

ITEM 6
MANDATE REDETERMINATION
SECOND HEARING: NEW TEST CLAIM DECISION
PROPOSED DECISION

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

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

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

Community College Construction (02-TC-47)

14-MR-03

Department of Finance, Requester

EXECUTIVE SUMMARY

Overview

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

The Commission adopted parameters and guidelines on March 23, 2012, authorizing reimbursement for community colleges to:

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

- The plans of the district concerning its future student services programs, and the effect on estimated construction needs that may arise because of particular student services to be emphasized. (Former § 81821(a).)¹
- The enrollment projections for each educational center within a community college district, made cooperatively by the Department of Finance and the district. (Former § 81821(b).)

¹ All citations refer to the Education Code unless otherwise indicated.

- An annual inventory of all land of the district using standard definitions, forms, and instructions adopted by the Board of Governors. (Former § 81821(e).)
- An estimate of district funds which shall be made available for capital outlay matching purposes pursuant to regulations adopted by the Board of Governors. (Former § 81821(f).)

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

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

Procedural History

On June 19, 2015, Finance filed a request for redetermination of the *Community College Construction*, 02-TC-47 decision, arguing that Senate Bill 860 (Stats. 2014, ch. 34) renders the mandate no longer reimbursable.² On July 31, 2015, the State Controller’s Office (Controller) concurred with Finance’s request to adopt a new test claim decision.³

On September 24, 2015, Commission staff issued the draft proposed decision for the first hearing. On October 8, the Controller filed comments concurring with the draft proposed decision for the first hearing. Neither Finance nor any of the claimants filed comments on the draft proposed decision for the first hearing.

At the December 3, 2015 hearing, the Commission adopted the first hearing decision on this mandate redetermination, finding that Finance made an adequate showing that the request identified a subsequent change in law, as defined, that may modify the state’s liability for this program such that Finance had a substantial possibility of prevailing at the second hearing, and the Commission directed staff to notice the second hearing on whether to adopt a new test claim decision.⁴ On December 4, Commission staff issued the draft proposed decision for the second

² Exhibit A, Request for Mandate Redetermination, page 1. Government Code section 17570 provides that a redetermination request “shall be filed on or before June 30 following a fiscal year in order to establish eligibility for reimbursement or loss of reimbursement for that fiscal year.” This redetermination request was filed on June 19, 2015, establishing a potential loss of reimbursement beginning July 1, 2013. However, the subsequent change in law identified by the requester was adopted on June 20, 2014, and as an urgency statute became effective on that date. Thus, if the Commission approves this request, the potential loss of reimbursement would begin on June 20, 2014.

³ Exhibit D, Office of the State Controller, Comments on the Request for Mandate Redetermination, July 31, 2015.

⁴ Exhibit G, Decision for the First Hearing, Draft Proposed Decision for the Second Hearing, and Draft Expedited Amendment to Parameters and Guidelines, issued December 4, 2015.

hearing and draft expedited amendment to the parameters and guidelines.⁵ On December 23, 2015, the Controller filed comments concurring with the draft proposed decision for the second hearing and draft expedited amendments to the parameters and guidelines.⁶

Commission Responsibilities

Government Code section 17570 provides a process whereby a previously determined mandate finding can be redetermined by the Commission based on a subsequent change in law. The redetermination process provides for two hearings. With regard to the second hearing the Commission's regulations state:

If the Commission proceeds to the second hearing, it shall consider whether the state's liability . . . has been modified based on the subsequent change in law alleged by the requester, thus requiring adoption of a new test claim decision to supersede the previously adopted test claim decision.⁷

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

Staff Analysis

A. Statutes 2014, Chapter 34 Has Eliminated the State's Liability for the *Community College Construction Program*.

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

- (a) The five-year plan for capital construction shall set out the estimated capital construction needs of the district with reference to ~~elements including at least all~~ both of the following elements:
 - (1) The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors.
 - (2) District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors.
- (b) The five-year plan for capital construction may also set out the estimated capital construction needs of the district with reference to other elements, including, but

⁵ Exhibit G, Decision for the First Hearing, Draft Proposed Decision for the Second Hearing, and Draft Expedited Amendment to Parameters and Guidelines, issued December 4, 2015.

⁶ Exhibit H, Office of the State Controller, Comments on the Draft Proposed Decision for the Second Hearing and Draft Expedited Parameters and Guidelines, December 23, 2015.

