emphasis added].[44,45]

AB 1610 adopts changes in the substantive law underpinning the *BIPs* mandate and directs DOF to seek a redetermination of the BIPs mandate under Government Code section 17570[46] based upon those changes.[47] Specifically, AB 1610 declares that BIPs are federally mandated; and thereby seeks to implicate Government Code section 17556(c) to negate the Commission's finding on state-mandated local costs.[48] AB 1610 also attempts to preclude reimbursement by inserting conditional language into the code section, giving the activities approved the appearance of downstream requirements of receipt of federal funding, which could be non-reimbursable under *Kern*.[49] Additionally, AB 1610 inserts language regarding offsetting revenue, intended to end reimbursement beginning in fiscal year 2010-2011.[50] The language of the enactment, as well as the Legislative Counsel's Digest,[51] indicate that the intention of this statute is to negate the Commission's decision on reimbursement for this program. But the Commission has no jurisdiction to change its prior final decision or to interpret the provisions of AB 1610, absent a request for redetermination pursuant to Government Code section 17570. To date, no request for redetermination has been filed with the Commission.

In *California School Boards Association v. State*, (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, the court addressed a similar situation, in which a legislative enactment sought to change mandates law and force a reconsideration of a number of decisions relying on the former law. The court in *CSBA I* held that this was a violation of the separation of powers doctrine to force the Commission to change a prior final decision: "the statutory scheme contemplates that the Commission, as a quasi-judicial body, has *the sole and exclusive authority*

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[44] Exhibit O, Education Code section 56523 (Stats. 2010, ch. 724 § 27 (AB 1610)) [emphasis added].

[45] AB 1610 is being challenged as unconstitutional in *California School Boards Association v. State*, Superior Court, County of Alameda, Case No. RG 11554698 (January 6, 2011).

[46] Exhibit O, Government Code section 17570 (Stats. 2010, ch. 719 (SB 856) [providing for redetermination of a test claim decision based on a subsequent change in law; also challenged in ongoing litigation with California School Boards Association, petitioners].

[47] Exhibit O, Education Code section 56523 (Stats. 2010, ch. 724 § 27 (AB 1610)).

[48] See *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified*) (2004) 33 Cal.4th 859 [discussion of section 17556(c); no reimbursement for programs implementing federal mandate].

[49] See *Department of Finance v. Commission on State Mandates* (*Kern High School District*) (2003) 30 Cal.4th 727 [no reimbursement for requirements triggered by or downstream of voluntary funded program].

[50] See Government Code sections 17556(e) and 17514 [no costs mandated by the state where increased costs are met with corresponding increase in funding].

[51] Exhibit O, Statutes 2010, chapter 724, (AB 1610) Legislative Counsel's Digest, paragraph 21.

to adjudicate whether a state mandate exists." The court held that "[t]he Commission's *authority to issue a final decision* that solely and exclusively adjudicates a test claim is *limited only by judicial review*," and that "[t]he Legislature's direction to the Commission to reconsider or set aside its final decisions is an unlawful collateral attack on those decisions." The court therefore concluded that, absent a valid statutory scheme allowing reconsideration based on subsequent changes in the law "[a]s a collateral attack, the Legislature's direction to the Commission to set aside or reconsider Commission decisions went beyond the power of the Legislature."[52]

At the time *CSBA I* was heard and decided, redetermination of Commission decisions based on a subsequent change in law was not a part of the Government Code. The *CSBA I* court recognized that "[o]ver time, any particular decision of the Commission may be rendered obsolete by changes in the law and material circumstances that originally justified the Commission's decision." The court held that "logic may dictate that [a Commission decision] must be subject to some procedure for modification after changes in the law or material circumstances," but the court declined to find, as urged, that the "inherent power of a court to modify a continuing injunction to take into account changes in the law and material circumstances" was sufficiently analogous to permit the Commission to initiate a redetermination absent an enabling statute.[53]

In 2010, the Legislature enacted Government Code section 17570 and 17570.1 (SB 856) to allow a party to request that the Commission re-determine and change a prior final test claim decision if there has been a subsequent change in the law. Section 17570 solves the problem identified in *CSBA I*, by providing a proper mechanism for reconsideration of a test claim decision where a subsequent change in law affects the legal framework underpinning a mandate determination. Section 17570 provides, in pertinent part:

> (b) The commission may adopt a new test claim decision to supersede a previously adopted test claim decision only upon a showing that the state's liability for that test claim decision pursuant to subdivision (a) of Section 6 of Article XIII B of the California Constitution has been modified based on a subsequent change in law.
>
> (c) A local agency or school district, statewide association of local agencies or school districts, or the Department of Finance, the Controller, or other affected stated agency may file a request with the commission to adopt a new test claim decision pursuant to this section.[54]

Here, judicial review of the *BIPs* claim was abandoned by DOF, after the settlement between DOF and claimants broke down. The three year statute of limitations to file for administrative mandamus challenging the Commission's decision on this test claim has passed,[55] and the dismissal was issued *with prejudice*. Therefore the Commission's decision is final, and no

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[52] *CSBA I*, *supra*, at pp. 1199-1200 [internal quotations and citations omitted].

[53] *CSBA I*, *supra*, at p. 1202.

[54] Exhibit O, Government Code section 17570 (Stats. 2010, ch. 719 § 33 (SB 856).

[55] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 169; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 534.

further judicial review may be had at this time. AB 1610 directs DOF to "exercise its authority pursuant to subdivision (c) of Section 17570 of the Government Code and file a request with the Commission on State Mandates for the purpose of seeking the adoption of a new test claim to supersede CSM-4464."[56] And, as stated above, no request for redetermination has been filed.

Accordingly, the subsequent changes in law made by AB 1610, in an attempt to change the statement of decision approving the *BIPs* test claim, cannot be considered by the Commission until or unless a request for redetermination is properly filed under section 17570. Absent that process, only the offsetting revenue issues raised by AB 1610, as discussed below, may be considered to reduce the amount of reimbursement beginning in fiscal year 2010-2011.[57]

DOF has stated, in comments filed on the draft staff analysis that "we believe that it is premature to adopt any parameters and guidelines for the BIPs program at this time." DOF asserts that "the Administration continues to engage in negotiations with the Legislature and stakeholders on similar statutory changes and will introduce a related proposal as part of the 2013-2014 Governor's Budget on January 10, 2013." DOF cites, for example, AB 1476, which "included provisions that would have significantly altered the underlying statute and regulations pertaining to the BIPs program." AB 1476 was not passed by the Legislature, but DOF asserts "we respectfully urge the Commission to postpone taking any action on the BIPs program until after the 2013-2014 budget bill and accompanying trailer bills are passed by the Legislature and signed by the Governor."[58]

DOF's position is untenable. It is difficult to imagine how adopting parameters and guidelines at this time could be premature. The test claim statute has been in effect since 1993; the test claim statement of decision was adopted in 2000; what followed was nearly seven years of protracted litigation, followed by a settlement agreement that ultimately fell apart due to legislative impasse. DOF points to AB 1476 as evidence that the Administration is attempting to change the underlying statutory requirements relating to the mandate, and DOF suggests that such changes would alter the landscape so much that the parameters and guidelines should wait. AB 1476 sought to direct the Department of Education to repeal the regulations that impose the *BIPs* mandates, but even if AB 1476 had passed, it would only have ended the mandate prospectively; it would have no effect on reimbursement retroactively, as indicated by the above analysis.[59]

There are no guarantees that DOF can offer that the Administration's foray into eliminating the mandate will be successful, nor when such an effort might be complete. Moreover, as discussed, there is no Legislative action short of a settlement with the claimants and eligible claimants (such as the one offered in 2009) that could affect the state's liability under the test claim statute both prospectively and retroactively. Since, at best, legislative action could only end the mandated activities, the most appropriate method of employing the Commission's process would be to

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[56] Exhibit O, Education Code section 56523(f) (Stats. 2010, ch. 724 § 27 (AB 1610)).

[57] See Government Code section 17557; Code of Regulations, Title 2, section 1183.1(a)(7).

[58] Exhibit M, DOF Comments on Draft Staff Analysis.

[59] See Exhibit O, AB 1476, at p. 19.

proceed with the parameters and guidelines as written, and then request a parameters and guidelines amendment if and when the test claim statute is repealed or amended.[60]

B. The Test Claim Statement of Decision, the Revised Proposed Parameters and Guidelines, and the Comments Filed By the Department of Finance, the State Controller's Office, and the Claimants Were Reviewed and Considered By the Commission as Discussed Below.

1. Period of Reimbursement (Section III. of Proposed Parameters and Guidelines)

The claimants' proposed language in Section III of the proposed parameters and guidelines, found at Exhibit B, that addresses the period of reimbursement for this claim, is incomplete, in part, and misstates the statutory deadline for establishing the period of reimbursement. The period of reimbursement section of the proposed parameters and guidelines is changed to incorporate the current boilerplate language adopted by the Commission.

2. Reimbursable Activities (Section IV. of Proposed Parameters and Guidelines)

The italicized text in this section is drawn from the claimants' revised proposed parameters and guidelines (Exhibit B), and inserted here for purposes of analysis. The bulleted text contains the Commission's analysis of each section of the reimbursable activities.

As described below, the Commission finds that the claimants' proposed reimbursable activities are consistent with the test claim regulations and the Commission's statement of decision on the test claim. Thus, the Commission adopts the reimbursable activities as proposed by the claimant.

The claimant requests reimbursement for the following one-time activities performed by SELPAs:

A. Proposed One-time Activities for SELPAs only

Preparing and Providing SELPA Procedures and Initial Training.

Preparing procedures for the SELPA local plan regarding the systematic use of behavioral intervention, for the training of behavioral intervention case managers and personnel involved with implementing behavioral intervention plans, for special training for emergency interventions, and for identification of approved behavioral emergency procedures.

The requested one-time activities are consistent with the requirements of the test claim regulations and the findings in the statement of decision as follows:

- Section 3052(j) provides for the adoption of SELPA plan requirements, which include systematic use of BIPs, training of behavioral intervention case managers and personnel involved in implementing BIPS, special training in emergency interventions, and identification of approved emergency procedures.

[60] See Government Code section 17557(d)(2)(A) [request to amend parameters and guidelines may be made to "Delete any reimbursable activity that has been repealed by statute or executive order after the adoption of the original or last amended parameters and guidelines."].

The Commission approved the SELPA plan requirements in the test claim statement of decision as follows:

> Under the test claim legislation's implementing regulations, each SELPA must include procedures in its local plan regarding the systematic use of behavioral interventions.[61] These procedures include training of behavioral intervention case managers, training of personnel involved with implementing behavioral intervention plans, special training for emergency interventions, and identification of approved behavioral emergency procedures.[62] SELPAs must inform all staff members and parents of these procedures whenever a behavioral intervention plan is proposed.[63]
>
> The Commission found that these activities represent a new program or higher level of service because SELPAs were under no obligation to include such information in their local plans before the adoption of the test claim legislation's implementing regulations.[64]

Based on the regulation, as approved, and the above language from the Commission's statement of decision, the claimants' description of the reimbursable activities under the SELPA plan requirements is consistent with the activities approved in the test claim.

The claimant requests reimbursement for the following three ongoing activities for SELPAs:

> *B. Proposed Ongoing Activities for SELPAs*
>
> *1. Training.*
>
> *Providing and obtaining training in behavior analysis, positive behavioral interventions, and behavioral emergency interventions. Time spent by personnel who design and conduct the training and time spent by personnel who receive the training is reimbursable. Such personnel include behavioral intervention case managers and personnel involved with implementing behavioral intervention plans, conducting functional analysis assessments, or implementing emergency interventions.*

SELPA-level training, as proposed, is consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Training is required to be included in the SELPA plan pursuant to subdivision (j) of section 3052. Subdivision (j) provides that the qualification and training of personnel to be designated as behavioral intervention case managers and personnel involved in

[61] Code of Regulations, Title 5, section 3052(j).

[62] *Id*. at subdivision (j)(2)(A)-(D).

[63] *Id*. at subdivision (j)(1).

[64] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 4.

implementing behavioral intervention plans and using emergency behavioral interventions must be included in the SELPA plan.

- Training is required to develop and implement BIPs pursuant to subdivision (a) of section 3052. Subdivision (a) provides that behavioral intervention plans shall only be implemented by, or be under the supervision of, staff with documented training in behavior analysis, including the use of positive behavioral interventions.
- Training at the SELPA level was approved by the Commission in the test claim statement of decision as follows:

> These procedures include training of behavioral intervention case managers, training of personnel involved with implementing behavioral intervention plans, special training for emergency interventions, and identification of approved behavioral emergency procedures…
>
> The Commission found that these activities represent a new program or higher level of service because SELPAs were under no obligation to include such information in their local plans before the adoption of the test claim legislation's implementing regulations.[65]

Based on the regulations, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding on-going SELPA-level training is consistent with the activities required by the regulations and approved in the test claim.

2. <u>Emergency Interventions.</u>

Preparing reports on the number of Behavioral Emergency Reports to the California Department of Education and Advisory committee on Special Education.

Preparing reports on emergency interventions is consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Section 3052 requires that Behavioral Emergency Report data "shall be collected by SELPAs which shall report annually the number of Behavioral Emergency Reports to the [CDE] and the Advisory Committee on Special Education."[66]
- The Commission approved the collection and reporting on Behavioral Emergency Reports at the SELPA-level as follows:

> SELPAs are required to collect data on "Behavioral Emergency Reports" and annually report the number of Reports to the California Department of Education and the Advisory Committee on Special Education.

[65] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 4.

[66] Code of Regulations, Title 5, section 3052(i)(9).

> The Commission found that all activities associated with emergency interventions represent a new program or higher level of service because school districts were under no obligation to develop and implement emergency behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.[67]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding emergency interventions is consistent with the activities approved in the test claim.

3. Due Process Hearings.

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 behavioral intervention plans.

The due process hearing activities are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Due process hearings are provided for in subdivision (m) of section 3052 of the test claim regulations, which make reference to Education Code section 56501 et seq.[68]
- The Commission approved the due process requirements in the test claim statement of decision as follows:

> Before the enactment of the test claim legislation's implementing regulations school districts were under no obligation to develop and implement behavioral intervention plans.
>
> Therefore, the Commission found that any due process procedures associated with the development and implementation of behavioral intervention plans represents a new program or higher level of service.[69]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding due process hearings is consistent with the activities approved in the test claim.

The claimant requests reimbursement for the following seven ongoing activities performed by school districts and county offices of education.

C. Proposed Ongoing Activities for School Districts and County Offices of Education

1. Conducting Functional Analysis Assessments.

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[67] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 8.

[68] Code of Regulations, Title 5, section 3052(m).

[69] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, pp. 8-9.

Providing notice to and obtaining written consent from parents to conduct functional analysis assessments; conducting functional analysis assessments; preparing written reports of assessment results; providing copies of assessment reports to parents and the IEP Team; conducting IEP Team meetings to review assessment results.[70]

The activities associated with conducting functional analysis assessments are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Conducting functional analysis assessments is provided for in section 3052(b).
    - The section provides that a functional analysis assessment must be conducted by or under the supervision of a person with documented training in behavior analysis with an emphasis on positive behavioral interventions.
    - The subdivision provides that "prior to conducting the assessment, parent notice and consent shall be given and obtained."
    - Paragraph (b)(2) provides for the completion of a written report, a copy of which "shall be provided to the parent."
- Section 3052(c) provides that "[u]pon completion of the functional analysis assessment, an IEP team meeting shall be held to review results and, if necessary, to develop a behavioral intervention plan."[71]
- The Commission approved the functional analysis assessments, described as follows:

> The Commission found that all of the activities associated with functional analysis assessments represent a new program or higher level of service because school districts were under no obligation to perform functional analysis assessments before the adoption of the test claim legislation's implementing regulations.[72]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding functional analysis assessments is consistent with the activities approved in the test claim.

2. <u>Developing and Evaluating Behavioral Intervention Plans.</u>

Participating in IEP Team meetings in which behavioral intervention plans are developed, evaluated, or modified, or in which functional analysis assessment results are reviewed; preparing behavioral intervention plans; and developing contingency plans for altering the procedures or the frequency

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[70] An IEP is an Individualized Education Program (Ed. Code § 56032 (Stats. 1993, ch. 1296 § 13.1 (AB 369))).

[71] Code of Regulations, Title 5, section 3052(b-c).

[72] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, p. 5.

or duration of the procedures. Providing copies of SELP A procedures on behavioral interventions and behavioral emergency interventions to parents and staff.

The activities associated with developing and evaluating behavioral intervention plans are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- IEP team meetings are provided for in subdivision (a) of section 3052, which provides that an IEP team "shall facilitate and supervise all assessment, intervention, and evaluation activities related to an individual's [BIP]."
- Section 3052(c) provides for the development of BIPs at an IEP team meeting upon completion of a functional analysis assessment.
- Section 3052(f) provides for evaluation of the effectiveness of BIPs, and provides that if the IEP team determines that changes are necessary to increase effectiveness, additional functional analysis assessments are conducted and changes proposed.
- Section 3052(h) provides for contingency BIPs, in which procedures may be altered without reconvening the IEP team.
- Section 3052(j) provides that the SELPA procedures "shall be available to all staff members and parents whenever a behavioral intervention plan is proposed."
- The Commission approved the development and evaluation of BIPs as follows:

  > The Commission found that, to the extent these activities are required to implement an individual's behavioral intervention plan, the activities represent a new program or higher level of service because school districts were under no obligation to develop and implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.
  >
  > Once a behavioral intervention plan is implemented, it is evaluated to measure the frequency, duration, and intensity of the targeted behavior identified in the functional analysis assessment. The teacher, the behavioral intervention case manager, parent or care provider, and others, as appropriate, review the evaluation at scheduled intervals determined by the IEP team. If the IEP team determines changes are necessary, the teacher and behavioral intervention case manager conduct additional functional analysis assessments, and based on the outcomes, propose changes to the plan.
  >
  > The Commission found that these activities represent a new program or higher level of service because school districts were under no obligation to evaluate the effectiveness of behavioral intervention plans or to modify

them based on an additional functional analysis assessment before the adoption of the test claim legislation's implementing regulations.[73]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding developing and evaluating BIPs is consistent with the activities approved in the test claim.

3. Implementing Behavioral Intervention Plans.

Implementing and supervising the implementation of behavioral intervention plans; measuring and documenting the frequency, duration, and intensity of targeted behavior and effectiveness of the behavioral intervention plan. Costs of employing personnel with documented training in behavioral analysis including positive behavioral interventions (whether such personnel are new staff or existing staff) to serve as behavioral intervention case managers is reimbursable under this component.

The activities associated with implementing the behavioral intervention plans are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Section 3052(a) provides that BIPs "shall only be implementing by, or be under the supervision of, staff with documented training in behavior analysis, including the use of positive behavioral interventions." This section thereby requires BIPs to be implemented, and requires local educational agencies to maintain properly-trained staff to conduct such implementation.
- Section 3052(f) provides for evaluating the effectiveness of BIPs, including measurement and documentation of the frequency, duration, and intensity of targeted behaviors.
- The Commission approved implementing BIPs as described in the previous section.[74]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding implementing BIPs is consistent with the activities approved in the test claim.