⁷ Code of Regulations, title 2, section 1190.5(b)(1) (Register 2015, No. 39).

not limited to:

- ~~(a)~~ (1) The plans of the district concerning its future academic and student services programs, and the effect on estimated construction needs which may arise because of particular courses of instruction or subject matter areas or student services to be emphasized.
- ~~(b)~~ (2) The enrollment projections for each district formulated by the Department of Finance, expressed in terms of weekly student contact hours. The enrollment projections for each individual college and educational center within a district shall be made cooperatively by the Department of Finance and the ~~community college district~~ Chancellor of the California Community Colleges.
- ~~(c)~~ ~~The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.~~
- ~~(d)~~ ~~District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.~~
- ~~(e)~~ (3) An annual inventory of all facilities and land of the district using standard definitions, forms, and instructions adopted by the board of governors.
- ~~(f)~~ (4) An estimate of district funds ~~which~~ that shall be made available for capital outlay matching purposes pursuant to regulations adopted by the board of governors.

Staff finds that the state's liability pursuant to article XIII B, section 6(a) of the California Constitution, for *Community College Construction*, 02-TC-47, has been modified based on this subsequent change in law. Specifically, as amended, Education Code section 81821(b) now states that community colleges now "may" rather than "shall" include in their five-year plans for capital construction the following information that is currently reimbursable in the parameters and guidelines: plans for future student services programs, enrollment projections for each education center within the district, an annual inventory of land, and an estimate of district funds made available for capital outlay matching purposes.⁸

The courts, when interpreting the state mandate requirements of article XIII B, section 6 of the California Constitution, have held that activities undertaken at the option or discretion of a local governmental entity, without any legal compulsion or threat of penalty for nonparticipation, do

⁸ Former Education Code section 81821(a), (b), (e), (f).

not trigger a state mandate.⁹ Moreover, courts generally interpret the word “may” as permissive and “shall” as mandatory.¹⁰

The legislative history of this amendment indicates that it: “Makes permissive a requirement that community colleges submit specified facilities information to the CCC Chancellor's office, thereby eliminating a reimbursable state mandate (this information will continue to be collected through the state's capital outlay process).”¹¹ Thus, based on the plain language of Statutes 2014, chapter 34 and the stated intent of the Legislature, the inclusion of this information in the five-year plan is not legally compelled by state law, and there is no evidence in the record that community college districts are practically compelled to include this information in their five-year plans. Therefore, including the information in the plan that was formerly required by former Education Code section 81821(a), (b), (e), and (f), is no longer mandated by the state.

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

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

In addition, the requirement for continuing review under Education Code section 81820 was approved only as to the newly required content in the prior test claim decision, because the requirement for continuing review was not new.

Therefore, since the information in former Education Code section 81821(a), (b), (e), and (f), is no longer required to be included in the plan, any continuing review of that information pursuant to Education Code section 81820 would be permissive and not mandated by the state.

Reimbursement is not required for downstream requirements that increase local costs that are triggered by a local discretionary decision to participate in a program.¹²

⁹ *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 742; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1365-1366.

¹⁰ Education Code section 75. *John Doe v. Albany Unified School District* (2010) 190 Cal.App.4th 668, 676 on statutory construction involving the terms “may” and “shall.”

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

¹² *Ibid.*

Based on this analysis, staff concludes that the *Community College Construction* program no longer imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, effective June 20, 2014.

Staff Recommendation

Staff recommends that the Commission adopt the proposed decision as its new test claim decision, ending reimbursement for the *Community College Construction* program as of June 20, 2014.

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

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

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

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

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

As Alleged to be Modified by:

Statutes 2014, Chapter 34 (SB 860)

Filed on June 19, 2015

By the Department of Finance, Requester

Case No.: 14-MR-03

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

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

(Adopted January 22, 2016)

DECISION

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

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

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

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

SUMMARY OF FINDINGS

The Commission finds that the state's liability pursuant to article XIII B, section 6(a) of the California Constitution, for *Community College Construction*, 02-TC-47, has been modified based on a subsequent change in law. Specifically, requirements for the five-year plan for capital construction were amended by Statutes 2014, chapter 34 (SB 860, eff. June 20, 2014) to provide that the following information that was approved in the prior test claim decision, and is currently reimbursable in the parameters and guidelines, "may also" rather than "shall" be included: plans for future student services programs, enrollment projections for each education center within the district, an annual inventory of land, and an estimate of district funds made available for capital outlay matching purposes.¹³ Therefore, the formerly mandated activities are no longer required.

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

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

In addition, the requirement to review the five-year plan on a continuing basis under Education Code section 81820 was approved only as to the newly required content in the prior test claim decision, because the requirement for continuing review was not new.

The courts, when interpreting the state mandate requirements of article XIII B, section 6 of the California Constitution, have held that activities undertaken at the option or discretion of a local governmental entity, without any legal compulsion or threat of penalty for nonparticipation, do not trigger a state mandate.¹⁴ Based on the plain language of Statutes 2014, chapter 34, the inclusion of formerly mandated information in the five-year plan is now not legally compelled by state law, and there is no evidence in the record that community college districts are practically compelled to include this information in their five-year plans. Thus, including the information in the plan that was formerly required by Education Code section 81821(a), (b), (e), and (f), is no longer mandated by the state.

Section 81820 was not amended by the 2014 statute, and continues to require that the five-year plan shall be subject to the continuing review by the governing board. However, since the

¹³ Former Education Code section 81821(a), (b), (e), (f).

¹⁴ *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 742; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1365-1366.

information in former Education Code section 81821(a), (b), (e), and (f), which the Commission found to impose a mandated new program or higher level of service in 02-TC-47, is no longer required to be included in the plan, any continuing review of that information pursuant to Education Code section 81820 would be permissive and not mandated by the state.

Reimbursement is not required for downstream requirements that increase local costs that are triggered by a local discretionary decision to participate in a program.¹⁵

Pursuant to Government Code section 17570, the Commission approves the request for redetermination and concludes that the *Community College Construction* program no longer imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, effective June 20, 2014.

COMMISSION FINDINGS

I. Chronology

10/27/2011	The Commission adopted the Test Claim Statement of Decision. ¹⁶
03/23/2012	The Commission adopted the Parameters and Guidelines. ¹⁷
06/20/2014	Statutes 2014, chapter 34 (SB 860) was filed by the Secretary of State and became effective immediately. ¹⁸
06/19/2015	The Department of Finance (Finance) filed the Request for Mandate Redetermination. ¹⁹
07/31/2015	The State Controller's Office (Controller) submitted comments on the request. ²⁰
09/24/2015	Commission staff issued the First Hearing Draft Proposed Decision. ²¹
10/08/2015	The State Controller filed comments on the First Hearing Draft Proposed Decision. ²²

¹⁵ *Ibid.*

¹⁶ Exhibit B, Test Claim Statement of Decision, *Community College Construction*, 02-TC-47.

¹⁷ Exhibit C, Parameters and Guidelines, *Community College Construction*, 02-TC-47.

¹⁸ Exhibit I, Statutes 2014, chapter 34 (selected pages).

¹⁹ Exhibit A, Request for Mandate Redetermination.

²⁰ Exhibit D, Office of the State Controller, Comments on the Request for Mandate Redetermination, July 31, 2015.

²¹ Exhibit E, Draft Proposed Decision, First Hearing, September 24, 2015.

²² Exhibit F, Office of the State Controller, Comments on Draft Proposed Decision for the First Hearing, October 8, 2015.

12/03/2015	The Commission adopted the Proposed Decision at the first hearing and directed Commission staff to notice the second hearing. ²³
12/04/2015	Commission staff issued the Second Hearing Draft Proposed Decision and the Draft Expedited Amendment to the Parameters and Guidelines. ²⁴
12/23/2015	The Controller filed comments on the Second Hearing Draft Proposed Decision and Draft Expedited Amendment to Parameters and Guidelines. ²⁵

II. Background

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

The plan shall reflect capital construction for community college purposes of the district for the five-year period commencing with the next proposed year of funding. The five-year plan shall be subject to continuing review by the governing board and annually shall be extended one year, and there shall be submitted to the board of governors, on or before the first day of February in each succeeding year, a report outlining the required modifications or changes, if any, in the five-year plan.²⁶

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

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

- (a) The plans of the district concerning its future academic and student services programs, and the effect on estimated construction needs which may arise because of particular courses of instruction or subject matter areas or student services to be emphasized.
- (b) The enrollment projections for each district formulated by the Department of Finance, expressed in terms of weekly student contact hours. The enrollment projections for each individual college and educational center within a district

²³ Exhibit G, Decision for the First Hearing, Draft Proposed Decision for the Second Hearing, and Draft Expedited Amendment to Parameters and Guidelines, issued December 4, 2015.