4. Modifications to Behavioral Intervention Plans.

Providing notice to parents or parent representatives of the need to make minor modifications to the behavioral intervention plans, meeting with parents to review existing program evaluation data; and developing minor modifications to behavioral intervention plans with parents or parent representatives.

[73] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, pp. 6-7 [internal footnotes and citations omitted].

[74] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at pp. 6-7.

The activities associated with modifying the behavioral intervention plans are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Section 3052(f) provides for changes to be made to BIPs on the basis of evaluations, which would require additional functional analysis assessments, which in turn require parental notice under subdivision (b).
- Section 3052(g) provides for minor modifications without an IEP team meeting, which can be made by the behavioral intervention case manager and a parent or parent representative.
- Section 3052(g) provides that parents are entitled to notice, and "shall be informed of their right to question any modification to the plan through the IEP procedures."
- The Commission approved modifications to BIPs in the test claim statement of decision, as follows:

> The Commission found that the activities of the behavioral intervention case manager and the IEP team regarding development and modification of behavioral intervention plans represent a new program or higher level of service because school districts were under no obligation to implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.[75]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding modifications to BIPs is consistent with the activities approved in the test claim.

> *5. Emergency Interventions.*
>
> *Employing emergency interventions; notifying parents and residential care providers after an emergency intervention is used; preparing and maintaining a Behavioral Emergency Report following the use of an emergency intervention; administrative review of Behavioral Emergency Reports; scheduling and conducting an IEP Team meeting to review a Behavioral Emergency Report and the need for a functional analysis assessment, interim behavioral intervention plan, or modification to an existing behavioral intervention plan.*

The activities associated with emergency interventions are consistent with the requirements of the test claim regulations and the statement of decision on the test claim as follows:

- Emergency interventions are provided for in section 3052(i).
- The Commission approved activities related to emergency interventions in the test claim statement of decision, as follows:

[75] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 7.

> The Commission found that all activities associated with emergency interventions represent a new program or higher level of service because school districts were under no obligation to develop and implement emergency behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.[76]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding emergency interventions is consistent with the activities approved in the test claim.

> *6. Prohibited Interventions.*
>
> *Training appropriate staff regarding the types of interventions that are prohibited under Title 5, California Code of Regulations section 3052, subdivision (1).*

Training staff regarding the types of interventions that are prohibited is consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Prohibited interventions are addressed in section 3052(l), which provides that no public education agency, or nonpublic school or agency may authorize, order, consent to, or pay for any of the listed interventions, or any interventions similar to or like the listed interventions. The list is non-exhaustive, implying that some ongoing development of prohibited interventions is expected.
- The Commission approved activities related to prohibited interventions in the test claim statement of decision as follows:

  > Interventions that may cause physical harm, deprivation of sleep or food, humiliation or ridicule, or deprivation of one or more senses are prohibited. The use of restrictive devices that limit mobility, locked seclusion, or inadequate supervision is also prohibited.
  >
  > The Commission found that the activity of informing school district personnel of the restrictions represents a new program or higher level of service because school districts were under no obligation to develop and implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.[77]

- SCO objected to the claimants' proposed language for prohibited interventions, noting that the "language found in the original SOD" provided for "informing school district personnel of the restrictions." In other words, the test claim statement of decision approved informing school personnel of prohibited interventions, which, as discussed above, is a non-exhaustive list, and SCO argued that "informing" and "training" are not sufficiently similar. On the other

[76] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at pp. 7-8.

[77] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 8.

hand, "informing" is a fairly vague description of an activity, whereas "training" is more precise, and is supportable based on the test claim statement of decision and the regulations at issue.

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding ongoing training related to prohibited interventions is consistent with the activities required by regulation and approved in the test claim.

7. Due Process Hearings.

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 behavioral intervention plans.

The activities associated with due process hearings are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Section 3052(m) provides that the provisions of the BIPs program "related to functional analysis assessments and the development and implementation of [BIPs] are subject to the due process hearing procedures specified in Education Code Section 56501 et seq."
- The Commission approved activities related to due process requirements in the test claim statement of decision, as follows:

> The provisions of the test claim legislation that relate to functional analysis assessments and the development and implementation of behavioral intervention plans are subject to the due process hearing procedures specified in the Education Code. Before the enactment of the test claim legislation's implementing regulations school districts were under no obligation to develop and implement behavioral intervention plans.
>
> Therefore, the Commission found that any due process procedures associated with the development and implementation of behavioral intervention plans represents a new program or higher level of service.[78]

Based on the foregoing discussion, the Commission finds that the reimbursable activities section of the proposed parameters and guidelines is consistent with the regulations approved by the Commission, and the activities approved in the statement of decision. There were no activities alleged in the test claim that were denied in the statement of decision. Moreover, there has been no objection or dispute as to the reimbursable activities raised by DOF or SCO. Accordingly, the Commission adopts the language proposed by the claimants in Section IV of the parameters and guidelines.

3. Claim Preparation (Section V. of Proposed Parameters and Guidelines)

[78] Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at pp. 8-9.

In lieu of filing a reimbursement claim based on detailed documentation of actual costs incurred in a fiscal year, these proposed parameters and guidelines offer three distinct RRMs, calculated by Average Daily Attendance (ADA) of a claimant, multiplied by a unit cost for that claimant's reimbursable activities, developed on the basis of survey data from a sample of eligible claimants. The surveys ask, for each specific activity, how much time was spent at the district/COE level and at the SELPA level, and by what classification of personnel. The surveys then apply an average hourly rate, including base pay and benefits of the personnel assigned to the activities, as calculated and reported by the survey respondents, to estimate the costs of a particular activity in the survey year (2006-2007). Those costs are totaled, for each district, and each SELPA, and divided by P2 ADA, as found on the CDE website.[79] The surveys do not inquire as to actual or total costs expended to implement the mandate in each district or COE, except where a district or COE hired outside consultants or specialists to complete the mandated activities who charged certain fees.

Due in part to the many years of litigation involving this test claim, there are not, to the claimants' knowledge, adequate records of cost information with which to make out more exacting estimates going back to 1993, the initial period of reimbursement.[80] But the California Department of Education (CDE) maintains ADA records, and, thus, an RRM based on ADA data is relatively simple to calculate. ADA-based formulae have been used in the past to fund special education generally,[81] and to fund the *Special Education* mandated program (CSM-3986).[82]

The claimants have proposed an RRM, to be considered by the Commission, relying on the same body of evidence collected in the pursuit of the settlement reached between claimants and DOF that was not funded by the Legislature. The claimants have provided the following exhibits in the record to support the proposed parameters and guidelines:

- Declarations from Diana McDonough, Linda Grundhoffer, and Michael Lenahan; Diana McDonough's declaration details the chain of events in this test claim, from the adoption of a statement of decision, to negotiations toward settlement, to the issuance of surveys to collect cost information in collaboration with DOF, to the filing of revised proposed parameters and guidelines; Linda Grundhoffer and Michael Lenahan are consultants with experience as school business officials, and their declarations focus primarily on the methodology of compiling and manipulating the survey data to arrive at an RRM;
- Exhibit 1: Positive Behavioral Intervention Plan/Functional Analysis Assessment Survey: This exhibit contains a copy of all three survey levels sent to the SELPAs; the Behavioral Intervention Case Manager level survey, the District level survey, and

[79] Exhibit B, Positive Behavioral Intervention Plan/Functional Analysis Assessment Survey, Claimants' Exhibit 1.

[80] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines, Cover Letter; Exhibit F, Claimants' Rebuttal to DOF Comments.

[81] See Exhibit O, Statutes 1997, chapter 854 (AB 602) [Education Code section 56836 et seq.].

[82] Exhibit O, Statutes 2001, chapter 203 (SB 982).

the SELPA level survey. These surveys were issued, and the responses collected, between December 2007 and May 2008, and asked for time spent on specific reimbursable activities, by position, in the 2006-2007 school year, and the average hourly rates for those positions;

- Exhibit 2: CSM-4464 Behavioral Intervention Plans Statewide Cost Survey: this exhibit contains compiled results of the surveys, in spreadsheet form, as prepared by claimants. Claimants state that the figures are actual, and that no estimations or guesses were made; in the case that a survey respondent left out some information, efforts were made to obtain the data; and, if unsuccessful, the data were excluded;
- Exhibit 3: Summary Survey of Hughes Bill Costs: this chart summarizes the survey data by SELPA, and includes the SELPA's ADA for the applicable year, the one-time costs, and estimated total costs for the 15 years of the potential reimbursement period, and provides a cost per ADA for each SELPA;
- Exhibit 4: Hughes Bill Survey Data: this exhibit explains the methodology and the statistical significance of the survey respondents as compared with the statewide ADA;
- Exhibit 5: Hughes Bill Survey With Department of Finance and Claimant Discrepancies;
- Exhibit 6: Hughes Bill Survey Reconciling Discrepancies;
- Exhibit 7: Summary – Survey of Hughes Bill Costs With Reimbursement Methodology Calculation: this chart shows the RRM per ADA that the parties calculated based on the survey data;[83]
- Amended Exhibit 2A: Declaration of Diana McDonough; Cover letter to SELPA directors regarding declarations; Cover letter to survey respondents regarding declarations; Blank form declaration provided to survey respondent: these documents detail the process of sending to the original survey respondents and the SELPA directors a form declaration and affidavit, so that the survey respondents may verify their original responses, under oath, in order that the surveys will be treated as credible evidence to support an RRM that the Commission could adopt;
- Amended Exhibit 2B: Original Survey Responses and Declarations: this exhibit pairs the declarations and affidavits from respondents with the original survey responses;
- Amended Exhibit 2C: Declarations of Linda Grundhoffer and Michael Lenahan; and,
- Amended Exhibit 2D: Reconciled spreadsheets summarizing data in survey responses and agreed upon by Finance.[84]

[83] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines.

[84] Exhibit J, Claimants' Comments and Amended Exhibit 2.

For the following reasons, the Commission finds that the evidence and exhibits submitted are sufficient to support adoption of an RRM for reimbursement of claims from July 1, 1993 through June 30, 2012, and reimbursement of actual costs beginning July 1, 2012, consistent with the constitutional and statutory requirements of RRMs, and of Commission decisions generally.

a. The purpose of an RRM is to reimburse local government efficiently and simply, with minimal auditing and documentation required.

i. The reimbursement requirement

Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government [defined to include school districts], the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service [with exceptions not applicable here]..."

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."[85] Section 17561(a) states: "[t]he state *shall* reimburse each local agency and school district for *all* 'costs mandated by the state,' as defined in Section 17514." Government Code section 17514, in turn, defines "costs mandated by the state" as any increased cost incurred as a result of any state statute or executive order that mandates a new program or higher level of service. The courts have interpreted the Constitutional and statutory scheme as requiring "full" payment of the actual costs incurred by a local entity once a mandate is determined by the Commission.[86]

The statutes providing for the adoption of an RRM, along with the other statutes in this part of the Government Code, are intended to implement article XIII B, section 6.[87]

ii. Statutory flexibility and constitutional consistency

Statutory authority for the adoption of an RRM was originally enacted in 2004, and was amended in 2007 to promote greater flexibility in adoption of an RRM.[88] In a 2007 report, the

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[85] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1282; *CSBA v. State of California* (2011) 192 Cal.App.4th 770, 785-786.

[86] Exhibit O, *CSBA v. State of California* (*CSBA II*) (Cal. Ct. App. 4th Dist. 2011) 192 Cal.App.4th 770, 786; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1264, 1284. The court in *County of Sonoma* recognized that the goal of article XIII B, section 6 was to prevent the state from forcing extra programs on local government in a manner that negates their careful budgeting of expenditures, and that a forced program is one that results in "increased actual expenditures." The court further noted the statutory mandates process that refers to the reimbursement of "actual costs incurred."

See also, Government Code sections 17522 defining "annual reimbursement claim" to mean a claim for "actual costs incurred in a prior fiscal year; and Government Code section 17560(d)(2) and (3), referring to the Controller's audit to verify the "actual amount of the mandated costs."

[87] Government Code section 17500 et seq.

Legislative Analyst's Office (LAO) states that an RRM is intended to reduce local and state costs to file, process, and audit claims; and reduce disputes regarding mandate reimbursement claims and State Controller's claim reductions. The report identifies under the heading "Concerns With the Mandate Process," the difficulties under the statutes then-in-effect:

- Most mandates are not complete programs, but impose increased requirements on ongoing local programs. Measuring the cost to carry out these marginal changes is complex.
- Instead of relying on unit costs or other approximations of local costs, reimbursement methodologies (or "parameters and guidelines") typically require local governments to document their actual costs to carry out each element of the mandate.
- The documentation required makes it difficult for local governments to file claims and leads to disputes with the State Controller's Office.

The LAO's recommendation to address these issues was to:

> Expand the use of unit-based and *other simple claiming methodologies* by clarifying the type of easy-to-administer methodologies that the Legislature envisioned when it enacted this statute…[89]

The LAO's recommendations were implemented in Statutes 2007, chapter 329 (AB 1222). The former section 17518.5 provided that an RRM must "meet the following conditions:"

> (1) 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.
>
> (2) 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.[90]

The 2007 amendments to section 17518.5 now define an RRM as follows:

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[88] Government Code section 17518.5 (enacted by Stats. 2004, ch. 890 (AB 2856); amended by Stats. 2007, ch. 329 (AB 1222)).

[89] Exhibit O, "State-Local Working Group Proposal to Improve the Mandate Process," Legislative Analyst's Office, June 21, 2007, page 3. See also, Assembly Bill Analysis of AB 2856 (2004), concurrence in Senate Amendments of August 17, 2004; Assembly Bill Analysis of AB 1222 (2007), concurrence in Senate Amendments of September 4, 2007. These bill analyses identify the purpose of the RRM process is to "streamline the documentation and reporting process for mandates."; *Kaufman & Broad Communities, Inc. v. Performance Plastering* (Cal. Ct. App. 3d Dist. 2005) 133 Cal.App.4th 26, at pp. 31-32 [Reports of the Legislative Analyst's Office may properly be considered, as legislative history, to determine the legislative intent of a statute].

[90] Exhibit O, Government Code section 17518.5 (Stats. 2004, ch. 890 § 6 (AB 2856)).

(a) "Reasonable reimbursement methodology" means a formula for reimbursing local agencies and school districts for costs mandated by the state, as defined in Section 17514.

(b) A reasonable reimbursement methodology shall be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or projections of other local costs.

(c) 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.

(d) Whenever possible, a reasonable reimbursement methodology shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state, rather than detailed documentation of actual costs . . . .

(e) A reasonable reimbursement methodology may be developed by any of the following:

(1) The Department of Finance.

(2) The Controller.

(3) An affected state agency.

(4) A claimant.

(5) An interested party.[91]

An RRM diverges from the traditional requirement of supporting a reimbursement claim with detailed documentation of actual costs incurred and, instead, may apply a standard formula or single standard unit cost, based on approximations of local costs mandated by the state. A unit cost based on approximations or other projections may result in some entities receiving more than their actual costs incurred to comply with a mandated program, and some receiving less.

While considering *Voter Identification Procedures*, (03-TC-23) last year, Commission staff requested comments from the parties and interested parties to three claims that were pending on a proposed unit cost RRM,[92] on the following question: "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?" Only the claimants in the *Behavioral Intervention Plans* (BIPS) claim responded directly to the question, arguing that the initial enactment of the RRM language and the subsequent amendment evidence the Legislature's conclusion that levels of mandate reimbursement may range widely and still be constitutional:

[91] Exhibit O, Government Code section 17518.5(b-d) (Stats. 2007, ch. 329 § 1 (AB 1222)).

[92] *Behavioral Intervention Plans* (CSM-4464); *Habitual Truants* (09-PGA-01, 01-PGA-06) (CSM-4487 and CSM-4487A); *Voter Identification Procedures* (03-TC-23).

> Since 2007, the current requirements for RRMs 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 RRMs "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." [Citation omitted.] In other words, the statute expressly contemplates variation and leaves open the possibility for a potentially large degree of variation in the costs offset.[93]

iii. Constitutional requirement of reasonable reimbursement

The Commission finds that the 2007 amendment to section 17518.5 provides for more flexibility when adopting a unit cost RRM, as compared with prior law. However, a unit cost must represent a reasonable approximation of the costs incurred by an eligible claimant to implement the state-mandated program, in order to comply with the constitutional requirement that all costs mandated by the state be reimbursed to a local government entity. Although it is argued in the comment above that a "large degree of variation" is constitutional, it may not be in every case. In certain circumstances, a unit cost based on a significant or large variation of costs reported may not reasonably represent the costs incurred by an eligible claimant and, thus, may not comply with the requirements of article XIII B, section 6 of the California Constitution. On the other hand, given the purpose of the RRM, to "[balance] accuracy with simplicity," some degree of variation in costs is implied.

The reimbursement requirement is constitutional, but the Legislature has the power to enact statutes that provide "reasonable" regulation and control of the rights granted under the Constitution.[94] The Commission must presume that the Government Code sections providing for the consideration and adoption of RRMs meet this standard and are constitutionally valid.[95] Section 17557(f) of the Government Code provides that the Commission, in adopting parameters and guidelines "*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*" [emphasis added].[96] Section 17518.5, as amended, provides for a high degree of flexibility in the adoption of an RRM. Therefore, the Commission must presume that an RRM may be adopted on the basis of any reasonable information that constitutes substantial evidence,

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[93] Exhibit H, Claimants' Response to Request for Comments on Pending RRMs, December 20, 2011.

[94] Exhibit O, *Chesney v. Byram* (1940) 15 Cal.2d 460, 465.

[95] Exhibit O, *CSBA II*, *supra*, 192 Cal.App.4th 770, 795; *Porter v. City of Riverside* (1968) 261 Cal.App.2d 832, 837.

[96] Exhibit O, Government Code section 17557 (Stats. 2010, ch. 719 (SB 856) § 32).

and that an RRM that "balances accuracy with simplicity" in reimbursement is permissible under the statute, and thus, constitutional, even if individual claimants are not fully or precisely reimbursed in each fiscal year.

The Commission must apply Government Code section 17518.5 in a constitutional manner. If the Commission approves a unit cost that does not comply with the requirements of the applicable code sections and does not represent a reasonable approximation of costs incurred by eligible claimants to comply with the mandated program, then the Commission's decision could be determined unconstitutional as applied to the case and determined invalid by the courts.[97]

b. *The only statutory requirements of an RRM are that it considers variations in costs and balances accuracy in reimbursement with simplicity in the claiming process.*

Government Code section 17518.5, as amended in 2007, eliminates both the prior rule that 50% of eligible claimants have their costs fully offset, and the rule that the total amount to be reimbursed under an RRM must be equivalent to the total statewide cost estimate. The LAO report upon which the 2007 amendments were largely based noted, under the heading "Concerns with the Mandate Process," that most mandates are not completely new programs in themselves, but higher levels of service of existing programs, and that "[m]easuring the cost to carry out these marginal changes is complex." The LAO also noted a difficulty in that "parameters and guidelines typically require local governments to document their actual costs to carry out each element of the mandate," rather than relying on a unit cost or other approximate reimbursement methodology.[98] Given these "Concerns with the Mandates Process" to which the amendments were addressed, the new statute should be interpreted as imposing less stringent requirements for documentation of costs, and less burdensome measuring of the marginal costs of higher levels of service.[99] In other words, the "requirements" that DOF and SCO read into the amended statute, as discussed below, are not critical to the adoption of an RRM.

Rather than providing rigid requirements or elements to which an RRM proposal for adoption must adhere, the amended statute focuses on the *sources of information for the development of an RRM*, and only requires that the end result "balances accuracy with simplicity."[100] Section 1183.131 of the regulations provides that a proposed RRM "shall include any documentation or *assumption relied upon* to develop the proposed methodology." The Commission's regulations thus further support a view of the RRM statute (section 17518.5) as being focused on the information to be used, rather than any specific degree of precision or accuracy necessary.[101] Implicit, of course, is also the constitutional requirement that the end result must reasonably

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[97] Exhibit O, *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.

[98] Exhibit O, "State-Local Working Group Proposal to Improve the Mandate Process," Legislative Analyst's Office, June 21, 2007, p. 1.

[99] Exhibit O, *Kaufman & Broad Communities, supra*, 133 Cal.App.4th 26, at pp. 31-32 [LAO reports may be relied upon as evidence of legislative history].

[100] Government Code section 17557.

[101] Exhibit O, Government Code section 17518.5(b-d) (Stats. 2007, ch. 329 § 1 (AB 1222)).

reimburse claimants for their mandated costs, as required by article XIII B, section 6. For these reasons, and as more fully described below, the Commission disagrees with the arguments raised by DOF and SCO, regarding the existence of statutory requirements or elements in section 17518.5, other than the requirements to balance accuracy with simplicity, and to reasonably reimburse eligible claimants for costs mandated by the state.

i. There is no statutory requirement that the adopted RRM be based on cost data from a representative sample of eligible claimants, and no minimum sample size required to be representative.

The plain language of the statute demonstrates that detailed, actual cost information is not required to develop an RRM. Section 17518.5 provides that 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 other local costs*."[102] The statute does not *require* any one of these options; it merely outlines these as *possible sources* for the development of evidence to support an RRM. Neither does the statute provide for a minimum number of claimants to constitute a representative sample.

Both SCO and DOF object to the proposed RRM on the basis of the eligible claimants surveyed. SCO notes that the RRM relies on survey data from 21 of 120 possible SELPA claimants, representing approximately 12% of SELPA in the 2006-2007 year.[103] DOF asserts the same insufficiency, but adds that those 21 SELPA represented only 11.3% of statewide ADA for the 2006-2007 school year. DOF also charges that the survey sample does not include representation from the ten largest SELPAs, "which accounted for over 32% of the total ADA in 2006-2007." And DOF "found that the Southern California region was underrepresented," in that 67% of the survey results came from the northern and central parts of the state, while those regions only represent 21% of ADA. "The Southern California region, on the other hand, accounts for 63% of the state's ADA but contributed just 20% of the survey results." In addition, "Los Angeles County represents 26 percent of the state's total ADA but only makes up 3 percent of the ADA surveyed." DOF concludes, based on the foregoing, that the RRM proposal is not based on cost information from a representative sample of eligible claimants, and therefore DOF urges the Commission to deny the RRM proposal.[104]

Claimants argue that SCO and DOF suggest a requirement of a minimum sample size where none exists. Claimants assert that the 21 SELPAs responding to the survey are representative of small and large SELPAs; single- and multi-district SELPAs; rural, urban, and suburban SELPAs; and are geographically diverse.[105] Claimants address DOF's concerns with substantially the same argument, but add as well that with respect to *Municipal Storm Water and Urban Runoff Discharges* (03-TC-04, 03-TC-20, 03-TC-21) the Commission approved an RRM based on information from only 8.2% of eligible claimants, as opposed to the 12% of eligible claimants

[102] Exhibit O, Government Code section 17518.5(b) (Stats. 2007, ch. 329 § 1 (AB 1222)).

[103] Exhibit C, SCO Comments Revised Proposed Parameters and Guidelines, January 24, 2011.

[104] Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[105] Exhibit D, Claimants Rebuttal to SCO Comments, February 23, 2011, p. 3.

who participated in the surveys in this case.[106] Claimants also note that "because substantial staff time was involved to complete the survey and no funding for the effort was available, [claimants] were not in a position to require participation." Claimants were able to find 30 SELPAs who voluntarily agreed to help with the data collection, but only 21 ultimately returned the surveys within a reasonable time frame.[107] Claimants further note that DOF agreed, during settlement negotiations, that the sample was adequate to develop an estimate of costs upon which to base the settlement. And, during negotiations, "[t]he survey results were reviewed and modified by [DOF] until [DOF] and the [claimants] agreed they were accurate."[108]

The Commission finds that section 17518.5 *does not require* that the adoption of the RRM be based on a representative sample of eligible claimants; "cost information from a representative sample of eligible claimants" is only *one potential source of evidence* upon which to base an RRM, along with "information provided by associations of local agencies and school districts, or *other projections* of local costs."[109] Thus, whether the sample size, or the constitution of the sample, is representative should not be dispositive on the question whether an RRM may be adopted.

DOF argues, in comments submitted in response to the draft staff analysis, that if a representative sample of eligible claimants is not a requirement of the statute, "this significant shortcoming makes it inappropriate for the data to be considered representative of actual costs and thus an inappropriate and unreasonable method of determining a reimbursement methodology." DOF continues to stress that "the survey data are collected from only 21 of 120 SELPAs statewide in 2006-07 and only represents 11.3 percent of total ADA," and that the "sample does not include ten of the largest SELPAs in the state constituting 32 percent of total ADA in 2006-07." DOF asserts that "Southern California is not adequately represented as it constitutes 63 percent of the state's ADA but contributed only 20 percent of the survey results," and that "[b]ased on these shortcomings, the sample suffers from significant bias and the survey results cannot be extrapolated to the entire state and should not be used as an RRM to cover costs incurred going back to 1993 as well as into the future."[110] DOF does not explain exactly why a lack of Southern California representation introduces fatal bias into the results, nor why 11.3 percent of ADA is insufficient. Neither does DOF explain why it is inappropriate to consider the data representative of actual costs simply because a representative sample of eligible claimants is not expressly required by the statute. DOF's comments are substantially the same as were raised prior to the draft staff analysis, and they are adequately treated by the analysis above.

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[106] Exhibit F, Claimants Rebuttal to DOF Comments, October 14, 2011, p. 6.

[107] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough, December 17, 2010.

[108] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough, December 17, 2010.

[109] Exhibit O, Government Code section 17518.5 (Stats. 2007, ch. 329 (AB 1222) § 1) [emphasis added].

[110] Exhibit M, DOF Comments on Draft Staff Analysis, December 28, 2012, at p. 2.

Furthermore, the Commission finds that *claimants have in fact put forward* cost information from a representative sample of claimants. The plain language of the section does not indicate a minimum sample size; a representative sample may be many things, but it will always be a smaller sample than the whole, and should be characteristic of the larger population.[111] Moreover, section 1183.13 of the Commission's regulations provides that a "representative sample of claimants does not include eligible claimants *that do not respond to surveys or otherwise participate* in submitting cost data."[112] Here, 21 SELPAs completed the surveys, as requested, and the sample contains some larger SELPAs, some smaller, some urban, suburban, and rural. Therefore, the Commission finds that even if a representative sample of claimants *were* held to be a requirement of adopting an RRM, the claimants have submitted cost data from a representative sample, in accordance with the ordinary meanings of "representative" and "sample," and with the definition found in the Commission's regulations.

ii. There is no statutory requirement that the RRM be based on detailed, actual cost data, nor audited cost data.

The statute provides that an RRM "[w]henever possible… shall be based on general allocation formulas, uniform cost allowances, and *other approximations of local costs* mandated by the state, *rather than detailed documentation* of actual costs."[113]

Both DOF and SCO opposed the proposed RRM in its comments because the RRM was developed based on unaudited cost data.[114] Claimants rightly point out that no *audited* cost data exists until claims have been filed, which they have not, because the reimbursement methodology is yet to be adopted. The statutes and regulations that provide for RRMs do not require any such level of precision, as noted above, and the practical realities of this case do not present any evidence that such an approach is feasible. The claimants indicate that school districts do not have data going back to 1993 to support the costs incurred during those years. The claimants also stress that "if actual, audited cost data existed, there would be no need for an RRM."[115]

As discussed above, the LAO recommendations that gave rise to the amendments to section 17518.5 were to expand the use of easy-to-administer reimbursement mechanisms. And, as discussed throughout this section, the amended text of section 17518.5 provides for flexibility in the development and adoption of RRMs. The section cannot reasonably be read to require audited cost data to develop an RRM, especially in the case that the RRM is proposed as a part of the first parameters and guidelines after a test claim decision, at which time no audited cost data

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[111] Exhibit O, See Webster's Third New International Dictionary, "representative," and "sample."

[112] Code of Regulations, Title 2, section 1183.13 (Register 2008, No. 17).

[113] Exhibit O, Government Code section 17518.5(d) (Stats. 2007, ch. 329 § 1 (AB 1222)).

[114] Exhibit C, SCO Comments, Revised Proposed Parameters and Guidelines, January 24, 2011; Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[115] Exhibit F, Claimants Rebuttal to DOF Comments, October 14, 2011, p. 7.

yet exists. Moreover, the RRM is specifically provided as an alternative to the requirement for detailed documentation of actual costs.

iii. There is no statutory requirement that an RRM mitigate or eliminate cost variation among local government claimants.

Section 17518.5(c) provides that an RRM "shall *consider* the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner."

DOF objects to the proposed RRM on the grounds that it "does not consider variation of costs among school districts to implement the mandate in a cost efficient manner." However, DOF's comments, in actuality, center on the fact that the proposed RRM does not adequately *address* or *eliminate* the variation of costs. DOF charges that the cost for a BIP per ADA in the surveys ranged from $1.31 to $81.91, averaging $10.17 per ADA; and that the cost per BIP ranged from $2,400 to $197,000 and averaged $17,047. DOF also notes that the highest cost reported per ADA is 62 times higher than the lowest, and the highest cost reported per BIP is 82 times higher than the lowest. DOF argues that these variations are too broad to permit adoption of an RRM in this case. DOF points out that if the proposed RRM were applied to the 21 survey respondents only three of the SELPAs would receive reimbursement within 20% of reported costs. The remaining 18 SELPAs would receive reimbursement ranging from 88 percent below to 677 percent above their costs, as reported in the surveys.

DOF concludes that this variation is due in part to the fact that some of the reimbursable activities are not performed in every case, or in every year, and therefore some SELPAs, and districts, would receive, under the proposed RRM, reimbursement for activities not necessary in every case, or not performed in every fiscal year. DOF notes that the number of BIPs reported by SELPAs ranges from 0 to 87, and has no apparent correlation to ADA. DOF argues that an RRM based on ADA is not appropriate, due to the wide range in costs, and the wide range in number of BIPs developed in different SELPAs, as revealed by the surveys. DOF also argues that "[r]eimbursement standards that would allow reimbursement for a school district in excess of that district's actual costs or overall reimbursement in excess of statewide actual costs should not be supported." [116]

Claimants respond to DOF's concerns, arguing first that "the variation should be 'considered' to determine what the 'reasonable' level of reimbursement is – and presumably that reasonable level would be one near the middle." Claimants hold that "a variation is relevant as to the *level* of reimbursement proposed in an RRM, not as to *whether* an RRM is appropriate." [Emphasis in original]. Claimants continue, "[t]here is no language that suggests a variation in costs bars reimbursement."[117]

Claimants also argue that, as a practical matter, reimbursement at a standard level will have normalizing effects:

> The highest spenders will not be reimbursed for their full costs, encouraging cost-efficiency. The lowest spenders will be reimbursed above their minimal

[116] Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[117] Exhibit F, Claimants' Rebuttal to DOF Comments, Dated October 14, 2011.

> costs, still encouraging cost-efficiency by ensuring that the mandate will be reasonably implemented, not under-implemented.

Claimants note that the Legislature did not choose to require the "least costly" implementation, but instead "it chose 'cost-efficient,' to protect against inflated costs while still promoting full program implementation."[118]

Furthermore, claimants argue that "focusing on the number of [BIPs] as a measure of a district's activities for this mandate is misplaced." The development of BIPs accounts for only three of the seven activities approved for reimbursement. The other four activities consist of training, development and implementation of emergency interventions, and due process hearings, all of which are ongoing activities regardless of the number of BIPs developed in a SELPA in any given year. Claimants note that the wide variation in the number of BIPs in a single calendar year depends on the students served in that year. And, while costs of development of BIPs within a SELPA may vary widely year to year, total statewide costs will be relatively stable from year to year, meaning that an ADA-based RRM is a "rational and reasonable method" by which to reimburse school districts for fluctuating costs.[119]

Moreover, claimants argue that DOF's view of the variation in costs is taken too simplistically:

> Finance's narrow focus does not acknowledge the actual manner in which the RRM is constructed. Co-Claimants developed a two-pronged RRM for ongoing activities, one primarily for training activities to be distributed by SELPA, the other for ongoing activities, to be distributed by school district or COE. Finance ignored this division when analyzing Co-Claimants' proposed RRM, lumping together these two costs…

Claimants point out that the ongoing SELPA-level activities, which are primarily training and reporting activities, are less varied, because those activities must be performed whether or not any functional analysis assessments, development and implementation of BIPs, or emergency interventions, for example, are required in a given year. By combining the SELPA-level and district/COE-level activities, DOF's charge as to the variability of costs per BIPs per ADA is misleading.

Finally, claimants argue that DOF's "true concern" is that an ADA-based RRM will provide too high reimbursement, not whether such reimbursement levels are accurate. Claimants note that DOF challenges the RRM on the basis of reimbursement in excess of actual costs, and "does not appear to be at all troubled that other claimants would be reimbursed less than actual costs."[120]

In comments submitted in response to the draft staff analysis DOF continues to stress the fact that "[t]he wide range of actual costs as well as the number of BIPs reported by SELPAs will create a reimbursement system in which some SELPAs will receive reimbursement in excess of

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[118] *Ibid.*

[119] *Ibid.*

[120] Exhibit F, Claimants' Rebuttal to DOF Comments, October 14, 2011.

their costs in a given year and others will not receive full reimbursement for their costs."[121] As cited above, the claimants argue that while costs may not be precisely reimbursed in every year, reimbursement will be reasonably representative of actual costs when viewed over time.

The Commission finds that subdivision (c) of section 17518.5 does not require that an RRM proposal address, mitigate, eliminate, or otherwise equalize variation in costs among local government. The Commission finds that variation is relevant to the development of an RRM in terms of finding an appropriate level of reimbursement, but not necessarily fatal to an RRM proposal. The Commission finds that the data submitted, and the proposal based on those data, do "consider the variation," as required, in order to arrive at the unit costs proposed.

iv. There is no statutory requirement that the RRM be based on more than one year of cost data, nor any limitation on the retroactive or prospective application of an RRM.

Applying a smaller sample of data to multiple claimants and multiple years is the essence of an RRM. SCO objects to the adoption of an RRM on the ground that the RRM based on this single year of data (2006-2007) would apply to 18 years of reimbursement claims. The claimants rightly point out that there is no legal basis for this objection. Claimants conclude that SCO's objection must be based on section 17518.5(d), which, provides:

> In cases when local agencies and school districts are projected to incur costs to implement a mandate over a period of more than one fiscal year, the determination of a reasonable reimbursement methodology may consider local costs and state reimbursements over a period of greater than one fiscal year, but not exceeding 10 years.[122]

The plain language of this subdivision does not proscribe applying an RRM to cost claims for more than 10 years; it only prohibits using more than 10 years of cost data to develop an RRM. SCO's interpretation is unfounded.

Claimants point out that given how long this case has taken to reach the claiming stage, limiting reimbursement under an RRM to only ten years would be unreasonable if applied retroactively. Claimants urge that, at most, the RRM should be limited to ten years prospectively, but claimants assert that SCO fundamentally misinterprets the meaning of subdivision (d), and that no such limitation is indicated.

Claimants also rightly point out that there is no requirement that data span more than one year. SCO suggests that the "snapshot" of a single year's costs is not sufficient to support adoption of the proposed RRM, but section 17518.5(d), as quoted above, provides that where claimants are likely to incur costs over multiple years, "the determination of a reasonable reimbursement methodology *may* consider local costs and state reimbursement over a period of greater than one fiscal year." The section does not *require* that the RRM consider costs over multiple years, but *allows* it.

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[121] Exhibit M, DOF Comments on Draft Staff Analysis, December 28, 2012, at p. 2.

[122] Exhibit O, Government Code section 17518.5 (Stats. 2007, ch. 329 (AB 1222) §1).

Indeed the nature of an RRM is to use a small sample of data to develop a formula to be applied to a greater number of claims. This is done either by applying survey data, or applying actual cost claims from a certain year or years, or by applying some other projection or estimation of local costs. Here, the proposed RRM relies on a sample of data from a portion of eligible claimants, for a (then-recent) school year, and seeks to develop a cost formula to be applied going forward. This is exactly what an RRM is meant to be, and to do, based on the statute and the regulations. Thus there is no reason to read into section 17518.5 any express limitation of the scale upon which an RRM can be applied.

Furthermore, in the interest of simplicity and efficient resolution of test claims and reimbursement of claimants, it will generally not be in the best interest of the state or the claimants to postpone the adoption of an RRM in order to obtain multiple years' cost information from eligible claimants. Section 17557 directs the Commission to consider an RRM that balances accuracy with simplicity; the goal of simplicity is undermined if the Commission is expected to require investigation and study of cost information spanning multiple years before an RRM can be adopted to begin reimbursement to local government.

Therefore, the Commission finds that there is no language in the governing statutes directing the Commission to use actual costs in adopting an RRM, or requiring that cost data from a span of years be submitted. The Commission finds also that there is no language suggesting that an RRM may only be applied for a certain number of years, either retroactively or prospectively.

v. Conclusion: section 17518.5 provides broad authority with few limitations for the development and adoption of RRMs.

The Commission finds that the only statutory and constitutional requirements for adoption of an RRM are: (1) considering variations in costs and balancing accuracy with simplicity; and (2) reasonable reimbursement of the eligible claimants' costs mandated by the state for the program, in line with article XIII B, section 6. Detailed actual cost information is not required. Neither is cost information from a representative sample of eligible claimants required; nor is audited data from multiple years of cost claims; nor an RRM proposal that addresses or mitigates variation in costs incurred among different districts. An RRM is meant to be based on an *approximation* of local costs, and need not necessarily precisely reimburse every dollar.

c. The Commission is not bound by strict evidence rules but must have substantial evidence in the record to support its decisions.

i. Substantial evidence standard for Commission proceedings

Government Code section 17559 requires that Commission decisions be based on substantial evidence in the record. Section 17559 allows a claimant or the state to petition for a writ of administrative mandamus under section 1094.5 of the Code of Civil Procedure, "to set aside a decision of the commission on the ground that the commission's decision is not supported by substantial evidence."[123]

Code of Civil Procedure section 1094.5, in turn, provides:

[123] Government Code section 17559(b) (Stats. 1999, ch. 643 (AB 1679)).

> Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. *In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record*.[124]

The latter finding is required for Commission decisions: when reviewing a decision of an administrative body exercising quasi-judicial power, "the reviewing court is limited to the determination of whether or not the decision is supported by substantial evidence and the court may not substitute its view for that of the administrative body, nor reweigh conflicting evidence."[125] Moreover, Government Code section 17559 expressly "requires that the trial court review the decision of the Commission under the substantial evidence standard."[126]

The evidence required to adopt an RRM is necessarily more relaxed than an actual cost reimbursement methodology.[127] However, when the Legislature added section 17518.5 to the Government Code, it did not change the existing requirement in section 17559 that all of the Commission's findings be based on substantial evidence in the record. Statutory enactments must be considered in the context of the entire statutory scheme of which they are a part and be harmonized with the statutory framework as a whole.[128] In 2011, the Commission clarified its regulations to specifically identify the quasi-judicial matters that are subject to these evidentiary rules, including proposed parameters and guidelines and requests to amend parameters and guidelines.[129, 130] Thus, the plain language of the statutory and regulatory mandates scheme requires substantial evidence in the record to support the adoption of an RRM.

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[124] Exhibit O, Code of Civil Procedure section 1094.5 (Stats. 2011, ch. 296 § 41 (AB 1023)).

[125] Exhibit O, *Board of Trustees of the Woodland Union High School District v. Munro* (Cal. Ct. App. 3d Dist. 1958) 163 Cal.App.2d 440, 445.

[126] *City of San Jose v. State* (Cal. Ct. App. 6th Dist. 1996) 45 Cal.App.4th 1802, 1810.

[127] See Government Code 17518.5 [Statute employs terms like "projections;" "approximations"].

[128] Exhibit O, *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743.

[129] California Code of Regulations, Title 2, section 1187 (Register 2010, No. 44.)

[130] The courts, in recent lawsuits dealing with questions of fact, have determined that the Commission's conclusions were not supported by any evidence in the record and, thus, the Commission's decisions were determined invalid pursuant to Government Code section 17559 and Code of Civil Procedure section 1094.5. (See, *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355 [Peace Officer Procedural Bill of Rights, on the issue of practical compulsion]; *State of California Department of Finance, State Water Resources Control Board, et al. v. Commission on State Mandates and County of San Diego, et al.*, Sacramento County Superior Court, Case No. 34-2010-80000604 [Discharge of Stormwater Runoff, on the issue of whether the permit requirements are considered to fall within the Maximum Extent Practicable standard of federal law]; *State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Control*

ii. Evidence rules for Commission proceedings.

The Commission is not required to observe strict evidentiary rules, but its decisions must be reasonable, and grounded in fairness. The courts have interpreted the evidentiary requirement for administrative proceedings as follows:

> While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally present, or by authenticated documents, maps or photographs; ordinarily, hearsay evidence standing alone can have no weight, and this would apply to hearsay evidence concerning someone else's opinion; furthermore, cross-examination within reasonable limits must be allowed. Telephone calls to one of the officials sitting in the case, statements made in letters and arguments made in petitions should not be considered as evidence.[131]

Section 1187.5(a) of the Commission's regulations provides that when exercising the quasi-judicial functions of the Commission, "[a]ny relevant non-repetitive evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs."[132] This regulation is borrowed from the evidentiary requirements of the Administrative Procedures Act, which contains substantially the same language.[133] Both the Commission's regulations, and the Government Code, provide that hearsay evidence is admissible if it is inherently reliable, but *will not be sufficient in itself* to support a finding unless

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Board, Los Angeles Region v. Commission on State Mandates and County of Los Angeles, et al., Los Angeles County Superior Court, Case No. BS130730 [Municipal Storm Water and Urban Runoff Discharges, on the issue of whether the permit requirements are considered to fall within the Maximum Extent Practicable standard of federal law]).

[131] Exhibit O, *Desert Turf Club v. Board of Supervisors for Riverside County* (1956) 141 Cal.App.2d 446, 455. The board based its denial of land use permit for race track on testimony, letters and phone calls from members of the public opposing horse racing and betting on moral grounds. The court held that there was no evidence in the record to support the decision. On remand, the court directed the board to "reconsider the petition of appellants as to land use, wholly excluding any consideration as to the alleged immorality of horse racing and betting as authorized by state law, and wholly excluding from such consideration all testimony not received in open hearing, and all statements of alleged fact and arguments in petitions and letters on file, except the bare fact that the petitioners or letter writers approve or oppose the granting of the petition; also wholly excluding each and every instance of hearsay testimony unless supported by properly admissible testimony, it being further required that the attorneys representing any party in interest be granted a reasonable opportunity to examine or cross-examine every new witness produced." *Id*. at p. 456.

[132] Code of Regulations, Title 2, section 1187.5.

[133] Exhibit O, Government Code section 11513.

the evidence would be admissible over objection in a civil case; in other words, unless a hearsay exception applies.[134]

Section 1187.5(d) provides for the admission of evidence and exhibits, and questioning of opposing witnesses, and states that "[i]f declarations are to be used in lieu of testimony, the party proposing to use the declarations shall comply with Government Code section 11514." [135] Government Code section 11514, in turn, provides:

> (a) At any time 10 or more days prior to a hearing or a continued hearing, any party may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, *shall be given the same effect as if the affiant had testified orally*. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.[136]

Note that the Commission's regulations use the word "declaration," and the Government Code refers to an "affidavit." An affidavit, by definition, if it is to be used before a court, must "be taken before any officer authorized to administer oaths," usually a judge.[137] But under the Code of Civil Procedure, section 2015.5, a declaration made *under penalty of perjury* is given the same force and effect as an affidavit sworn before an authorized officer. Such declaration must be in writing, must be "subscribed by him or her," and must name the date and place of execution.[138]

The competency of witnesses giving testimonial evidence, in general, relies on personal knowledge. Witnesses are generally required to "express themselves at the lowest possible level of abstraction," rather than making conclusions before the trier of fact. Opinion testimony is generally limited, "if a witness is not testifying as an expert," to that which is "[r]ationally based on the perception of the witness" or "[h]elpful to a clear understanding of his testimony."[139] Where a finding of fact can be made "on the basis of common experience, without any special skill or training…the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury and not by the witness." The opinion rule applies equally to evidence submitted by affidavit: a "general expression of an opinion or belief, without the fact on which it is founded, is in no sense legal evidence."[140]

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[134] Code of Regulations, Title 2, section 1187.5; Exhibit O, Government Code section 11513.

[135] California Code of Regulations, Title 2, section 1187.5.

[136] Exhibit O, Government Code section 11514(a) (Stats. 1947, ch. 491 § 6) [emphasis supplied].

[137] Exhibit O, Code of Civil Procedure section 2012 (Stats. 1907, ch. 393 § 1).

[138] Exhibit O, Code of Civil Procedure section 2015.5 (Stats. 1980, ch. 889 § 1).

[139] Exhibit O, Evidence Code section 800 (Stats. 1965, ch. 299 § 2).

[140] Exhibit O, California Jurisprudence 3d, Vol. 31A: Evidence, section 613.

Where a witness is testifying as an expert, opinion testimony is permitted where both:

- The subject is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact," and
- Is based on matter, including the expert's experience or training, "whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates."[141]

Before a court accepts such evidence, however, an expert must be qualified, pursuant to section 720 of the Evidence Code, which provides:

> (a) A person is qualified to testify as an expert if he has special knowledge, skill, expertise, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.
>
> (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.[142]

The California Supreme Court has held that an expert witness is qualified "if his peculiar skill, training, or experience enable him to form opinion that would be useful to the jury."[143] And in order to lay the foundation to introduce expert testimony, "[it is] the province of the court to determine, from the examination as to the witness' qualifications, whether he [is] competent to testify as an expert."[144] An expert's testimony is intended to make complicated facts or information more understandable to the fact finder, and in so doing may rely on any information, including that which is not admissible in itself, but may not make legal conclusions.[145]

Therefore, in keeping with the applicable evidentiary standards provided by the statutes and regulations, and in an attempt to harmonize the case law with the clear import of statute and regulation, the following standards emerge:

- Commission decisions must be supported by "substantial evidence" under section 17559, but the conduct of hearings need not adhere to strict evidence rules pursuant to section 1187.5 of the Commission's regulations and Government Code section 11513(c).

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[141] Exhibit O, Evidence Code section 801 (Stats. 1965, ch. 299 § 2).

[142] Exhibit O, Evidence Code section 720 (Stats. 1965, ch. 299 § 2).

[143] Exhibit O, *People v. Davis* (1965) 62 Cal.2d 791, at p. 800.

[144] Exhibit O, *Bossert v. Southern Pacific Co.* (1916) 172 Cal. 504, at p. 506.

[145] Exhibit O, Evidence Code section 805; *WRI Opportunity Loans II LLC v. Cooper* (Cal. Ct. App. 2d Dist. 2007) 154 Cal.App.4th 525, at p. 532, Fn 3 ["Generally, Evidence Code section 805 permits expert testimony on the ultimate issue to be decided by the factfinder. However, this rule does not ... authorize ... an 'expert' to testify to legal conclusions in the guise of expert opinion. Such legal conclusions do not constitute substantial evidence." (internal citations omitted)].

- Any relevant non-repetitive evidence *shall* be admitted if it is the sort of evidence on which responsible persons are accustomed to rely;
- Hearsay evidence may be used to supplement or explain, although it shall not be sufficient to support a finding unless admissible over objection in civil actions.[146]
- Under section 11514, as referenced in the Commission's regulations, an affidavit or declaration may be "given the same effect as if the affiant had testified orally," if properly noticed and an opportunity to cross-examine the affiant is given.[147]
- Expert testimony, in the form of an affidavit, would be admissible if the Commission finds a witness qualified by special skill or training, and the testimony (here, declaration) is helpful to the Commission.[148]
- Furthermore, surveys of eligible claimants as a method of gathering cost data are contemplated by the statute and the regulations as a viable form of evidence, but they must be admissible under the Commission's regulations and the evidence rules, as discussed.[149]

iii. Claimants' evidence supporting the proposed RRM is admissible

In this case then, the Commission finds that the rules of evidence do not bar the introduction of the surveys as evidence. The surveys are proffered by the claimants to support the adoption of the three RRMs proposed: one for the one-time SELPA-level activities, one for ongoing SELPA-level activities, and one for ongoing district and COE-level activities.[150] The surveys are relevant, and non-repetitive, and therefore shall be admitted under the regulations. The surveys, without more, would be hearsay, and would not alone be sufficient to support a Commission decision. But the surveys are accompanied by declarations under penalty of perjury,[151] and therefore section 11514, where complied with, gives an affidavit, or a declaration, if made in compliance with Code of Civil Procedure section 2015.5, the same effect as oral testimony, which in turn *is sufficient* to support a Commission decision.[152]

In addition, the conclusions and calculations made by the consultants *based on the survey results* qualify as expert testimony. The surveys were compiled by Mr. Lenahan, and Ms. Grundhoffer. Ms. Grundhoffer is a State Trustee for CDE, and a consultant to the Fiscal Crisis and Management Assistance Team, and before that worked for 10 years as a school business official; Ms. Grundhoffer is qualified as an expert witness, capable of testifying regarding school finance

[146] California Code of Regulations, Title 2, section 1187.5.

[147] Exhibit O, Government Code section 11514(a) (Stats. 1947, ch. 491 § 6).

[148] Exhibit O, Evidence Code sections 720; 801 (Stats. 1965, ch. 299 § 2).

[149] Government Code section 17518.5; Code of Regulations, Title 2, section 1183.13.

[150] Exhibit B, Revised Proposed Parameters and Guidelines, December 17, 2010.

[151] Exhibit J, Claimants' Comments and Amended Exhibit 2, August 15, 2012.

[152] Code of Regulations, section 1187.5; Exhibit O, Government Code section 11514.

and budget matters, and the regarding cost data with which she worked and the methodology that she used.[153] Mr. Lenahan has a B.S. in Accounting and an M.B.A. in Finance, and is retired after 30 years as a school business official; his experience includes calculating and reviewing costs for programs and developing school district budgets on the basis of those calculations. Mr. Lenahan is qualified as an expert to testify regarding school finance, and the study and compiling of cost data, and the methodology that he helped develop.[154] The declarations of Ms. Grundhoffer and Mr. Lenahan are intended to distill the information in the three hundred or more individual survey responses into an accessible set of figures. In this way, Mr. Lenahan and Ms. Grundhoffer constitute expert witnesses, within the meaning of the Evidence Code,[155] and because their conclusions are submitted in the form of declarations under penalty of perjury, they have the same force and effect as oral testimony under Code of Civil Procedure section 2015.5 and Government Code section 11514, as discussed above.

The state has not filed evidence rebutting the hours, hourly rates, or total costs reported in the surveys, or disputing the calculations prepared by the claimants' experts.

d. Substantial evidence in the record supports the adoption of the proposed RRM for costs incurred from fiscal year 1993-1994 to fiscal year 2011-2012.

The issue for the Commission is whether substantial evidence supports the adoption of the proposed RRM. The claimants have proposed three RRMs: one for one-time SELPA-level activities; one for ongoing SELPA-level activities; and one for ongoing district-level activities.

The one-time SELPA-level activities include preparing and providing SELPA procedures and initial training for personnel involved in implementing behavioral intervention plans or emergency behavioral interventions. The one-time activities are reimbursed by multiplying the total SELPA ADA for the applicable year in which the activities are performed by the unit rate as adjusted for the applicable year by the implicit price deflator. The unit rate for 2006-2007 is $0.32818.

The ongoing SELPA-level activities include ongoing training in behavior analysis, positive behavior interventions, and emergency interventions; preparing reports for CDE on the number of emergency behavior interventions performed; and satisfying due process hearing requirements regarding functional analysis assessments and the development and implementation of behavioral intervention plans. Those activities are reimbursed by multiplying the total SELPA ADA for each applicable year by the unit rate as adjusted by the implicit price deflator for that year. The unit rate for 2006-2007 is $1.18702.

The ongoing district-level activities include conducting functional analysis assessments; developing, implementing, and evaluating behavioral intervention plans; modifying behavioral intervention plans; performing emergency interventions and completing required documentation; training staff on prohibited interventions, and avoiding the use of prohibited interventions; and satisfying due process hearing requirements related to functional analysis assessments or the

[153] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer.

[154] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

[155] Exhibit O, Evidence Code sections 720; 801 (Stats. 1965, ch. 299 § 2).

development or implementation of behavioral intervention plans. These activities are reimbursed by multiplying the district's ADA for each applicable year by the unit rate as adjusted by the implicit price deflator for that year. The unit rate for 2006-2007 is $9.45701.

As discussed above, the purpose of an RRM is to reimburse local government efficiently and simply. The statute governing RRMs was amended in 2007 to promote flexibility in the development of an RRM, and the only remaining statutory requirements of an RRM are to *consider variations in costs among eligible claimants* and to *balance accuracy in reimbursement with simplicity in the claiming process*. There is no requirement of a minimum sample size for the data used to develop an RRM, nor a requirement to use actual, detailed cost data at all; estimated cost information is sufficient. There is no requirement that an RRM mitigate or eliminate cost variation among local government claimants, or that cost data from more than one fiscal year be considered. However, the purpose of an RRM is to promote simplicity; not to ignore accuracy, where accuracy can be achieved.

Here, the proposed RRM *does consider the variation in costs* among school districts to implement the mandate in a cost efficient manner. The proposed RRM *is* developed on the basis of cost information from a representative sample of eligible claimants; a permissible source of information upon which to develop an RRM rate. And the proposed RRM relies on "other approximations" of local costs, to the extent that the survey data submitted provide the number of hours spent and average hourly rates of the personnel assigned, and not the actual costs to comply with the mandate. In this way the proposed RRM *does balance accuracy with simplicity*, as required, at least for the costs incurred from the 1993-1994 fiscal year through the 2011-2012 fiscal year.

DOF continues to argue, in comments submitted in response to the draft staff analysis, that the proposed RRMs do not "meet the statutory requirements for establishing an RRM contained in [Government Code sections 17557 and 17518.5]."[156] As discussed above, the "requirements" of an RRM are nothing more than considering the variation in costs among eligible claimants (not mitigating or eliminating variation) and balancing accuracy with simplicity. DOF fails to address the issue of the factual sufficiency of the evidence, and whether the substantial evidence standard has been met by the claimants. Absent any dispute on point, the claimants' view of the evidence should be accepted, and the RRM should be considered sufficient to meet the statutory requirements as they are understood by the Commission.

However, as discussed above, whether an RRM meets the statutory requirements does not end the inquiry. The statutes must be applied in a constitutional manner, meaning that the decision adopted by the Commission must provide for reasonable reimbursement of eligible claimants' actual costs incurred.

For the reasons below, the Commission finds that the proposed RRMs reasonably represent the costs mandated by the state to comply with the *BIPs* program from the 1993-1994 fiscal year to fiscal year 2011-2012. However, for purposes of obtaining claims data that more accurately reflects future costs, the Commission finds that actual cost claiming is required for prospective claims, beginning in the 2012-2013 fiscal year, as discussed below.

[156] Exhibit M, DOF Comments on Draft Staff Analysis, at p. 1.

The claimants "drafted and redrafted a survey document to accurately assess the costs of implementing these mandates and shared these drafts with [DOF]." The claimants concluded that "the survey would best measure the costs of [BIPs] implementation by seeking information at three levels within each SELPA: the Behavioral Intervention Case Manager (BICM) level, the district level, and the SELPA level." The parties agreed to use only the most recent completed school year, so that the school districts would have "ready access" to the information necessary. The claimants stated that they took all reasonable precautions "to collect the most reliable, non-inflated data."[157] The claimants hired consultants, as described above, to compile the results. Those consultants called schools and districts "to obtain the actual information" where there were missing data, and if they were unsuccessful in obtaining the data they ultimately chose not to use any of that SELPA's information.[158]

The survey results were then averaged by taking the total SELPA-level costs, and the total district-level costs, and dividing by P2 ADA for 2006-2007 (attendance data collected by the state).[159] Those average figures are proposed as a unit rate for all other districts and SELPAs, which is represented as "reasonable, representative, and cost effective" for all local educational agencies in the state by claimants' experts.[160]

The claimants acknowledge that the data ranged widely, from 2006-2007 costs of $1.3096 per ADA in Inyo County to $81.9353 per ADA in Modoc County. The average value, of approximately $10 per ADA, will not accurately reimburse the vast majority of claimants for each fiscal year, as pointed out by DOF: "only three SELPAs would receive reimbursement [under this RRM] within 20 percent of reported costs."[161] However, the claimants urge adoption of the RRM because of its simplicity in addressing a group of cost claims long overdue for reimbursement, and because the RRM will have cost-efficient benefits, and because reimbursement over multiple years will more reasonably represent actual costs than in a single year. The claimants argue that an average level of reimbursement, will encourage cost savings in districts currently spending more and encourage fuller implementation in districts not fully in compliance.[162] The claimants also argue that any reimbursement scheme that relies on services rendered to students would incentivize the activities involved in the BIPs mandate; a per-ADA calculation is incentive-neutral, in that it funds the program based on the number of students in the district or the SELPA, regardless of what BIPs activities are undertaken in a given year or on behalf of a certain student or students.[163] Finally, the claimants also argue that "special education costs can vary widely from year to year in the same district depending on the needs of

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[157] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[158] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer.