²⁴ Exhibit G, Decision for the First Hearing, Draft Proposed Decision for the Second Hearing, and Draft Expedited Amendment to Parameters and Guidelines, issued December 4, 2015.

²⁵ Exhibit H, Office of the State Controller, Comments on the Draft Proposed Decision for the Second Hearing and Draft Expedited Parameters and Guidelines, December 23, 2015.

²⁶ Education Code section 81820 (Stats. 1990, ch. 1372).

shall be made cooperatively by the Department of Finance and the community college district.

- (c) The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.
- (d) District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.
- (e) An annual inventory of all facilities and land of the district using standard definitions, forms, and instructions adopted by the board of governors.
- (f) An estimate of district funds which shall be made available for capital outlay matching purposes pursuant to regulations adopted by the board of governors.

On October 27, 2011, the Commission adopted the *Community College Construction*, 02-TC-47, test claim decision, based on Education Code section 81800 et seq., as added and amended by statutes enacted from 1980 through 1995. The Commission found that Education Code section 81820 did not impose a new program or higher level of service for requiring community college districts to prepare, submit, and review on a continuing basis, a five-year capital construction plan because these were required under prior law enacted in 1967, by former Education Code section 20065.²⁷ However, some of the information included in the plan, identified in Education Code section 81821(a), (b), (e), and (f), was newly required by the test claim statutes. The Commission approved the test claim, finding that reimbursement was required for including the new information in a community college district's five-year plan for capital construction that is submitted to the Board of Governors. The Commission also approved the continuing review of this newly-required information pursuant to Education Code section 81820, since the requirement for continuing review of the five-year plan was only new as to the newly-required content in section 81821.

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

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

²⁷ Exhibit B, Test Claim Statement of Decision, *Community College Construction*, 02-TC-47, page 18.

- The plans of the district concerning its future student services programs, and the effect on estimated construction needs that may arise because of particular student services to be emphasized. (§ 81821(a).)
- The enrollment projections for each educational center within a community college district, made cooperatively by the Department of Finance and the district. (§ 81821(b).)
- An annual inventory of all land of the district using standard definitions, forms, and instructions adopted by the Board of Governors. (§ 81821(e).)
- An estimate of district funds which shall be made available for capital outlay matching purposes pursuant to regulations adopted by the Board of Governors. (§ 81821(f).)²⁸

The Subsequent Change in Law

Effective June 20, 2014, Statutes 2014, chapter 34 amended Education Code section 81821 by providing that enrollment capacity and facility capacity information, formerly required under subdivisions (c) and (d), “shall” be included in the content of the five-year plan in subdivision (a). As determined by the Commission in the *Community College Construction*, 02-TC-47 test claim decision, the enrollment and facility capacity information was required under prior law and did not constitute a new program or higher level of service. Thus, reimbursement was denied for preparing and submitting that information.²⁹

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

- (a) The five-year plan for capital construction shall set out the estimated capital construction needs of the district with reference to ~~elements including~~ at least all both of the following elements:
- (1) The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors.
 - (2) District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors.
- (b) The five-year plan for capital construction may also set out the estimated capital construction needs of the district with reference to other elements, including, but

²⁸ Exhibit C, Parameters and Guidelines, *Community College Construction*, 02-TC-47, page 3.

²⁹ Exhibit B, Test Claim Statement of Decision, *Community College Construction*, 02-TC-47, pages 18-21.

not limited to:

- ~~(a)~~ (1) The plans of the district concerning its future academic and student services programs, and the effect on estimated construction needs which may arise because of particular courses of instruction or subject matter areas or student services to be emphasized.
- ~~(b)~~ (2) The enrollment projections for each district formulated by the Department of Finance, expressed in terms of weekly student contact hours. The enrollment projections for each individual college and educational center within a district shall be made cooperatively by the Department of Finance and the ~~community college district~~ Chancellor of the California Community Colleges.
- ~~(c)~~ ~~The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.~~
- ~~(d)~~ ~~District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.~~
- ~~(e)~~ (3) An annual inventory of all facilities and land of the district using standard definitions, forms, and instructions adopted by the board of governors.
- ~~(f)~~ (4) An estimate of district funds ~~which~~ that shall be made available for capital outlay matching purposes pursuant to regulations adopted by the board of governors.