[159] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

[160] Exhibit B, Revised Proposed Parameters and Guidelines, Cover Letter.

[161] Exhibit E, DOF Comments on Revised Proposed Parameters and Guidelines.

[162] Exhibit F, Claimants' Rebuttal to DOF Comments.

[163] *Ibid.*

particular students,"[164] but "the total costs state-wide from year to year are not likely to vary, and thus a per ADA approach as [claimants] propose is a rational and reasonable method."[165]

Furthermore, although DOF believed that a per-ADA funding approach was accurate enough in the context of a settlement, here DOF expresses concern that the RRM based on ADA may reimburse some claimants in excess of their actual costs, and therefore may not be appropriate. But a per-ADA approach to reimbursement for the *BIPs* program is consistent with the manner in which special education has been funded in this state since 1997. By statute, all special education funding is now calculated based on the total ADA of the district or districts making up a SELPA; not just on the basis of the special education students being served.[166] Thus, the Legislature has found it reasonable to fund a "free appropriate public education" for special needs students, as required by applicable federal statutes, by way of calculations based on ADA. Similarly, the *Consolidated Special Education Test Claim* (CSM-3986) was provided for by way of a per-ADA funding formula, pursuant to a settlement between the claimants and the DOF.[167]

It must be conceded, however, that neither of those prior instances of per-ADA funding of special education was developed by the Commission through the mandates process. The Legislature's actions were taken pursuant to political priorities and settlement agreements with school districts, while this RRM, if adopted by the Commission, would have to fulfill a constitutional funding requirement and reasonably represent the costs mandated by the state for local educational agencies.

As stated above, there is evidence in the record that the proposed RRM will reimburse some claimants in excess of, and some less than, their actual costs for fiscal year 2006-2007. There is evidence that some of the ongoing activities will not vary substantially from year to year, and that only the activities tied to services for individual students will vary. And there is evidence that the Legislature chose to make the adoption of RRMs more flexible, and directed that the Commission consider an RRM that balances accuracy with simplicity. There is argument that the proposed reimbursement level will provide incentives for districts to cut costs in some cases, and to more fully implement the program in others. And there is argument that because the number of students served statewide does not vary substantially from year to year, but only within districts and SELPAs, the variability in reimbursement will balance over time. Moreover, there is no requirement that the RRM consider cost data over the course of several fiscal years.

Note also that DOF and SCO, for all their objections relating to the legal requirements of an RRM, have not put forward any evidence to rebut the calculations or conclusions of the claimants' experts. The state has not filed evidence rebutting the hours, hourly rates, or total costs reported in the surveys, or disputing the calculations prepared by the claimants' experts.

Therefore, the Commission finds that the substantial evidence standard is satisfied for the adoption of the RRM for the 1993-1994 fiscal year through the 2011-2012 fiscal year, by virtue

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[164] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer.

[165] Exhibit F, Claimants' Rebuttal to DOF Comments.

[166] Exhibit O, Education Code sections 56836.06-56836.155 (Stats. 1997, ch. 854 § 65 (AB 602))

[167] Exhibit O, Statutes 2001, chapter 203 (SB 982).

of the admissibility of the surveys with accompanying declarations, the declarations of the educational consultants as expert witnesses, and the fact that no evidence has been submitted to rebut the claimants' evidence of the costs mandated by the state. Under the substantial evidence standard, as it has ordinarily been applied by the courts, the Commission's findings based on the evidence in the record will not be re-weighed by the court. Rather a court will consider only whether, in light of the whole record, substantial evidence supports the Commission's decision.

Given that the Legislature has seen fit to fund special education based on ADA, rather than based on actual costs of services provided, and given that DOF and the Legislature saw fit to do the same with respect to mandated programs for *Special Education* (CSM 3986) as well, the Commission finds it reasonable, under the California Constitution, to fund the mandated activities involved in *BIPs* on the basis of a unit cost per ADA, from fiscal year 1993-1994 to 2011-2012.

e. Actual cost claiming is required for ongoing claims, in the interest of promoting accurate reimbursement of costs incurred by school districts and SELPAs.

At the hearing on these proposed parameters and guidelines, Ms. Bevernick testified for the claimants that actual cost data going back to 1993, the beginning of the reimbursement period, would be difficult, if not impossible, to provide. Some of the necessary documentation to develop actual cost claims would have to be located in "hard copy," and "processes that lead to BIPs and follow BIP implementation will need to be captured." Ms. Bevernick continued, "[t]his information is not aggregated in any data system…[i]t will need to be gathered by unstructured means."[168] Furthermore, Ms. McDonough indicated that the SELPAs do not generally have data readily available to support actual cost claims for past years, but could begin to collect the necessary information prospectively, if required to do so.[169]

Adopting the RRMs both for the initial claiming period, and for prospective claims, would mean essentially "locking-in" the proposed per-ADA reimbursement at the level established on the basis of the single year survey data collected in 2006. The claimants have acknowledged that this data ranged widely from one SELPA to another. The claimants have also acknowledged that at least some districts will be reimbursed less than their actual costs in any given year, on the basis of this RRM.[170] Additionally, there was testimony at the January 25, 2013 hearing that the costs for BIPS and the number of BIPs students has increased significantly since the data was collected in 2006. Therefore, the Commission finds that the variation in costs and the lack of accuracy is too great to justify continued application of an RRM based on ADA without first evaluating additional claiming data. Actual costs submitted for future claims would provide some ability to reevaluate the amount of reimbursement to which districts should be entitled. The parties may propose a new RRM, based on actual cost data or some other projection, at some later date.

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[168] Exhibit O, Hearing Transcript, January 25, 2013, at pp. 57-59.

[169] *Id*, at p. 84.

[170] Exhibit O, Hearing Transcript, January 25, 2013, at pp. 41.

On the basis of the foregoing discussion, the Commission finds that applying the RRM only to claims prior to the 2012-2013 fiscal year is consistent with the constitutional and statutory requirements applicable to the Commission's decisions. Accordingly, the parameters and guidelines state that eligible claimants may file for reimbursement based on P2 ADA figures for fiscal years 1993-1994 through 2011-2012, but then require eligible claimants to file reimbursement claims based on actual costs incurred in each fiscal year beginning in fiscal year 2012-2013. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts. Each claim will be subject to the audit of the SCO. However, to the extent allowed by the SCO within their auditing authority, certain activities may be reimbursed based on auditing tools such as time studies.

4. Offsetting Revenues and Other Reimbursements (Section VII. of Proposed Parameters and Guidelines**)**

The claimants propose the following language for Section VII. Offsetting Revenues and Reimbursements:

> Any offsetting savings that the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.
>
> The Statement of Decision has not identified any existing general school, COE, or SELPA funding, or special education program funding as an offset to the reimbursable activities.[171]

The proposed language, however, fails to illustrate the complete picture of available special education program funding that might be applied to offset mandated costs in this test claim. As discussed above, the subsequent change in law effected by AB 1610 cannot, of its own force, negate the Commission's findings of law that a program is eligible for reimbursement under article XIII B, section 6 of the California Constitution. However, a subsequent change in law to isolate specified revenues against which the costs of the mandate must be offset can be considered by the Commission when adopting parameters and guidelines.[172,173] The

[171] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines, December 17, 2010.

[172] See, e.g., Government Code section 17557(d)(2), wherein the Legislature has given the Commission authority to amend parameters and guidelines to delete any reimbursable activity that has been repealed, or to update offsetting revenues that apply to the mandated program. AB 1610 requires local educational agencies to apply special education funds to satisfy BIPs costs first, and in that way imposes an offset not identified in the test claim statement of decision.

[173] In a footnote on page 6 of the claimants' comments on the draft staff analysis, claimants challenge the Commission's reliance on section 17557(d)(2), above. Section 17557(d)(2) provides that a request to amend parameters and guidelines may be made to "[u]pdate offsetting

Commission has identified two budget line items containing offsetting revenues that may be applied to reduce the amount to be subvened under the three RRMs, as specified below. The claimants, in comments submitted on the draft staff analysis, take issue with the findings. The claimants' concerns will be addressed in the analysis below.

a. Appropriations made in Line Item 6110-161-0001 in the annual Budget Act are potentially offsetting from July 1, 1993 until October 19, 2010, and must be deducted from a reimbursement claim to the extent a district applied these funds to provide for BIPs mandated activities.

Line Item 6110-161-0001 in the annual Budget Act provides state funding for special education at all times relevant to this test claim.[174] Item 6110-161-0001 provided $66 million in 1993, more than doubled to $1.62 billion in 1994, and increased incrementally to more than $3 billion in fiscal year 2012-2013, including $100 million in ongoing annual funding added pursuant to the 2001 settlement of the *Special Education Mandated Costs* claim (CSM 3986).[175] The *BIPs*

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revenues and offsetting savings that apply to the mandated program and do not require a new legal finding that there are no costs mandated by the state pursuant to subdivision (e) of section 17556." The claimants' concern is that paragraph (d)(2) relates to an request to amend parameters and guidelines, and that there has been no such request. Claimants' objection would be well-heard but that section 17557(d)(2) is referred to (in footnote) only as an illustration of the continuing jurisdiction of the Commission. It is true that here there is no request to amend parameters and guidelines, but there would be no such request where no parameters and guidelines have yet to be adopted. The section is relied upon only to demonstrate that where no new legal finding is necessary on the issue of whether the BIPs program is eligible for reimbursement under article XIII B, section6, as would require a new test claim filing or a request for redetermination under section 17570, the Commission holds continuing jurisdiction to update offsetting revenue or savings as subsequent changes in law may occur prior to adoption of the parameters and guidelines. It would lead to an absurd result to hold that if a mandate is ended, or funded, between the time a test claim is approved for reimbursement and the time parameters and guidelines are adopted, that the Commission is powerless to take notice of the change in the legal landscape surrounding the test claim. In addition, the Commission's regulations, at section 1183.1, require that the parameters and guidelines identify any offsetting revenues for the program.

[174] Statutes 1993, chapter 55 (SB 80); Statutes 1994, chapter 139 (SB 2120); Statutes 1995, chapter 303 (AB 903); Statutes 1996, chapter 162 (SB 1393); Statutes 1997, chapter 282 (AB 107); Statutes 1998, chapter 324 (AB 1656); Statutes 1999, chapter 50 (SB 160); Statutes 2000, chapter 52 (AB 1740); Statutes 2001, chapter 106 (SB 739); Statutes 2002, chapter 379 (AB 425); Statutes 2003, chapter 157 (AB 1765); Statutes 2004, chapter 208 (SB 1113); Statutes 2005, chapter 38 (SB 77); Statutes 2006, chapter 47 (AB 1801); Statutes 2007, chapter 171 (SB 77); Statutes 2008, chapter 268 (AB 1781); Statutes 2009, chapter 1, 4th Extraordinary Session (AB 1); Statutes 2010, chapter 712 (SB 870); Statutes 2011, chapter 33 (SB 87); Statutes 2012, chapter 21 (AB 1464).

[175] Statutes 2001, chapter 203 (SB 982).

program, adopted by CDE regulation pursuant to Education Code section 56523, is part of the special education statutes in the Education Code (Chapter 5.5 of Part 30, entitled "Special Education Programs") and it provides special education related services. Therefore the funds available generally for special education constitute *potentially* offsetting revenues against the activities involved in the *BIPs* mandate, to the extent a claimant uses the special education funding for *BIPs* activities. After October 19, 2010, as discussed below, the funds received under that line item constitute *required* offsetting revenues, pursuant to changes effected in AB 1610.

In comments submitted in response to the draft staff analysis, the claimants dispute the identification of Line Item 6110-161-0001 as potentially offsetting revenue. The claimants rely on Government Code section 17556(e) to suggest that local government claimants are eligible for full reimbursement for state-mandated costs unless there are offsetting savings or "*additional revenue that was specifically intended to fund the costs of the state mandate* in an amount sufficient to fund the cost of the state mandate."[176] The claimants argue as well that because the test claim statement of decision found no offsetting savings or additional revenue, to here identify potentially offsetting revenues is inconsistent with the law and with the Commission's prior decision. The claimants assert that the funds identified in the analysis "do not and cannot constitute potentially offsetting revenues against the mandated activities involved in the BIPs test claim because they have never included funds specifically intended for the *BIPs* mandate or provided offsetting savings."[177]

The claimants further argue that the settlement of the *Special Education Mandated Costs* claim (CSM 3986) in 2000-01 demonstrates that no funding was previously available for the mandated activities. In the settlement of that test claim, the state provided a $270 million one-time payment, $100 million in additional annual funding for special education, and $250 million over ten years, in satisfaction of outstanding mandates claims, as follows:

> The funds provided in subdivisions (a) to (e), inclusive, shall be used for the costs of *any state-mandated special education programs* and services established pursuant to Sections 56000 to 56885, inclusive…as those sections read on or before July 1, 2000. These funds shall be considered in full satisfaction of, and are in lieu of, any reimbursable mandate claims relating to special education programs and services, with the exception of the programs and services delineated in subdivision (g).[178]

Subdivision (g), in turn, provides:

> Notwithstanding subdivision (f), the following existing mandate test claim *remains subject to the normal mandate procedure*, including judicial review, if

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[176] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 1-2. See Government Code section 17556(e) for the origin of the italicized language.

[177] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 2-3.

[178] Education Code section 56836.156 (Stats. 2001, ch. 203 (SB 982)) [subdivision (g), in turn, refers to the BIPs mandate].

> any: behavioral interventions established pursuant to Section 56523 and Sections 3001 and 3052 of Title 5 of the California Code of Regulations.[179]

The claimants cite this legislation as evidence of the state's understanding of the landscape of available funding for *BIPs*. The claimants assert that the fact of the settlement itself "acknowledges the *basic requirement that the State provide an additional subvention of funds specifically intended* to fund state-mandated costs," and that "[t]his addition of funding specifically intended to reimburse certain special education mandated costs evidences the State's belief that there was not existing funding in any of the annual Budget Acts up to the date of the settlement."[180]

The claimants also argue that the Governor's proposed budget for 2012-2013 eliminated the *BIPs* mandated program without providing for any accompanying reduction in funds, that the state (DOF) approved the *BIPs* mandate settlement agreement, and that both of these actions suggest that the state has not provided any funding specifically intended for the *BIPs* mandate, and that therefore no offsetting revenues can be identified. And finally, the claimants argue that "perhaps most telling, the fact that the State proposed adding additional funds to AB 602 on an ongoing basis in the BIP settlement and proposed bill suggests that the State does not even believe that there are any such ongoing offsets."[181]

The claimants also assert, without evidence in support, that "[t]o the extent districts have used existing special education funds to implement the *BIPs* mandate, they either did so to the detriment of other special education programs to avoid encroachment or encroached on general funds to fund other special education programs." Moreover, the claimants demonstrate an essential misunderstanding of the analysis herein, saying:

> To state that districts must deduct "potentially offsetting revenues" when no funds were specifically intended for the BIP mandate and when no other bill provided for offsetting savings such that districts experienced no net costs, contravenes the constitutional requirement that the state provide a subvention of funds to reimburse the increased cost of a state mandate.[182]

The claimants state, on page 3 of the comments, that the offsets identified "do not meet the constitutional and statutory standard of offsetting savings or additional revenue specifically intended to fund the costs of the state mandate in an amount sufficient to fund the costs of the state mandate as delineated above."[183]

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[179] *Ibid.*

[180] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at p. 4.

[181] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 4-6.

[182] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 2-3.

[183] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at p. 3.

The bulk of the claimants' argument rests on a misunderstanding of the distinction between revenues identified at the test claim phase that would prohibit a finding of costs under section 17556, and offsetting or potentially offsetting revenues identified in parameters and guidelines. The "constitutional and statutory standard" that the claimant implies is not supported by the applicable case law and governing statutes. In adopting parameters and guidelines, the Commission is required by Government Code section 17557 to determine the "amount to be subvened" under the Constitution. Specifically, the Commission's regulations require parameters and guidelines to identify offsetting revenues that may apply to the program as follows:

i. Dedicated state and federal funds appropriated for this program

ii. Non-local agency funds dedicated for this program.

iii. Local agency's general purpose funds for this program.

iv. Fee authority to offset partial costs of this program.[184]

These items, required to be identified, are not meant to call into question the Commission's finding that a program is reimbursable, but are only meant to highlight the possible non-local funds that might be called upon to determine the amount to be subvened. This analysis is not inconsistent with the test claim statement of decision because the parameters and guidelines do not require a finding of *additional revenue specifically intended to cover the costs of the mandate*, and in an amount sufficient to cover the costs of the mandate, as required under section 17556(e) to deny the test claim (as suggested by the claimants).[185]

Here, because the parameters and guidelines only identify *potentially* offsetting revenues, the Controller may only reduce a claimant's reimbursement *if the claimant demonstrates, by applying the funds authorized to be used on the program to the mandated activities*, that it was not compelled to rely on local proceeds of taxes to fund the mandate. A reduction in this manner is consistent with Article XIII B, section 6, which requires subvention only when the costs in question can be recovered solely from tax revenues. The Supreme Court has determined that

> [Article XIII B, section 6] was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. [Citations omitted.] Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditures of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse … local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered solely from tax revenues.

[184] Code of Regulations, Title 2, section 1183.1 (Register 2005, No. 36).

[185] Government Code section 17556(e).

> . . . . As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes.[186]

Accordingly, in *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, the Supreme Court held that claimant school districts were *not entitled to reimbursement* for costs incurred in complying with notice and agenda requirements for meetings of a school site council, without reaching the issue of whether the underlying funded school site council program was itself mandated, "because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary notice and agenda-related expenses." In that case, the court "found nothing to suggest that a school district is precluded from using a portion of the [program] funds obtained from the state for the implementation of the underlying funded program to pay the associated [mandated] costs." In fact, the court found that the program "explicitly authorizes school districts to do so," quoting the statute authorizing the appropriation of program funds to allow school districts to "claim funds appropriated for purposes of this article for expenditures in, but not limited to, reasonable district administrative expenses."[187] The court concluded, therefore, that "we view the state's provision of *program funding as satisfying, in advance, any reimbursement requirement*." (Emphasis added.)

Thus, state program funds appropriated to school districts that *can* be used for a mandated program are required to be identified as potential offsets in the parameters and guidelines. And, in turn, *by applying the identified potentially offsetting revenues to the mandate*, an eligible claimant shows the actual expenditure of funds other than its local tax revenues on the program, thus demonstrating that it is not in need of the protection offered by Article XIII B, section 6, to the extent of the revenues thus applied. When funds other than local proceeds of taxes are thus applied, the Controller may reduce reimbursement accordingly.