The legislative history of this 2014 amendment states that it: “Makes permissive a requirement that community colleges submit specified facilities information to the CCC Chancellor's office, thereby eliminating a reimbursable state mandate (this information will continue to be collected through the state's capital outlay process).”³⁰

On June 19, 2015, Finance filed a request for redetermination of the *Community College Construction* mandated program. On December 3, 2015, the Commission heard and adopted the first-hearing decision on this mandate redetermination, finding that Finance made an adequate showing that the request identified a subsequent change in law, as defined, that may modify the state's liability for this program such that Finance had a substantial possibility of prevailing at this second hearing.

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

A. Department of Finance, Requester

In its request for redetermination, Finance states:

³⁰ Exhibit I, Assembly Floor Analysis of Senate Bill No. 860 (2013-2014 Reg. Sess.) as amended June 12, 2014, page 3.

Chapter 34, Statutes of 2014 (SB 860) made components of Education Code section 81821, that were determined to be reimbursable activities, permissive by moving those components into a subdivision that allows rather than requires specified estimates to be included in the district's five-year capital construction plan.³¹

Finance maintains that because the activities determined to be reimbursable are now permissive, the state's liability should be zero as of June 20, 2014, the effective date of Statutes 2014, chapter 34. Finance did not submit comments on the draft proposed decision for this matter.

B. State Controller

The Controller states that it "concurs with the Department of Finance's request to adopt a new test claim decision and to amend the parameters and guidelines for the Community College Construction Program."³²

In comments on the draft proposed decision for the second hearing and proposed parameters and guidelines, the Controller said it "recommends no changes."³³

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 redetermination process calls for a two hearing process. At the first hearing, the requester must make "an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior test claim decision, that may modify the state's liability pursuant to Article XIII B, section 6(a) of the California Constitution."³⁴

Code of Regulations, title 2, section 1190.5(b) provides that "[i]f the Commission proceeds to the second hearing, it shall consider whether the state's liability pursuant to article XIII B, section 6(a) of the California Constitution has been modified based on the subsequent change in law alleged by the requester, thus requiring adoption of a new test claim decision to supersede the previously adopted test claim decision."³⁵

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

³¹ Exhibit A, Request for Mandate Redetermination, page 1.

³² Exhibit D, Office of the State Controller, Comments on the Request for Mandate Redetermination, July 31, 2015.

³³ Exhibit H, Office of the State Controller, Comments on the Draft Proposed Decision for the Second Hearing and Draft Expedited Parameters and Guidelines, December 23, 2015.

³⁴ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2015, No. 39).

³⁵ Register 2015, No. 39.

A. Statutes 2014, Chapter 34 Has Eliminated the State's Liability for the *Community College Construction Program*.

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 has modified the state's liability for reimbursement. A subsequent change in law is defined in Government Code section 17570(a)(2) as:

A change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law, except that a "subsequent change in law" does not include the amendments to Section 6 of Article XIII B of the California Constitution that were approved by the voters on November 2, 2004. A "subsequent change in law" also does not include a change in the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of Section 17551.

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.

This request is based on Statutes 2014, chapter 34, an urgency statute, which became effective on June 20, 2014.³⁶ Statutes 2014, chapter 34 amended Education Code section 81821 by providing, in subdivision (b), that the new information previously approved by the Commission for reimbursement in the *Community College Construction* test claim decision (formerly required by Ed. Code, § 81821(a), (b), (e), and (f)) is no longer required to be included in the five-year plan for capital construction, but "may also" be included in the plan as estimated capital construction needs of the district as follows (with amendments noted in strikeout and underline):

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

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

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

~~(c) The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of~~

³⁶ Urgency statutes become effective immediately upon enactment (Cal. Const., art. IV, section 8(c)(3)).

~~governors in consultation with the California Postsecondary Education Commission and consistent with its standards.~~

- ~~(d) District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.~~
- ~~(e) (3) An annual inventory of all facilities and land of the district using standard definitions, forms, and instructions adopted by the board of governors.~~
- ~~(f) (4) An estimate of district funds which that shall be made available for capital outlay matching purposes pursuant to regulations adopted by the board of governors.~~

The legislative history of this amendment states that it, “Makes permissive a requirement that community colleges submit specified facilities information to the CCC Chancellor’s office, thereby eliminating a reimbursable state mandate (this information will continue to be collected through the state’s capital outlay process).”³⁷

Finance asserts that the plain language of the section 81821(b), as amended, makes the requirements in the parameters and guidelines permissive by substituting the word “may” in place of the word “shall,” resulting in no costs mandated by the state for this program.³⁸

The Commission finds that the state’s liability for *Community College Construction*, 02-TC-47, has been modified based on a subsequent change in law. Pursuant to the amendments made by Statutes 2014, chapter 34, all reimbursable activities identified in the parameters and guidelines for 02-TC-47, are no longer mandated by the state or reimbursable.

The courts, when interpreting the state mandate requirements of article XIII B, section 6 of the California Constitution, have held that activities undertaken at the option or discretion of a local governmental entity, without any legal compulsion or threat of penalty for nonparticipation, do not trigger a state mandate.³⁹ This is also true if downstream requirements that increase local costs are triggered by a discretionary local decision to participate in a program.⁴⁰ Moreover, courts generally interpret the word “may” as permissive and “shall” as mandatory.⁴¹

In this case, Education Code section 81821(b), as amended by the 2014 statute, no longer contains the mandatory language that requires community college districts to include in their five-year plans for capital construction the information previously found by the Commission to

³⁷ Exhibit I, Assembly Floor Analysis of Senate Bill No. 860 (2013-2014 Reg. Sess.) as amended June 12, 2014, page 3.

³⁸ Exhibit A, Request for Mandate Redetermination, page 1.

³⁹ *City of Merced*, *supra*, 153 Cal.App.3d 777, 783; *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742; *Department of Finance (POBRA)*, *supra*, 170 Cal.App.4th 1355, 1365-1366.

⁴⁰ *Ibid.*

⁴¹ Education Code section 75. *John Doe v. Albany Unified School District* (2010) 190 Cal.App.4th 668, 676 on statutory construction involving the terms “may” and “shall.”

impose a reimbursable state-mandated program. Thus, the inclusion of this information in the five-year plan is not legally compelled by state law, and there is no evidence in the record that community college districts are practically compelled to include this information in their five-year plans. Including the information in the plan that was formerly required by Education Code section 81821(a), (b), (e), and (f), is no longer mandated by the state.

The Commission further finds that community college districts are not mandated by the state to review this information on a continuing basis, as required Education Code section 81820. Section 81820 was not amended by the 2014 statute, and continues to require that the five-year plan shall be subject to the continuing review by the governing board. However, since the information in former Education Code section 81821(a), (b), (e), and (f), which the Commission found to impose a mandated new program or higher level of service in 02-TC-47, is no longer required to be included in the plan, any continuing review of that information pursuant to Education Code section 81820 would be permissive and not mandated by the state.⁴²

Therefore, the Commission finds that Statutes 2014, chapter 34 constitutes subsequent change in law pursuant to Government Code section 17570(a)(2), that modifies the state's liability for the *Community College Construction* program. Based on this record, and pursuant to the plain language of Statutes 2014, chapter 34, the Commission finds that Education Code sections 81820 and 81821 do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6.

According to Government Code section 17570, a redetermination request "shall be filed on or before June 30 following a fiscal year in order to establish eligibility for reimbursement or loss of reimbursement for that fiscal year." This redetermination request was filed on June 19, 2015, establishing a potential loss of reimbursement beginning July 1, 2013. However, the subsequent change in law identified was adopted on June 20, 2014, and as an urgency statute became effective immediately.⁴³ Therefore, the *Community College Construction* program no longer imposes a reimbursable state-mandated program as of June 20, 2014, the effective date of the subsequent change in law.

V. Conclusion

Based on the foregoing, the Commission approves the request for a new test claim decision and concludes that the *Community College Construction*, 02-TC-27 mandate has ended based on a subsequent change in law and does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution as of June 20, 2014.

⁴² *Department of Finance (POBRA)*, *supra*, 170 Cal.App.4th 1355, 1365-1366.

⁴³ California Constitution, article IV, section 8(c)(3); Government Code section 9600(b).