The finding that available revenues satisfied the reimbursement requirement in *Kern* rests on a number of variables, which are somewhat less clear on these facts, but the analysis can nevertheless be applied. In *Kern*, the notice and agenda requirements applied to a number of different *funded* programs, and imposed requirements that were administrative in nature *within* the specified programs. Moreover, the court found that the mandated costs were "rather modest."[188] Additionally while the programs upon which the mandated activities were imposed were fully funded, those programs might also be voluntary. And finally, the funding that the court identified, at least for the "Bilingual-Bicultural Education program" was explicitly made available for costs of that nature.[189]

Here, the *BIPs* mandated activities fall within the special education program generally, but impose far more than "modest" administrative costs. Additionally, the provision of special

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[186] *County of Fresno, supra*, 53 Cal.3d at p. 487.

[187] *Kern*, supra, at pp. 747.

[188] In *Kern*, the Commission had already adopted parameters and guidelines with a unit cost for the program, allowing reimbursement at $90 per meeting. (*Kern, supra,* at p. 747, fn. 16.)

[189] *Kern, supra,* at pp. 746-747.

education services is not voluntary, and though it is arguably "fully" funded, there is argument that the mandated activities extend beyond currently available funding: claimants have asserted that the *BIPs* mandated activities have resulted in substantial encroachment upon other special education activities and services. Finally, because the *BIPs* mandated activities are mandated by the state as a part of the provision of special education and related services, there is no reason to conclude that the funding is not applicable to those costs, even though no explicit provision has been made for *BIPs*. The annual Budget Act provides more than $3 billion for "Special Education Programs for Exceptional Children."[190] The *BIPs* mandated activities are a part of providing special education services, authorized under section 56523 and Line Item 6110-161-0001 provides funding for all special education instruction and services in Education Code section 56000 et seq. With the exception of $100 million specifically intended to fund the programs identified in the Special Education Mandated Costs (CSM 3986) settlement, implemented by Statutes 2001,chapter 203 (SB 982), the funds in Line Item 6110-161-0001 are available to offset the costs of the *BIPs* mandated activities. However, absent explicit authorization such as was found in *Kern*, the offset must be considered *potential*, and not *required*. As the foregoing analysis demonstrates, this finding is not inconsistent with the test claim statement of decision.

The claimants also argue, in further demonstration of the fundamental misunderstanding of the proper scope of the "specifically intended" language found in Government Code section 17556, that the "state's actions have been consistent with the notion that it must provide a subvention of funds *specifically intended* to reimburse state mandates – funds over and above existing special education funding." The claimants argue that the state's conduct demonstrates that because no funding was *specifically intended* to reimburse the *BIPs* mandated activities, no funding was available at all, and no offsets should be identified. As is discussed throughout this section, *potentially* offsetting revenues may be found when program funding has been provided and can be used, even when the funding is not *additional revenue specifically intended to reimburse the costs of the mandate*, or is not sufficient to cover all costs of the mandate.

The Commission's findings regarding the existence of potentially offsetting revenues are not tantamount to "stat[ing] that districts must deduct [those revenues]," as suggested by the claimants. The test claim statement of decision did indeed conclude that there was no "additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate" and approved the claim. But it is not inconsistent to consider here whether some other available state revenues might have been applied by an eligible claimant to satisfy, in whole or in part, the costs of the mandate. The Commission therefore finds potentially offsetting revenues within existing state special education funding from Line Item 6110-161-0001, except as provided by Statutes 2001, chapter 203 (SB 982), as specified below.

b. Changes to Education Code section 56523 effected by Statutes 2010, chapter 724 (AB 1610) transform potential offsets to required offsets, beginning in fiscal year 2010-2011.

[190] See, e.g., Statutes 2002, Chapter 379, Line Item 6110-161-0001; Statutes 2012, Chapter 1464, Line Item 6110-161-0001.

Beginning in fiscal year 2010-2011, changes effected by AB 1610 (Stats. 2010, ch. 724) to Education Code section 56523 (the test claim statute for *BIPs*) *require* eligible claimants to first use the funds appropriated in Item 6110-161-0001 to offset the costs of the *BIPs* mandate. Section 56523 is amended by AB 1610 to provide, in pertinent part:

> (e) Commencing with the 2010-11 fiscal year, *if any activities authorized pursuant to this section and implementing regulations are found be a state reimbursable mandate* pursuant to Section 6 of Article XIII B of the California Constitution, *state funding provided for purposes of special education* pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act *shall first be used to directly offset any mandated costs*.[191]

AB 1610 is currently being challenged on constitutional grounds in *California School Boards Association v. State*, Superior Court of California, County of Alameda, Case No. RG 11554698 (filed January 6, 2011). The petitioners in that case allege that the changes made to Education Code section 56523 by AB 1610 constitute "a clear attempt to eliminate the state's mandate liability for several Commission-determined mandates."[192] The claimants incorporate the constitutional arguments of the CSBA petitioners by reference in comments submitted in response to the draft staff analysis.[193]

However, the Commission, like any other quasi-judicial body, "must presume the Legislature acts consistent with the Constitution when enacting legislation."[194] Line Item 6110-161-0001, pursuant to Education Code section 56523, as amended in 2010, provides state funding for special education programs, of which *BIPs* is a part, that must be applied to the *BIPs* program first, beginning in fiscal year 2010-2011.

In comments submitted in response to the draft staff analysis, the claimants focus largely on whether funding for the *BIPs* mandate was specifically intended to cover the costs of the mandate, as discussed above. Here, AB 1610 represents the state's expression of such intent from fiscal year 2010-2011 forward. However, the claimants have also urged that no "new or additional revenue" was provided: "AB 1610 does not include 'additional revenue' 'specifically intended' for the BIP mandate." The claimants continue: "[i]nstead, it offers the 'same' revenue which is simply 'deemed' to satisfy the state's obligation to reimburse the BIP mandate"

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[191] Exhibit O, Education Code section 56523 (Stats. 2010, ch. 724 § 27 (AB 1610)).

[192] Exhibit O, Memorandum of Points and Authorities, *CSBA v. State*, Superior Court, County of Alameda, Case No. RG 11554698. The petitioners in the current AB 1610 challenge assert that the language of AB 1610 which purports to deem the funds in Line Item 6110-161-0001 as being in satisfaction of the mandated costs is also contrary to the Commission's findings. The petitioners assert that the provision refers to "the appropriation for special education," and that "no new money is provided; existing funding is simply 'deemed' to satisfy the obligation to reimburse for the costs of this program."

[193] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 7-8.

[194] Exhibit O, *CSBA II*, *supra*, 192 Cal.App.4th at p. 795.

It is true that no new or additional revenue was appropriated. But, as discussed above, the distinction must be drawn between offsetting revenue under section 17556(e) and offsetting revenue identified for parameters and guidelines. The language cited by the claimants above regarding "additional revenue" "specifically intended" to fund the mandate, is drawn directly from section 17556, which addresses findings to be made in the test claim statement of decision to determine whether a test claim can be approved and is eligible for reimbursement. As noted above, section 1183.1 of the Commission's regulations requires the parameters and guidelines to include not only dedicated state and non-local agency funds.[195]

Moreover, as discussed above, a local government claimant only warrants the protection of article XIII B, section 6 for its expenditure of local "proceeds of taxes."[196] Where the funding at issue is given by the state in the first instance, the Commission must assume that the Legislature acts consistently with the Constitution if the Legislature designates a portion of those non-local funds to cover the costs of a mandated program or activity. Additionally, as in *Kern*, "the costs necessarily incurred in complying with [mandated program requirements] under that funded program do not entitle claimants to obtain reimbursement under article XIII B, section 6, because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary…expenses."[197]

Furthermore, there is precedent to support the Legislature's power to direct local educational agencies with respect to how funds are expended, which is essentially the result reached by AB 1610. In *California Teachers Association v. Hayes*, the court stated:

> Since Proposition 98 did not alter the state's role in education, the Constitution continues to make education and the operation of the public schools a matter of statewide rather than local or municipal concern. Local school districts remain agencies of the state rather than independent, autonomous political bodies. The Legislature's control over the public education system is still plenary. The Legislature still has ultimate and nondelegable responsibility for education in this state. All school properties are still held in trust with the state as the beneficial owner. And school districts still do not have a proprietary interest in moneys which are apportioned to them. Of course, if the electorate chose to alter our constitutional scheme for education it could do so. Education could be made a matter of local concern and school districts could be given greater autonomy. But we cannot conclude that such a major governmental restructuring was accomplished by implication in a measure dealing with public finance which spoke not at all on such matters.[198]

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[195] Code of Regulations, Title 2, section 1183.1

[196] *County of Fresno, supra*, at p. 487.

[197] *Kern*, supra, (2003) 30 Cal.4th 727.

[198] Exhibit O, *California Teachers Ass'n v. Hayes* (Cal. Ct. App. 3d Dist. 1992) 5 Cal.App.4th 1513, at p. 1533.

AB 1610, as quoted above, provides direction to local educational agencies, in accordance with the Legislature's plenary control over schools and school districts, to use certain funds first, beginning in the 2010-2011 fiscal year. As such, those funds, as specified, must be included in the parameters and guidelines as "dedicated state funds."[199]

The available funding is reduced, however, for fiscal years 2011-2012 and 2012-2013, by AB 114. AB 114, enacted in 2011, provides that:

> [F]unding provided in provisions 18 and 26 of Item 6110-161-0001 and provision 9 of Item 6110-161-0890 of Section 2.00 of the Budget Act of 2011 for educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) shall be exclusively available for these services only for the 2011-2012 and 2012-2013 fiscal years.[200]

Provisions 18 and 26 of Item 6110-161-0001 in the 2011 Budget Act provide $31 million and $218,786,000, respectively, in state funding for educationally related mental health services.[201] These funds are earmarked, pursuant to AB 114, to be available only for the care of emotionally disturbed pupils, and therefore not available, for the two fiscal years, as provided, for the *BIPs* program. In Item 6110-161-0001 of the 2012 Budget Act the funds are set aside, in accordance with AB 114, as follows:

> 22. Of the amount specified in Schedule (1), $348,189,000 shall be available only to provide educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by an individualized education program pursuant to the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and as described in Section 56363 of the Education Code. The Superintendent of Public Instruction shall allocate these funds to special education local plan areas in the 2012–13 fiscal year based upon an equal rate per pupil using the methodology specified in Section 56836.07 of the Education Code.

Based on the foregoing, the parameters and guidelines identify the following offsetting revenue:

- Except as provided by Statutes 2001, chapter 203 (SB 982)[202], Item 6110-161-0001 of Section 2.00 of the annual Budget Act provides state funding for special education that is potentially offsetting from July 1, 1993 (the

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[199] Code of Regulations, Title 2, section 1183.1

[200] Statutes 2011, chapter 43, section 54 (AB 114).

[201] Statutes 2011, chapter 33 (SB 87).

[202] SB 982 provided for $100 million in augmentation of Line Item 6110-161-0001, beginning in 2001, and continuing in the annual budget acts, to provide for the *Special Education Mandated Costs* test claim (CSM 3986). That funding is intended exclusively, and by express priority, to fund the costs of the specified mandated programs identified in Education Code 56836.156, and therefore cannot be identified as potentially offsetting revenue for this mandate.

beginning of the period of reimbursement) until June 30, 2010. To the extent an eligible claimant applies these potentially offsetting revenues to the approved mandated activities during this time period, those funds shall be identified and deducted from the reimbursement claims filed on the basis of the RRM.

- Commencing with the 2010-11 fiscal year, and except as provided by Statutes 2001, chapter 203 (SB 982), and Statutes 2011, chapter 43, section 54 (AB 114) for fiscal years 2011-2012 and 2012-2013,[203] state funding provided for purposes of special education pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act shall first be used to directly offset any mandated costs in this program. Except as provided in Statutes 2001, chapter 203 and Statutes 2011, chapter 43, funds received by an eligible claimant from this appropriation shall be identified and deducted from the reimbursement claims filed on the basis of the RRM, beginning in the 2010-2011 fiscal year.

c. The federal Individuals with Disabilities Education Act (IDEA) funding appropriated in Item 6110-161-0890 for special education is potentially offsetting revenue against the mandated activities, and must be deducted from the claim to the extent a district used these funds to provide for BIPs mandated activities.

Item 6110-161-0890 in the annual Budget Act provides federal funding for special education, distributed by CDE.[204] This funding is meant to provide assistance to the states to provide special education and related services to students, as provided by applicable law. The provision of special education and related services is federally mandated under IDEA, but the act "leaves primary responsibility for implementation to the states." Thus, "[t]o the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon

[203] AB 114 earmarked a portion of funds appropriated in Item 6110-161-0001 and Item 6110-161-0890 for educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) to be exclusively available for these mental health services only for the 2011-2012 and 2012-2013 fiscal years. Thus, the funds identified in AB 114 cannot be used for purposes of the *BIPs* mandate in fiscal years 2011-2012 and 2012-2013.

[204] Statutes 1993, chapter 55 (SB 80); Statutes 1994, chapter 139 (SB 2120); Statutes 1995, chapter 303 (AB 903); Statutes 1996, chapter 162 (SB 1393); Statutes 1997, chapter 282 (AB 107); Statutes 1998, chapter 324 (AB 1656); Statutes 1999, chapter 50 (SB 160); Statutes 2000, chapter 52 (AB 1740); Statutes 2001, chapter 106 (SB 739); Statutes 2002, chapter 379 (AB 425); Statutes 2003, chapter 157 (AB 1765); Statutes 2004, chapter 208 (SB 1113); Statutes 2005, chapter 38 (SB 77); Statutes 2006, chapter 47 (AB 1801); Statutes 2007, chapter 171 (SB 77); Statutes 2008, chapter 268 (AB 1781); Statutes 2009, chapter 1, 4th Extraordinary Session (AB 1); Statutes 2010, chapter 712 (SB 870); Statutes 2011, chapter 33 (SB 87); Statutes 2012, chapter 21 (AB 1464).

local school districts, the costs of such programs of higher levels of service are state-mandated and subject to subvention."[205]

The Commission found in the test claim statement of decision that the program at issue in these parameters and guidelines is a new program or higher level of service, beyond that required under IDEA.[206] However, the federal IDEA funds are allocated to the states for special education and related services, and the *BIPs* activities fall within the ambit of related services. Therefore, consistent with the reasoning applied above to state special education funds, to the extent that an eligible claimant chooses to apply the identified revenues to the mandated activities, reimbursement may be reduced accordingly.

The claimants object to the identification of federal IDEA funds as a potential offset, in comments submitted in response to the draft staff analysis. The claimants cite Education Code section 56844, which contains substantially the same language as Title 20 of the United States Code, section 1412; both of which address the permissible uses of federal special education funding. Education Code section 56844 provides, in pertinent part:

> In complying with paragraph (17), regarding the prohibition against supplantation of federal funds, and paragraph (18), regarding maintenance of state financial support for special education and related services, of subsection (a) of Section 1412 of Title 20 of the United States Code, the *state may not use funds paid to it* under Part B of the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) *to satisfy state-mandated funding obligations to local educational agencies*, including funding based on pupil attendance or enrollment, or on inflation.[207]

Title 20, United States Code, section 1412 provides similarly:

> (20) Rule of construction
>
> In complying with paragraphs (17) and (18), *a State may not use funds paid to it under this subchapter to satisfy State-law mandated funding obligations to local educational agencies*, including funding based on student attendance or enrollment, or inflation.[208]

Notwithstanding the apparent prohibition against the state's use of federal IDEA funds "to satisfy state-mandated funding obligations to local educational agencies," neither the state statute, nor the federal statute, touches on how a local educational agency may direct funds received under IDEA. Moreover, while in some contexts it may be ambiguous whether a federal

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[205] *Hayes v. Commission on State Mandates* (Cal. Ct. App. 3d Dist. 1992) 11 Cal.App.4th 1564, 1594.

[206] See Exhibit A, Corrected Statement of Decision, Behavioral Intervention Plans.

[207] Education Code section 56844 (Stats. 2005, ch. 653 (AB 1662)). See also 20 United States Code section 1412(a)(20) (Pub. L. 108-446, Title I, § 101, Dec. 3, 2004, 118 Stat. 2676).

[208] 20 United States Code section 1412(a)(20) (Pub. L. 108-446, Title I, § 101, Dec. 3, 2004, 118 Stat. 2676).

statute referring to "the State" means to include by implication the local government subdivisions within the state, in section 1401 of Title 20 separate definitions are provided for "State" and "local educational agency," and in section 1412 the prohibition is directed to the state; no suggestion is made that the terms might be inclusive of one another or used interchangeably.

The claimants argue that the identification of Item 6110-161-0890 in the annual Budget Act as a potential offset "is in violation of state law which forbids federal funds provided to districts for special education purposes from being used for state mandates." But the claimants overreach in this interpretation of the law on point; the section upon which the claimants rely forbids the *state* from using IDEA funds for state-mandated activities; it does not prohibit the local educational agencies from applying the federal funds to mandated programs. In this way it would be fair to argue that federal IDEA funds could never be treated as a *required* offset, because the state could not, without running afoul of the federal provision, *compel* local educational agencies to apply federal funds in this way. It would also be reasonable to conclude that the Controller could not apply a *mandatory* reduction in reimbursement based on federal IDEA funds whether or not eligible claimants chose to apply the funds to the BIPs mandate. But neither of those is the situation on these facts.

In further support of this interpretation is the LAO's report recommending the changes that would become Education Code 56844, on which the claimants rely. The LAO states that "Congress reauthorized the federal special education law in 2004." A newly added provision of that law "prohibits states from using federal funds to pay for 'state-law mandated funding obligations *to local educational agencies*.'" The LAO interprets this prohibition as intended "to prohibit states from using federal funds to supplant state funds for normal budget increases such as growth and COLA." Therefore the LAO recommends that the Legislature adopt a plan to provide for growth and cost of living adjustments for the state's share of special education funding, rather than allowing the federal funding to cover these costs for both the state and federal shares of special education funding. No mention is made of limiting the manner in which local educational agencies can apply the federal funds received.[209]

Furthermore, while claimants rely on Education Code section 56844 and Title 20, section 1412 of the United States Code, section 1411 of Title 20 is overlooked. Section 1411 provides that

> The Secretary shall make grants to States, outlying areas, and freely associated States, and provide funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with this subchapter.[210]

Section 1411 goes on to provide that states are authorized to reserve some portion of funding received under IDEA "[t]o assist local educational agencies in providing positive behavioral

[209] Exhibit O, LAO Report on K-12 Education, February 25, 2005, at pp. 71-74.

[210] United States Code, title 20, section 1411(a)(1) (Pub. L. 91-230; Pub. L. 108-446, 118 Stat. 2662).

interventions and supports and appropriate mental health services for children with disabilities."[211]

As is shown by the foregoing analysis, the claimants' reliance on section 56844 is misplaced. The code section does not, as the claimants suggest, prohibit the use of federal IDEA funds toward *BIPs* activities conducted by the local educational agencies. Instead, the more reasonable view is that both the state and federal statutes on point prohibit the state from *compelling* the use of federal IDEA funds to cover the costs of *BIPs* and other mandated activities. In this context, then, the Commission finds that the federal funds are a potential offset, but could never be compelled by the state to be applied as an actual offset, as is directed by AB 1610 with reference to the state special education funds. Therefore, the federal funds are only *potentially* offsetting as against the *BIPs* mandated activities, and not required offsets as discussed above. Only if eligible claimants are shown to have applied these funds to the mandated activities would their reimbursement claims be correspondingly reduced.

AB 114, as discussed above, limits the amount of funding available for potentially offsetting revenue with respect to the IDEA funds as well as state special education funds. AB 114 requires certain specified funds in Line Item 6110-161-0890 of the annual Budget Act to be applied exclusively, for two fiscal years, to the provision of out-of-home services to emotionally disturbed pupils. Provision 9 of Item 6110-161-0890 of the 2011 Budget Act provides $69 million in federal funding for educationally related mental health services.[212] And in Item 6110-161-0890 of the 2012 Budget Act the funds are set aside, in accordance with AB 114, as follows:

> 7.5. Of the funds appropriated in Schedule (4), $51,750,000 shall be available only for the purpose of providing educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by an individualized education program pursuant to the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and as described in Section 56363 of the Education Code.[213]

AB 114 requires that these provisions be used exclusively for services to emotionally disturbed pupils for the 2011-2012 and 2012-2013 fiscal years. Therefore, for the 2011-2012 and 2012-2013 fiscal years, the revenues that are considered potentially offsetting must exclude the funds described above.

Accordingly, the parameters and guidelines contain the following source of offsetting revenue:

- Except as provided by Statutes 2011, chapter 43, section 54 (AB 114) for fiscal years 2011-2012 and 2012-2013, Item 6110-161-0890 of Section 2.00 of the annual Budget Act, which provides for state pass-through allocation of federal funding for special education, constitutes potentially offsetting revenue beginning July 1, 1993 (the beginning of the period of

[211] United States Code, title 20, section 1411(e)(2)(C) (Pub. L. 91-230; Pub. L. 108-446, 118 Stat. 2662).

[212] Statutes 2011, chapter 33 (SB 87).

[213] Statutes 2012, chapters 21/29 (AB 1464).

reimbursement). To the extent an eligible claimant applies this potentially offsetting revenue to the approved mandated activities, those funds shall be identified and deducted from the reimbursement claims filed on the basis of the RRM.

The parameters and guidelines reflect these changes, and incorporate the current boilerplate language approved by the Commission.

5. State Controller's Claiming Instructions (section VIII. of Proposed Parameters and Guidelines)

Prior to 2012, existing law required the State Controller to issue claiming instructions for each reimbursable mandate no later than 60 days after receiving the adopted parameters and guidelines from the Commission. In 2011, SB 112 (Statutes 2011, chapter 144) revised this statute to require the State Controller to issue the claiming instructions within 90 days of receiving the parameters and guidelines. Due to the change in statute, the Commission updated this section to reflect this new 90-day requirement.

V. CONCLUSION

For the foregoing reasons the Commission hereby adopts this statement of decision and the attached proposed parameters and guidelines, including the proposed reasonable reimbursement methodology.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE PARAMETERS AND GUIDELINES: 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 Period of reimbursement begins July 1, 1993	Case No.: CSM 4464 *Behavioral Intervention Plans* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted April 19, 2013*) (*Served April 25, 2013*) (*Corrected April 29, 2013*)

PARAMETERS AND GUIDELINES

On April 29, 2013, the Commission on State Mandates (Commission) adopted parameters and guidelines. Pursuant to California Code of Regulations, title 2, section 1188.2(b), the attached corrected parameters and guidelines are hereby issued to address a clerical error on page 6 to accurately reflect that actual cost claiming applicable to ongoing claims begins July 1, 2012 instead of July 1, 2013 and clerical errors on page 2 to accurately reflect that actual cost claiming is "beginning" on July 1, 2012, rather than "after" July 1, 2012.

Heather Halsey, Executive Director

Adopted: April 19, 2013
Corrected: April 29, 2013

PARAMETERS AND GUIDELINES

California Code of Regulations, Title 5, Sections 3001 and 3052

Register 93, No. 17; Register 96, No. 8; Register 96, No. 32

Behavioral Intervention Plans
CSM-4464

Period of reimbursement begins July 1, 1993

I. Summary of the Mandate

On September 28, 2000, the Commission on State Mandates (Commission) adopted its statement of decision finding that regulations in Title 5, California Code of Regulations, sections 3001 and 3052, which implement Education Code section 56523, impose a reimbursable state-mandated new program 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 this test claim for the following categories of reimbursable activities:

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

II. Eligible Claimants

School districts and county offices of education (COEs), as defined in Government Code section 17519, are eligible to claim reimbursement where specified below. SELPAs, whose sole constituents are school districts and COEs, are also eligible as specified below. Community colleges and charter schools are not eligible to claim reimbursement.

III. Period of Reimbursement

Government Code section 17557(e) states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The claimants filed the test claim on September 28, 1994, establishing eligibility for reimbursement on or after July 1, 1993. Therefore, costs incurred pursuant to Code of Regulations, Title 5, sections 3001 and 3052, on or after July 1, 1993, are eligible for reimbursement under these parameters and guidelines.

Reimbursement for state-mandated costs may be claimed as follows:

- Reimbursement based on the unit cost reasonable reimbursement methodologies (RRMs) provided for in these parameters and guidelines applies to costs incurred beginning on July 1, 1993, and ending June 30, 2012.
- Actual costs for one fiscal year shall be included in each claim submitted beginning July 1, 2012.
- Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
- Pursuant to Government Code section 17560(a), a claimant may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim for that fiscal year based on the RRMs.
- If revised claiming instructions are issued by the State Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a claimant filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Government Code section 17560(b).)
- If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a).
- There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. Reimbursable Activities

To be eligible for mandated cost reimbursement beginning July 1, 2012, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant that incurs increased costs, the following activities are reimbursable:

A. One-Time Activities - SELPA Only.

The direct and indirect costs of labor, materials and supplies, contracted services, equipment and other capital assets, travel, and training incurred for the following mandate components are eligible for reimbursement on a one-time basis:

1. Preparing and Providing SELPA Procedures and Initial Training.

   Preparing procedures for the SELPA local plan regarding the systematic use of behavioral intervention, for the training of behavioral intervention case managers and personnel involved with implementing behavioral intervention plans, for special training for emergency interventions, and for identification of approved behavioral emergency procedures.

B. On-Going Activities - SELPA Only.

The direct and indirect costs of labor, materials and supplies, contracted services, equipment and other capital assets, travel, and training incurred for the following mandate components are eligible for reimbursement on an on-going basis:

1. Training.

Providing and obtaining training in behavior analysis, positive behavioral interventions, and behavioral emergency interventions. Time spent by personnel who design and conduct the training and time spent by personnel who receive the training is reimbursable. Such personnel include behavioral intervention case managers and personnel involved with implementing behavioral intervention plans, conducting functional analysis assessments, or implementing emergency interventions.

2. Emergency Interventions.

Preparing reports on the number of Behavioral Emergency Reports to the California Department of Education (CDE) and Advisory committee on Special Education.

3. Due Process Hearings.

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 behavioral intervention plans.

C. On-going Activities - School Districts and COEs Only.

The direct and indirect costs of labor, materials and supplies, contracted services, equipment and other capital assets, travel, and training incurred for the following mandate components are eligible for reimbursement on an on-going basis:

1. Conducting Functional Analysis Assessments.

Providing notice to and obtaining written consent from parents to conduct functional analysis assessments; conducting functional analysis assessments; preparing written reports of assessment

results; providing copies of assessment reports to parents and the IEP Team; conducting IEP Team meetings to review assessment results.[1]

2. Developing and Evaluating BIPs.

Participating in IEP Team meetings in which BIPs are developed, evaluated, or modified, or in which functional analysis assessment results are reviewed; preparing BIPs; and developing contingency plans for altering the procedures or the frequency or duration of the procedures. Providing copies of SELPA procedures on behavioral interventions and behavioral emergency interventions to parents and staff.

3. Implementing BIPs.

Implementing and supervising the implementation of BIPs; measuring and documenting the frequency, duration, and intensity of targeted behavior and effectiveness of the BIP. Costs of employing personnel with documented training in behavioral analysis including positive behavioral interventions (whether such personnel are new staff or existing staff) to serve as behavioral intervention case managers is reimbursable under this component.

4. Modifications to BIPs.

Providing notice to parents or parent representatives of the need to make minor modifications to the BIPs, meeting with parents to review existing program evaluation data; and developing minor modifications to BIPs with parents or parent representatives.

5. Emergency Interventions.

Employing emergency interventions; notifying parents and residential care providers after an emergency intervention is used; preparing and maintaining a Behavioral Emergency Report following the use of an emergency intervention; administrative review of Behavioral Emergency Reports; scheduling and conducting an IEP Team meeting to review a Behavioral Emergency Report and the need for a functional analysis assessment, interim BIP, or modification to an existing BIP.

6. Prohibited Interventions.

Training appropriate staff regarding the types of interventions that are prohibited under Title 5, California Code of Regulations section 3052(l).

7. Due Process Hearings.

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.

V. Claim Preparation and Submission

In lieu of filing detailed documentation of actual costs, the Commission adopted a reasonable reimbursement methodology (RRM) to reimburse claimants for all *direct* and *indirect* costs of the reimbursable activities identified in Section IV. Reimbursable Activities of this document as authorized by Government Code sections 17557(b) and 17518.5. The RRM is the method of

[1] An IEP is an Individualized Education Program (Ed. Code § 56023 (Stats. 1993, ch. 1296 § 13.1 (AB 369))).

claiming from July 1, 1993 to June 30, 2012 only. Beginning July 1, 2012, eligible claimants will be reimbursed based on actual costs. Additionally, each reimbursement claim must be filed in a timely manner.

A. Reasonable Reimbursement Methodology For Costs Incurred from July 1, 1993 to June 30, 2012

The RRM for the mandated activities shall consist of three uniform cost allowances as follows:

1. RRM for One-time Activities - SELPA Only.

The RRM for the one-time activities shall be calculated as follows: Multiply the total number of SELPA ADA for the one fiscal year during which the one-time activities were performed, likely the 1993-94 fiscal year, by the relevant unit cost rate for one-time SELPA activities for that fiscal year. The unit cost rate for one time SELPA activities is $.32818 for FY 2006-07. This unit cost rate shall be adjusted by the Implicit Price Deflator to the appropriate fiscal year during which the one-time activities were performed.

SELPA ADA figures shall be those found on the CDE website for AB 602, P2 ADA or a comparable source.

The State Controller's Office shall provide the correct unit cost rate for each fiscal year with each year's claiming instructions.

2. RRM for On-going Activities - SELPA Only - Training.

The RRM for the on-going activities shall be calculated as follows: Multiply the total number of SELPA ADA for the fiscal year by the relevant unit cost rate for on-going SELPA activities for the fiscal year. The unit cost rate for on-going SELPA activities is $1.18702 for FY 2006-07. This unit cost rate shall be adjusted for each prior and subsequent year by the Implicit Price Deflator.

ADA figures shall be those found on the CDE website for AB 602, P2 ADA or a comparable source.

The State Controller's Office shall provide the correct unit cost rate for each fiscal year with each year's claiming instructions.

3. RRM for On-going Activities - School Districts and COEs.

The RRM for the on-going activities shall be calculated as follows: Multiply the total number of ADA per fiscal year by the relevant unit cost rate for on-going school district and COE activities for the fiscal year. The unit cost rate for ongoing school district and COE activities is $9.45701 for FY 2006-07. This unit cost rate shall be adjusted for each prior and subsequent year by the Implicit Price Deflator.

ADA figures shall be those found on the CDE website for AB 602, P2 ADA or a comparable source.

The State Controller's Office shall provide the correct unit cost rate for each fiscal year with each year's claiming instructions.

B. Actual Cost Claiming Applicable to Ongoing Claims Beginning July 1, 2012

The following shall apply to all claims filed on or after July 1, 2012.

Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the dates when services were performed and itemize all costs for those services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

6. Training

Report the cost of training an employee to perform the reimbursable activities, as specified in Section IV. of this document. Report the name and job classification of each

employee preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and purpose (related to the mandate of the training session), dates attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element A.1., Salaries and Benefits, and A.2., Materials and Supplies. Report the cost of consultants who conduct the training according to the rules of cost element A.3., Contracted Services.

Indirect Cost Rates

Indirect costs are costs that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs may include: (a) the indirect costs originating in each department or agency of the governmental unit carrying out state mandated programs; and (b) the costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

Claimants must use the CDE approved indirect cost rate for the year that funds are expended.

VI. Record Retention

Pursuant to Government Code section 17558.5(a), a reimbursement claim for costs filed by a claimant pursuant to this chapter is subject to the initiation of an audit by the State Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the State Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. Pursuant to Government code section 17561(d)(2), the State Controller has the authority to audit the application of a reasonable reimbursement methodology. If an audit has been initiated by the State Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings. Claimants must retain documentation that supports the application of the RRM, including ADA documentation.

VII. Offsetting Revenues and Other Reimbursements

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

The following offsetting revenues are identified, for purposes of the reimbursable activities approved in the test claim:

- Except as provided by Statutes 2001, chapter 203 (SB 982)[2], Item 6110-161-0001 of Section 2.00 of the annual Budget Act provides state funding for special education that is potentially offsetting from July 1, 1993 (the beginning of the period of reimbursement) until June 30, 2010. To the extent an eligible claimant applies these potentially offsetting revenues to the approved mandated activities during this time period, those funds shall be identified and deducted from the reimbursement claims filed on the basis of the RRM.
- Commencing with the 2010-11 fiscal year, and except as provided by Statutes 2001, chapter 203 (SB 982), and Statutes 2011, chapter 43, section 54 (AB 114) for fiscal years 2011-2012 and 2012-2013,[3] state funding provided for purposes of special education pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act shall first be used to directly offset any mandated costs in this program. Except as provided in Statutes 2001, chapter 203 and Statutes 2011, chapter 43, funds received by an eligible claimant from this appropriation shall be identified and deducted from the reimbursement claims filed on the basis of the RRM, beginning in the 2010-2011 fiscal year.
- Except as provided by Statutes 2011, chapter 43, section 54 (AB 114) for fiscal years 2011-2012 and 2012-2013, Item 6110-161-0890 of Section 2.00 of the annual Budget Act, which provides for state pass-through allocation of federal funding for special education, constitutes potentially offsetting revenue beginning July 1, 1993 (the beginning of the period of reimbursement). To the extent an eligible claimant applies this potentially offsetting revenue to the approved mandated activities, those funds shall be identified and deducted from the reimbursement claims filed on the basis of the RRM.

VIII. State Controller's Claiming Instructions

Pursuant to Government Code section 17558(b), the State Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies

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[2] SB 982 provided for $100 million in augmentation of Line Item 6110-161-0001, beginning in 2001, and continuing in the annual budget acts, to provide for the *Special Education Mandated Costs* test claim (CSM 3986). That funding is intended exclusively, and by express priority, to fund the costs of the specified mandated programs identified in Education Code 56836.156, and therefore cannot be identified as potentially offsetting revenue for this mandate.

[3] AB 114 earmarked a portion of funds appropriated in Item 6110-161-0001 and Item 6110-161-0890 for educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) to be exclusively available for these mental health services only for the 2011-2012 and 2012-2013 fiscal years. Thus, the funds identified in AB 114 cannot be used for purposes of the *BIPs* mandate in fiscal years 2011-2012 and 2012-2013.

and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(l), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. Remedies before the Commission

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the State Controller to modify the claiming instructions and the State Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.2.

X. Legal and Factual Basis for the Parameters and Guidelines

The statements of decision for the test claim and parameters and guidelines are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record is on file with the Commission.

RECEIVED
August 10, 2015
Commission on
State Mandates

BETTY T. YEE
California State Controller
Division of Accounting and Reporting

August 10, 2015

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Notice of Complete Filing and Schedule for Comments
Mandate Redetermination Request, 14-MR-05
Behavioral Intervention Plans (CSM-4464)
California Code of Regulations, Title 5, Section 3001 and 3052,
as added or amended by Register 93, No. 17; Register 96, No. 8; Register 96, No. 32
As Alleged to be Modified by Statutes 2013, Chapter 48 (SB 86)
California Department of Finance, Requester

Dear Ms. Halsey:

The State Controller's Office concurs with the Department of Finance's request to adopt a new test claim decision and to amend the parameters and guidelines for the Behavioral Intervention Plans program.

Should you have any questions regarding the above, please contact Tiffany Hoang at (916) 323-1127 or email THoang@sco.ca.gov.

Sincerely,

JAY LAL, Manager
Local Reimbursements Section

MAILING ADDRESS P.O. Box 942850, Sacramento, CA 94250
STREET ADDRESS 3301 C Street, Suite 700, Sacramento, CA 95816

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

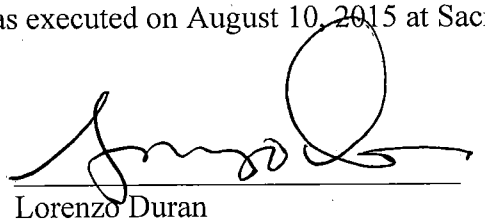
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On August 10, 2015, I served the:

SCO Comments
Mandate Redetermination Request, 14-MR-05
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)
California 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 August 10, 2015 at Sacramento, California.



Lorenzo Duran
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/7/15

Claim Number: 14-MR-05

Matter: Behavioral Intervention Plans (CSM-4464)

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.)

Amber Alexander, *Department of Finance*
915 L Street, Sacramento, Ca
Phone: (916) 445-0328
Amber.Alexander@dof.ca.gov

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Harmeet Barkschat, *Mandate Resource Services,LLC*
5325 Elkhorn Blvd. #307, Sacramento, CA 95842
Phone: (916) 727-1350
harmeet@calsdrc.com

Lacey Baysinger, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
lbaysinger@sco.ca.gov

Mike Brown, *School Innovations & Advocacy*
5200 Golden Foothill Parkway, El Dorado Hills, CA 95762
Phone: (916) 669-5116
mikeb@sia-us.com

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916)595-2646

Bburgess@mgtamer.com

Gwendolyn Carlos, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-0706
gcarlos@sco.ca.gov

David Cichella, *California School Management Group*
3130-C Inland Empire Blvd., Ontario, CA 91764
Phone: (209) 834-0556
dcichella@csmcentral.com

Joshua Daniels, Attorney, *California School Boards Association*
3251 Beacon Blvd, West Sacramento, CA 95691
Phone: (916) 669-3266
jdaniels@csba.org

Marieta Delfin, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-4320
mdelfin@sco.ca.gov

Andra Donovan, *San Diego Unified School District*
Legal Services Office, 4100 Normal Street, Room 2148, , San Diego, CA 92103
Phone: (619) 725-5630
adonovan@sandi.net

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Chris Ferguson, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Ferguson@dof.ca.gov

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Paul Golaszewski, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8341
Paul.Golaszewski@lao.ca.gov

Ed Hanson, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
ed.hanson@dof.ca.gov

Mark Ibele, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814

Phone: (916) 651-4103
Mark.Ibele@sen.ca.gov

Paul Jacobs, Fiscal & Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8329
Paul.Jacobs@lao.ca.gov

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

David Scribner, *Max8550*
2200 Sunrise Boulevard, Suite 240, Gold River, CA 95670
Phone: (916) 852-8970
dscribner@max8550.com

Steve Shields, *Shields Consulting Group,Inc.*
1536 36th Street, Sacramento, CA 95816
Phone: (916) 454-7310
steve@shieldscg.com

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-5849
jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
DSpeciale@sco.ca.gov

Meg Svoboda, *Senate Office of Research*
1020 N Street, Suite 200, Sacramento, CA
Phone: (916) 651-1500
meg.svoboda@sen.ca.gov

Amy Tang-Paterno, Educational Fiscal Services Consultant, *California Department of Education*
Government Affairs, 1430 N Street, Suite 5602, Sacramento, CA 95814
Phone: (916) 322-6630
ATangPaterno@cde.ca.gov

Thomas Todd, Assistant Program Budget Manager, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
Thomas.Todd@dof.ca.gov

Jolene Tollenaar, *MGT of America*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 443-411
jolene_tollenaar@mgtamer.com

Brian Uhler, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8328
brian.uhler@lao.ca.gov

Marichi Valle, *San Jose Unified School District*
855 Lenzen Avenue, San Jose, CA 95126
Phone: (408) 535-6141
mvalle@sjusd.org

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

September 23, 2015

Lisa Mierczynski
Department of Finance
915 L Street
Sacramento, CA 95814

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

Re: **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing**
Mandate Redetermination Request, 14-MR-05
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)
California Department of Finance, Requester

Dear Ms. Mierczynski:

The draft proposed decision for the above-named matter is enclosed for your review and comment.

Written Comments

Written comments may be filed on the draft proposed decision by **October 14, 2015**. You are advised that comments filed with the Commission on State Mandates (Commission) are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Please see http://www.csm.ca.gov/dropbox.shtml on the Commission's website for instructions on electronic filing. (Cal. Code Regs., tit. 2, § 1181.3.)

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

Hearing

This matter is set for hearing on **Thursday, December 3, 2015**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The proposed decision will be issued on or about November 19, 2015. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Sincerely,

Heather Halsey
Executive Director

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Hearing Date: December 3, 2015
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ITEM __

MANDATE REDETERMINATION
FIRST HEARING: ADEQUATE SHOWING

DRAFT PROPOSED DECISION

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

As Alleged to be Modified by:

Statutes 2013, Chapter 48 (AB 86)

Behavioral Intervention Plans (CSM-4464)

14-MR-05

Department of Finance, Requester

EXECUTIVE SUMMARY

Overview

On September 28, 2000, the Commission on State Mandates (Commission) adopted a statement of decision finding that regulations in Title 5, California Code of Regulations, sections 3001 and 3052, which implement Education Code section 56523, impose a reimbursable state-mandated new program, related to *Behavioral Intervention Plans* (*BIPs*), on school districts and special education local plan areas (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 of Regs., tit. 5, §§ 3001 and 3052(j).)
- Development and implementation of behavioral intervention plans (BIPs). (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(a), (c), (d), (e), and (f).)
- Functional analysis assessments. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(b), (c), and (f).)
- Modifications and contingent BIPs. (Cal. Code of Regs., tit. 5, § 3052(g) and (h).)
- Development and implementation of emergency interventions. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(i).)
- Prohibited behavioral interventions. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(l).)
- Due process hearings. (Cal. Code of Regs., tit. 5, § 3052(m).)

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

adopted April 19, 2013 and corrected on April 29, 2013.[1] The parameters and guidelines contain three reasonable reimbursement methodologies (RRMs): one for one-time activities required in the 1993-1994 school year; one for ongoing SELPA-level activities; and one for ongoing county-level activities.[2]

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

Procedural History

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

On August 10, 2015, the State Controller's Office (Controller) filed comments concurring with Finance's request.[5] On September 23, 2015, Commission staff issued the draft proposed decision for the first hearing on the mandate redetermination.[6]

Commission Responsibilities

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

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

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

[3] Register 2013, No. 42 (October 16, 2013); Register 2014, No. 19 (July 1, 2014).

[4] Exhibit A, Request for Mandate Redetermination.

[5] Exhibit D, Controller's Comments on Request for Redetermination.

[6] Exhibit E, Draft Proposed Decision.

> the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing. [7]

The regulations further state:

> If the Commission proceeds to the second hearing, it shall consider whether the state's liability…has been modified based on the subsequent change in law alleged by the requester, thus requiring adoption of a new test claim decision to supersede the previously adopted test claim decision.[8]

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

This request for redetermination alleges a subsequent change in law that requires a finding that there are no costs mandated by the state pursuant to section 17514, in that Statutes 2013, chapter 48 requires the repeal of the regulatory provisions that make up the mandate, and purports also to remove all force and effect of those regulatory provisions. Education Code section 56523, as amended by Statutes 2013, chapter 48, requires the Superintendent of Public Instruction to "repeal those regulations governing the use of behavioral interventions…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…"[10]

Accordingly, the specified sections have been repealed.[11] Only Sections 3001 and 3052 of Title 5 of the California Code of Regulations were approved in the Commission's September 28, 2000 test claim decision (corrected November 23, 2010).[12] Therefore, staff finds that amended Education Code section 56523 and the subsequent repeal of the subject regulations constitutes a subsequent change in law, as defined.

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[7] Code of Regulations, Title 2, section 1190.5(a)(1) (Register 2014, No. 21).

[8] Code of Regulations, Title 2, section 1190.5(b)(1) (Register 2014, No. 21).

[9] Code of Regulations, Title 2, section 1190.5(a)(1) (Register 2014, No. 21).

[10] Education Code section 56523(a) (Stats. 2013, ch. 48 (AB 86)).

[11] Register 2014, No. 19; Register 2013, No. 42.

[12] Exhibit B, Test Claim Statement of Decision.

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.

At this hearing, the Commission is required to determine 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."[13] The subsequent change in law alleged is an amendment to the Education Code section that expressly disclaims the statutory authorization for the regulations, and directs the Superintendent to repeal the regulations. The regulations were, accordingly, repealed by Register 2013, No. 42, and Register 2014, No. 19, respectively.

Based on the foregoing, staff finds that 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.

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 to adopt a new test claim decision 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.

[13] Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

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

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.

SUMMARY OF THE FINDINGS

The Commission finds that the Department of Finance (Finance) has made an adequate showing that the state's liability pursuant to article XIII B, section 6(a) of the California Constitution, for the *Behavioral Intervention Plans*, CSM-4464 mandate may be modified based on a subsequent change in law, such that Finance has a substantial probability of prevailing at the second hearing. Specifically, Statutes 2013, chapter 48, section 44 (AB 86) expressly requires the Superintendent of Public Instruction to repeal the regulations that impose the mandate, and declares that those sections "are no longer supported by statute." 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.

COMMISSION FINDINGS

I. Chronology

09/28/2000	The Commission adopted the test claim statement of decision on *Behavioral Intervention Plans*, CSM-4464 which was corrected on November 23, 2010.[14]
04/19/2013	The Commission adopted the statement of decision and parameters and guidelines for *Behavioral Intervention Plans*, CSM-4464 which were corrected on April 29, 2013.[15]
06/30/2015	Finance filed a request for redetermination on the *Behavioral Intervention Plans* mandate, CSM-4464.[16]
08/10/2015	The State Controller's Office filed comments on the request for redetermination.[17]
09/23/2015	Commission staff issued the draft proposed decision for the first hearing.[18]

II. Background

On September 28, 2000, the Commission adopted a statement of decision finding that regulations in Title 5, California Code of Regulations, sections 3001 and 3052, which implement Education Code section 56523, impose a reimbursable state-mandated new program 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).)

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

[15] Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013.

[16] Exhibit A, Request for Mandate Redetermination, 14-MR-05.

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

[18] Exhibit E, Draft Proposed Decision, First Hearing.

- 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,[19] 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.[20] 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.[21]

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 test claim regulations were adopted to implement. As amended, section 56523 now provides that "[t]he Superintendent shall repeal those regulations governing the use of behavioral interventions…including Section 3052 and subdivisions (d), (e), (f), (g), and (ab) of Section 3001 of Title 5 of the California Code of Regulations, as those provisions existed on January 10, 2013." The State Board has since repealed those regulations, as directed.[22]

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 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.[23]

[19] Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013, pages 2-5.

[20] Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013.

[21] See Exhibit C, Statement of Decision and Parameters and Guidelines, pages 67-68.

[22] Register 2014, No. 19 (amended July 1, 2014); Register 2013, No. 42 (repealed October 16, 2013).

[23] Exhibit A, Request for Mandate Redetermination, 14-MR-05, page 8.

B. State Controller's Office

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.[24]

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 states 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."[25] 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 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

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[24] Exhibit D, Controller's Comments on Request for Redetermination.

[25] Code of Regulations, Title 2, section 1190.5(a)(1) (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.

> 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]

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

Finance, in its request for redetermination, alleges that a subsequent change in law requires a finding that there are no costs mandated by the state pursuant to section 17514, in that Statutes 2013, chapter 48 requires the repeal of the regulatory provisions that make up the mandate, and also purports to remove all force and effect of those regulatory provisions. The original test claim regulations, 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, alleged here to modify the state's liability for the mandated program, now 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.[27]

The test claim statement of decision and parameters and guidelines for CSM-4464 found reimbursable activities imposed by Code of Regulations, title 5, sections 3001 and 3052.[28] 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.[29] In addition, the entirety of section 3052, which described the substantive requirements or elements of behavioral interventions and behavioral intervention plans, has been repealed.[30] 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),[31] and the only regulations on which the RRM in the parameters

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[26] Government Code section 17570 (Stats. 2010, ch. 719 (SB 856)).

[27] Education Code section 56523(a) (Stats. 2013, ch. 48 (AB 86)).

[28] See, e.g., Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013, page 65.

[29] Register 2014, No. 19.

[30] Register 2013, No. 42.

[31] Exhibit B, Test Claim Statement of Decision.

and guidelines was based.[32] 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 finds that Statutes 2013, chapter 48, constitutes a subsequent change in law, as defined.

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

At this hearing, the Commission is required to determine 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."[33] If the Commission determines that the request has a substantial possibility of prevailing at the second hearing, the Government Code provides that the Commission shall notice a second hearing to determine if a new test claim decision shall be adopted to supersede the previously adopted test claim decision.[34]

Here, the subsequent change in law is an amendment to the Education Code section underlying the approved test claim regulations, which expressly disclaims the statutory authorization for the regulations, and directs the Superintendent to repeal the regulations. The regulations were, accordingly, repealed by Register 2013, No. 42, and Register 2014, No. 19. Therefore, Education Code section 56523, and the repealed regulations, constitute 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.

V. Conclusion

Based on the foregoing, the Commission finds that the requester has made an adequate showing that the state's liability has been modified based on a subsequent change in law, and a second hearing is required to determine whether to adopt a new test claim decision to reflect the state's modified liability. The Commission hereby directs staff to notice the second hearing to determine whether to adopt a new test claim decision to supersede the previously adopted test claim decision.

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

[33] Code of Regulations, Title 2, section 1190.5(a)(1) (Register 2014, No. 21).

[34] Government Code section 17570(d)(4) (Stats. 2010, ch. 719 (SB 856)).

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

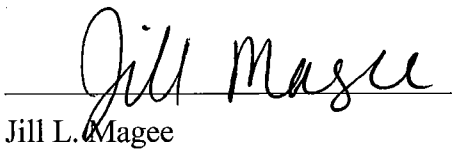
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On September 23, 2015, I served the:

Draft Proposed Decision, Schedule for Comments, and Notice of Hearing
Mandate Redetermination Request, 14-MR-05
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)
California 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 September 23, 2015 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/10/15

Claim Number: 14-MR-05

Matter: Behavioral Intervention Plans (CSM-4464)

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.)

Amber Alexander, *Department of Finance*
915 L Street, Sacramento, Ca
Phone: (916) 445-0328
Amber.Alexander@dof.ca.gov

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Harmeet Barkschat, *Mandate Resource Services,LLC*
5325 Elkhorn Blvd. #307, Sacramento, CA 95842
Phone: (916) 727-1350
harmeet@calsdrc.com

Lacey Baysinger, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
lbaysinger@sco.ca.gov

Mike Brown, *School Innovations & Advocacy*
5200 Golden Foothill Parkway, El Dorado Hills, CA 95762
Phone: (916) 669-5116
mikeb@sia-us.com

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916)595-2646

Bburgess@mgtamer.com

Gwendolyn Carlos, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-0706
gcarlos@sco.ca.gov

David Cichella, *California School Management Group*
3130-C Inland Empire Blvd., Ontario, CA 91764
Phone: (209) 834-0556
dcichella@csmcentral.com

Joshua Daniels, Attorney, *California School Boards Association*
3251 Beacon Blvd, West Sacramento, CA 95691
Phone: (916) 669-3266
jdaniels@csba.org

Marieta Delfin, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-4320
mdelfin@sco.ca.gov

Andra Donovan, *San Diego Unified School District*
Legal Services Office, 4100 Normal Street, Room 2148, , San Diego, CA 92103
Phone: (619) 725-5630
adonovan@sandi.net

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Chris Ferguson, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Ferguson@dof.ca.gov

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Paul Golaszewski, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8341
Paul.Golaszewski@lao.ca.gov

Ed Hanson, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
ed.hanson@dof.ca.gov

Mark Ibele, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814

Phone: (916) 651-4103
Mark.Ibele@sen.ca.gov

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

David Scribner, *Max8550*
2200 Sunrise Boulevard, Suite 240, Gold River, CA 95670
Phone: (916) 852-8970
dscribner@max8550.com

Steve Shields, *Shields Consulting Group,Inc.*
1536 36th Street, Sacramento, CA 95816
Phone: (916) 454-7310
steve@shieldscg.com

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-5849
jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
DSpeciale@sco.ca.gov

Meg Svoboda, *Senate Office of Research*
1020 N Street, Suite 200, Sacramento, CA
Phone: (916) 651-1500
meg.svoboda@sen.ca.gov

Amy Tang-Paterno, Educational Fiscal Services Consultant, *California Department of Education*
Government Affairs, 1430 N Street, Suite 5602, Sacramento, CA 95814
Phone: (916) 322-6630
ATangPaterno@cde.ca.gov

Thomas Todd, Assistant Program Budget Manager, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
Thomas.Todd@dof.ca.gov

Jolene Tollenaar, *MGT of America*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 443-411
jolene_tollenaar@mgtamer.com

Brian Uhler, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8328
brian.uhler@lao.ca.gov

Marichi Valle, *San Jose Unified School District*
855 Lenzen Avenue, San Jose, CA 95126
Phone: (408) 535-6141
mvalle@sjusd.org

RECEIVED
October 08, 2015
Commission on
State Mandates

BETTY T. YEE
California State Controller
Division of Accounting and Reporting

October 8, 2015

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Draft Proposed Decision, Schedule for Comments, and Notice of Hearing
Mandate Redetermination Request, 14-MR-05
Behavioral Intervention Plans (CSM-4464)
California Code of Regulations, Title 5, Section 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)
California Department of Finance, Requester

Dear Ms. Halsey:

The State Controller's Office reviewed the draft proposed decision for the Behavioral Intervention Plans program and recommends no changes.

Should you have any questions regarding the above, please contact Tiffany Hoang at (916) 323-1127 or email THoang@sco.ca.gov.

Sincerely,

JAY LAL, Manager
Local Reimbursements Section

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

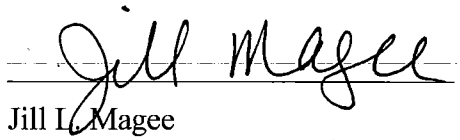
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On October 8, 2015, I served the:

SCO Comments
Mandate Redetermination Request, 14-MR-05
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)
California 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 October 8, 2015 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/10/15

Claim Number: 14-MR-05

Matter: Behavioral Intervention Plans (CSM-4464)

Requester: Department of Finance

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Amber Alexander, *Department of Finance*
915 L Street, Sacramento, Ca
Phone: (916) 445-0328
Amber.Alexander@dof.ca.gov

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Harmeet Barkschat, *Mandate Resource Services,LLC*
5325 Elkhorn Blvd. #307, Sacramento, CA 95842
Phone: (916) 727-1350
harmeet@calsdrc.com

Lacey Baysinger, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
lbaysinger@sco.ca.gov

Mike Brown, *School Innovations & Advocacy*
5200 Golden Foothill Parkway, El Dorado Hills, CA 95762
Phone: (916) 669-5116
mikeb@sia-us.com

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916)595-2646

Bburgess@mgtamer.com

Gwendolyn Carlos, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-0706
gcarlos@sco.ca.gov

David Cichella, *California School Management Group*
3130-C Inland Empire Blvd., Ontario, CA 91764
Phone: (209) 834-0556
dcichella@csmcentral.com

Joshua Daniels, Attorney, *California School Boards Association*
3251 Beacon Blvd, West Sacramento, CA 95691
Phone: (916) 669-3266
jdaniels@csba.org

Marieta Delfin, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-4320
mdelfin@sco.ca.gov

Andra Donovan, *San Diego Unified School District*
Legal Services Office, 4100 Normal Street, Room 2148, , San Diego, CA 92103
Phone: (619) 725-5630
adonovan@sandi.net

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Chris Ferguson, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Ferguson@dof.ca.gov

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Paul Golaszewski, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8341
Paul.Golaszewski@lao.ca.gov

Ed Hanson, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
ed.hanson@dof.ca.gov

Mark Ibele, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814

Phone: (916) 651-4103
Mark.Ibele@sen.ca.gov

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

David Scribner, *Max8550*
2200 Sunrise Boulevard, Suite 240, Gold River, CA 95670
Phone: (916) 852-8970
dscribner@max8550.com

Steve Shields, *Shields Consulting Group,Inc.*
1536 36th Street, Sacramento, CA 95816
Phone: (916) 454-7310
steve@shieldscg.com

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-5849
jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
DSpeciale@sco.ca.gov

Meg Svoboda, *Senate Office of Research*
1020 N Street, Suite 200, Sacramento, CA
Phone: (916) 651-1500
meg.svoboda@sen.ca.gov

Amy Tang-Paterno, Educational Fiscal Services Consultant, *California Department of Education*
Government Affairs, 1430 N Street, Suite 5602, Sacramento, CA 95814
Phone: (916) 322-6630
ATangPaterno@cde.ca.gov

Thomas Todd, Assistant Program Budget Manager, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
Thomas.Todd@dof.ca.gov

Jolene Tollenaar, *MGT of America*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 443-411
jolene_tollenaar@mgtamer.com

Brian Uhler, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8328
brian.uhler@lao.ca.gov

Marichi Valle, *San Jose Unified School District*
855 Lenzen Avenue, San Jose, CA 95126
Phone: (408) 535-6141
mvalle@sjusd.org